DONATED
BY

R. N. Vaishnavi

M.A. (PSYCHO.); M.A, (POL. SC.); PUNJAB
L.L B. ALLAHBAD

Advocate

Supreme Court of India

High Court of J & K State

9B, R, C, ROAD, PRATAP PARK.
SRINAGAR (KASHMIR.)

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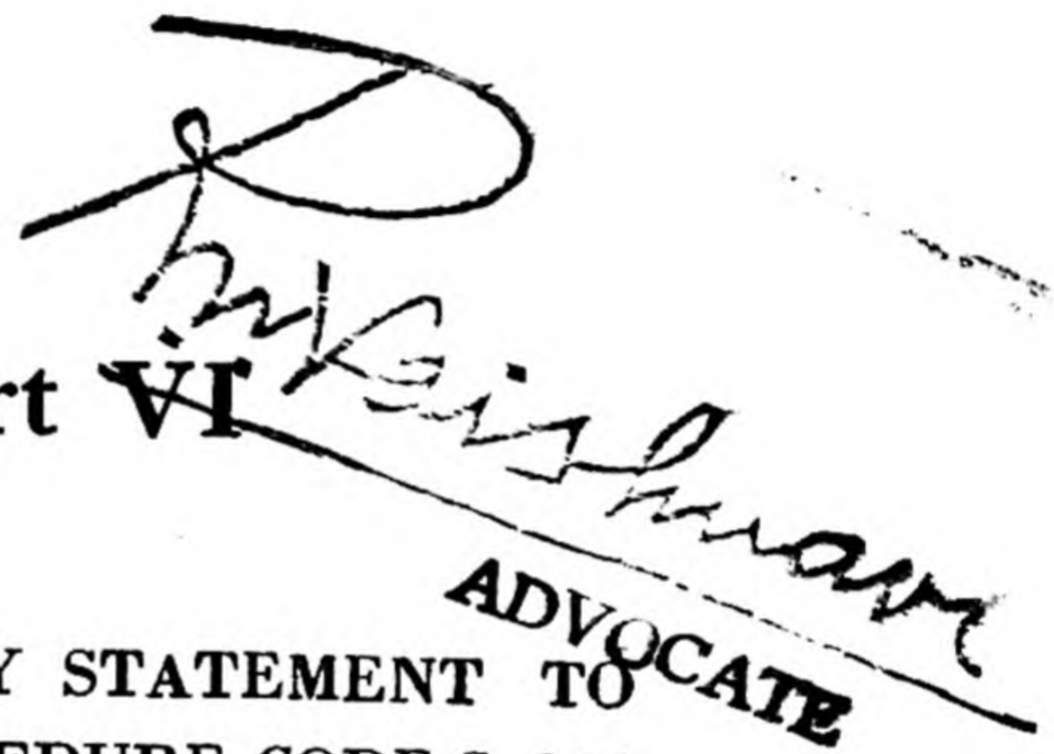
THE FIFTY YEARS' DIGEST
1901-1950
(Civil, Criminal & Revenue)

BY

D. V. CHITALEY & N. RAMARATNAM



Part VI

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CONTENTS.

	Cols.
Contradictory Statements	1
Contribution	1
Contributory Liability	1
Contributory Negligence	1
Conversion	1
Conveyance	2
Conviction	2
Co-occupant	2
Co-operative Credit Societies Act (10 of 1904)	2
Co-operative Societies	2
Co-operative Societies Act (2 of 1912)	2
Co-operative Societies Rules.	36
Co-owner	36
Coparcener	36
Co-partner	36
Copies	36
Co-plaintiff	36
Co-prisoner, Evidence of	36
Co-proprietors	36
Copyright	36
Copyright Act 1911	37
Copyright Act (3 of 1914)	54
Coroner	56
Coroners Act (4 of 1871)	56
Corporate Body or Body Corporate	57
Corporations	57
Co-sharers	62
Abadi (*See also* Landlord and Tenant—(Abadi)	63
Accounting (*See also* Accounting and Co-sharers)	64
Action against trespassers	65
Adverse possession	67
Buildings on common land	83
Constitution and compensation	86
Dispossession	88
Exclusive possession	91
Fraud	101
Injunction	101
Joint possession	102
Lambardar	112
Lease	122
Liability to account	124
Mutual relations	126
Notice	133
Ouster	133
Partition	139
Party wall	152
Pre-emption	155
Rights and Liabilities	155
Shamilat land	172
Sir land	176
Suits by	177
Suits for possession	181
Suits for Rents and Profits	186
Trespassers—Rights against	196
Who are co-sharers	198
Miscellaneous	199
Costs	201
Co-Tenancy. *See* Co-sharer	207
Co-Tenants	207
Co-Trustee	208
Cotton Cloth and Yarn (Control) Order, 1943	208
Cotton Cloth and Yarn (Control) Order, 1945	222
Cotton Duties Act (II of 1896)	225
Cotton Ginning and Pressing Factories Act (12 of 1925)	226
Cotton Textiles (Control of Movement) Order (1946)	226
Councils (Indian) Act (24 and 25)	227
Counsel	228
Counsel's Fees	228
Counter-claim	228
Counter-Part	228
Counterfeiting Coin	228
Co-Uralans	228
Court	228
Counter-claim	228
Counter-Part	228
Court-duty of	228
Court-fees	229
Court-fees Act (VII of 1870) (Statute-Index)	231
Court-Fees Act, S. 1	242
Court-Fees Act, S. 2	245
Court-Fees Act, S. 3	245
Court-Fees Act, S. 4	245
Court-Fees Act, S. 5	248
All High Court Rules, Ch. III, R. 11	248
Chief Inspector of stamps	248
Decision by Court—No reference under S. 5.	248
Dispute—Meaning	249
Finality	249
Jurisdiction of Taxing Officer	249
Object	250
Powers of Registrar	250
Reference under—Jurisdiction to refer to Bench	250
Refeence under—Subject-matter not covered by S. 3	251
Taxing judge's jurisdiction	251
Taxing officer if has judicial powers	252
Taxing officer—Finality of decision	252
Taxing officer—Procedure	254
Taxing officer of High Court is Registrar Appellate Side	255
Court-Fees Act, S. 11	255
Administration Suit.	255
Appeal in mortgage suit	255
Applicability	255
"Decree"	255
Decree with condition that it cannot be executed unless Court-fee paid	255
Court-Fees Act, S. 6.	255
Court-Fees Act, S. 7	261
Court-Fees Act S. 7 (1)	271
Accounts	271
Appeal against final decree	272
Appeal	272
Appeal—Future Interest	273
Applicability	273
Ascertained sum of cesses	274
Commission	274
Commutation of grain rent	274
Damages	275
Declaration	275
Maintenance	276
Mesne Profits	276
Money Suit	276

	Cols.
Mortgage	277
Court-Fees Act, S. 7 (ii)	277
Court-Fees Act, S. 7 (iii)	279
Court-Fees Act, S. 7 (iv)	279
Court-Fees Act, S. 7 (iv-a)	284
Court-Fees Act, S. 7 (iv-b)	287
Court-Fees Act, S. 7 (iv-c)	301
Alternative Relief	302
Appeal	302
Applicability	304
Appointment of receiver	310
Cancellation of document	312
Consequential relief	320
Declaration and consequential relief	323
Declaratory suit	327
Injunction	338
Interpretation	346
Joint Hindu family	346
Partition Suits	348
Possession	350
Setting aside decree	358
Valuation	366
Miscellaneous	376
Court-Fees Act, S. 7 (iv) (d)	376
Court-Fees Act, S. 7 (iv) (e)	379
Court-Fees Act, S. 7 (iv) (f)	380
Accounts	380
Administration Suit	385
Appeal	387
Mesne Profits	393
Partition Suit	393
Partnership	393
U.P. Agri. Relief Act—Suits under	397
Miscellaneous	398
Court-Fees Act, S. 7 (iv-A) (Madras)	399
Applicability	399
Cancellation of deed	401
Construction	405
Declaration	405
Declaration that alienation is void	405
Declaration that Compromise decree is not binding	406
Declaration that decree is void	406
Declaration that order is void	407
Declaration that will is invalid	407
Partition suit	408
Reversioner	410
Setting aside decree	411
Court-Fees Act, S. 7 (v)	420
Adoption	420
Amendment suggested	421
Ancillary relief	421
Appeal	421
Applicability	422
Cancellation of deed	423
Claim petition	424
Cross-Objection	424
Declaration suit for in respect of land	425
Declaration and possession	425
Declaration principal relief	425
Land	426
Licence—Ejectment of	426
Market-value	426
Mortgagee—Suit for possession	427
Paddy lands	427
Partition	427
Possession	431
Pre-emption	436
Setting aside order relating to immovable property	437
Specific performance	437
Tank bed	437
Tenant suing landlord	438
Trust Suit	438
S. 7 (v) (a)	438
S. 7 (v) (b)	441
S. 7 (v) (c)	445
S. 7 (v) (d)	446
S. 7 (v) (e)	448
S. 7 (v) (i)	451
S. 7 (v), Provisos	451
Court-Fees Act, S. 7 (vi)	451
Court-Fees Act, S. 7 (viii)	454
Court-Fees Act, S. 7 (ix)	455
Appeals	455
Foreclosure suit	464
Jurisdiction	465
Redemption suit	465
Redemption of share	468
Suit for possession	469
Suit to enforce mortgage by sale	469
Suits Valuation Act, S. 8	469
Surplus profits	469
Miscellaneous	470
Court-Fees Act, S. 7 (x) (a)	471
S. 7 (xi)	475
S. 8	484
S. 9	489
S. 10	490
S. 11	493
Administration suit	494
Appeal in mortgage suit	494
Applicability	494
Decree	499
Decree with condition that it cannot be executed unless Court-fee paid	500
Decree for payment of Court-fee	500
Decree in excess of claim	
Effect of non-payment	500
Excution on non-payment of extra Fee	501
Extension of time	501
Interest	501
Mortgage suit	502
Order to pay additional court-fee and dismissing suit in default	502
Suit for accounts	502
Suit on tort	504
Suit for dissolution of partnership	504
Valuation of suit	505
Value of relief ascertained after trial	505
Scope	505
Court-Fees Act, S. 12	505
Appeal	505
Appellate Court	508
Applicability	510
Compromise between court and parties	511
Decision as to Court-fee	511
Decision of trial Court—Finality	514
Deficiency in Court-fee	514
Doubtful question of Court-fee—Reference	515
Duty of trial court to fix court-fee	516
Effect of admission of document	516
Extension of time	516
Fictitious valuation	516
Finality of decision	516
Fraud	519
High Court—Duty of	519
High Court—Powers of	520
Interlocutory orders	520
Interpretation	520
Objection about court-fee when to be taken	521
Revision	521
Scope	522
Valuation Basis	523
Written statement claiming set-off	523
Miscellaneous	524
Court-Fees Act, S. 13-15	585

	Cols.
Applicability	525
Application for refund	526
Custody—Fees	526
Inherent powers	526
Refund mandatory	529
Refund	529
Remand	532
Withdrawal of appeal	534
Court-Fees Act, S. 14	535
S. 15	535
S. 17	537
Applicability	537
Aggregate value	537
Alternative reliefs	539
Common cause of action	541
Consolidation of appeals	542
Consolidation	542
Costs—Claim as to	542
Declaratary suit	543
Distinct causes of action	543
Distinct reliefs	544
Distinct subjects	544
Mortgage suit	550
Pre-emption suit	551
Redemption suit	552
Single debt	552
Specific performance and delivery	552
"Subject"	552
Suit against several tenants	553
Suit for administration	553
Suit for rent by some co-sharer—Decree in favour of all—Appeal	554
Court-Fees Act, S. 19	554
S. 19 (a)	557
S. 19 (c)	557
S. 19 (d)	558
S. 19 (e)	560
S. 19 (h)	560
Court-Fees Act, S. 19-I	563
Applicability	563
Bad debts	563
Compromise after filing application	564
Construction	564
Fees payable according to Law at time of grant	
Letters for part property	565
Provident fund	565
Scope	565
Succession	566
Time for payment	567
Court-Fees Act, S. 20	567
S. 27	569
Court-Fees Act, S. 28	571
Applicability	571
Scope	572
Appeal insufficiently stamped	573
Appellate Court's order to make good deficiency—Appeal	573
Deficit fee paid—Effect	574
Deficient Court-fee	574
Effect of insufficiency of stamp	577
Miscellaneous	577
Court-Fees Act, S. 30	578
S. 31	579
S. 34	580
S. 35	580
Court-Fees Act, Sch. I, Art. I	581
Appeal—Valuation	581
Applicability	584
Award—Appeal against decree on	587
Charge	587
Conditional decree	588
Cause	589
Counter-claim	591
Cross-objections	592
Garnishee order	593
Instalment decree	593
Interest—Future Interest	594
Interest pendente lite	594
Land Acquisition Act—Ref. under	596
Letters of Administration on probate of will	596
Mesne profits	597
Mortgage suit	597
Partition suit	604
Partnership	605
Personal liability	606
Pre-emption—Appeal	606
Reducing claim for Court-fee	607
Refund of purchase money	607
Rent-suit	607
Restitution	607
Separate Appeals	608
Set-off	608
Suit for money due on adjustment of accounts	611
U.P. Agriculturists Relief Acts	612
U.P. Encumbered Estates Act	613
Sch. I, Arts. 4 and 5	614
Applicability	
Application if can confine valuation to smaller figure	615
Application for review	615
Computation of time for making application	616
Interpretation	617
Mesne profits—Review	618
Partial relief	618
Portion of decree	618
Restoration	619
Sch. I, Art. 11	619
"Amount or value of property"	620
Ancestral property	620
Determination of Court-fee	620
Interpretation	621
Letters of administration	621
Order in probate proceedings	621
Probate	621
Properties covered by grant	621
Property—Power of appointment	622
Provident-Fund	622
Sch. I, Art. 12	622
Sch. I, Art. 13	624
Sch. I, Art. 14	624
Sch. II, Art. 1	625
Sch. II, Art. 2	627
Sch. II, Art. 6	628
Sch. II, Art. 10	630
Sch. II, Art. 11	631
Award	631
Bengal Money-lenders Act, S. 38 (3)—Appeal	632
Final decree	632
Letters of administration	633
Madras Agri. Relief Act	633
Mesne profits	633
Orders not having force of decree	634
Order refusing leave to appeal	635
Order rejecting plaint	635
Orders to which Art. 11 is applicable	635
Order under O. 21, R. 50 (2), C.P. Code	635
Order under O. 21, R. 63-H, C.P. Code	635
Probate proceedings	635
Restitution	636
Review	637
U.P. Agriculturists Relief Act	638
U.P. Encumbered Estates Act	638
Workmen's Compensation Act, S. 30	639
Sch. II, Art. 17 (1)	639

	Cols.
Accounts ..	640
Applicability ..	640
Attachment—Declaration against ..	641
Attachment setting aside ..	642
Civil Court ..	642
Cross-objections ..	642
Declaration in appeal ..	643
Interpleader suit ..	643
Suit under C.P. Code, O. 21, R. 63 ..	643
Suit for possession after dismissal of application under O. 21, R. 97, C.P. Code ..	645
Suit under O. 21, R. 103, C.P. Code ..	646
Suit for partition ..	646
Suit for declaration ..	647
Sch. II, Art. 17 (iii) ..	647
Adoption ..	647
Alteration in relief ..	648
Appeal against manner in which decree is to be executed ..	648
Appeal against part of a decree ..	648
Appellate Court—Powers of ..	648
Applicability ..	649
Bengal Tenancy Act, S. 106—Suits under ..	651
Commutation suit ..	651
Declaration ..	651
Declaratory suit ..	654
Different causes of action ..	657
Effect on jurisdiction ..	657
Further declaration ..	657
Injunction and confirmation of possession ..	658
Mandatory ..	658
Mortgage ..	658
Revenue sale ..	660
Suit for declaration only ..	660
Sch. II, Art. 17 (iv) ..	660
Sch. II, Art. 17 (v) ..	661
Sch. II, Art. 17 (vi) ..	662
Applicability ..	662
Mortgage Suit ..	667
Partition Suit ..	669
Partition and possession ..	678
Preliminary decree for accounts ..	678
Recovery of Trust property ..	678
Refusal to grant letters of administration ..	678
Restitution of conjugal rights ..	678
Trust suits ..	679
Miscellaneous ..	682
Sch. II, Art. 17 (A) ..	684
Sch. II, Art. 17 (B) ..	690
Sch. II, Art. 20 ..	694
Sch. II, Art. 22 ..	695
Sch. III ..	697
Court of appeal ..	697
Court—Jurisdiction of ..	697
Court process ..	697
Court sale ..	697
Court of Wards ..	697
Court of Wards Act ..	697
Covenant ..	698
Covenant breach of ..	699
Covenant for title ..	699
Covenant not to alienate ..	699
Covenant in restraint ..	699
Covenant running with land ..	699
Co-widow ..	699
Creation of endowment ..	699
Creditor and Debtor ..	699
Creditor's interest ..	699
Criminal Appeal Ordinance of Trinidad and Tobago ..	699
Criminal Appeals ..	700
Criminal Approver ..	700
Criminal breach of contract ..	700
Crimnal breach of trust ..	700
Criminal conspiracy ..	701
Criminal Courts ..	701
Criminal force ..	701
Criminal intimidation ..	701
Criminal Law ..	701
Criminal Law Amendment Act (14 of 1908) ..	702
Criminal Law Amendment Act (23 of 1932) ..	711
Criminal Law Amendment Ordinance (29 of 1943) ..	716
Criminal Law Amendment Ordinance (38 of 1944) ..	719
Criminal misappropriation ..	721
Criminal negligence ..	721
Criminal Procedure Code (5 of 1898) ..	721
Cr.P. Code, S. 1. ..	724
Cr.P. Code, S. 4 ..	726
S. 4 (1) (b) Bailable offence ..	726
S. 4 (1) (f) Cognizable offence ..	727
S. 4 (1) (h) Complaint ..	727
S. 4 (1) (i) European British subject ..	742
S. 4 (1) (j) High Court ..	743
S. 4 (1) (k) Inquiry ..	743
S. 4 (1) (l) Investigation ..	745
S. 4 (1) (m) Judicial proceeding ..	745
S. 4 (1) (o) Offence ..	746
S. 4 (1) (r) Pleader ..	747
S. 4 (1) (v) Summons Case ..	749
S. 5 ..	750
S. 6 ..	753
S. 7 ..	754
S. 9 ..	755
S. 10 ..	756
S. 12 ..	757
S. 13 ..	759
S. 14 ..	760
S. 15 ..	761
Bench Court—Absence of members ..	761
Bench Court—Trial by ..	762
Bench Magistrates—Duty of ..	764
Bench Magistrates—Powers of ..	764
S. 16 ..	766
S. 17 ..	769
S. 18 ..	771
S. 20 ..	772
S. 21 ..	772
S. 22 ..	773
S. 26 ..	773
S. 28 ..	773
S. 29 ..	775
S. 30 ..	777
S. 31 ..	780
S. 32 ..	780
S. 33 ..	783
S. 34 ..	783
S. 35 ..	784
Applicability and scope ..	784
Concurrent sentences ..	785
Separate sentences ..	787
Separate offences ..	790
Separate trials ..	793
Defective sentences ..	794
Appeals ..	795
S. 36 ..	796
S. 37 ..	797
S. 39 ..	797
S. 40 ..	798
S. 41 ..	799
S. 42 ..	799
S. 44 ..	800
S. 45 ..	800

	Cols.
S. 46	802
S. 47	804
S. 51	804
S. 54	805
Applicability of	805
Object and Scope of	809
Resistance to arrest under	813
Miscellaneous	814
S. 55	815
S. 56	817
S. 57	819
S. 58	819
S. 59	820
S. 60	823
S. 61	823
S. 62	823
S. 64	824
S. 65	824
S. 68	824
S. 69	826
S. 70	826
S. 71	826
S. 72	826
S. 75	827
S. 76	829
S. 77	830
S. 79	831
S. 80	831
S. 82	832
S. 83	832
S. 85	834
S. 87	834
S. 88	839
S. 89	843
S. 90	845
S. 91	847
S. 92	848
S. 94	848
Scope and applicability	848
Issuing search-warrant under	851
Exempted category	853
S. 95	854
S. 96	854
Applicability and scope	854
Search-warrant—Duty of Court	858
S. 98	859
S. 99	859
S. 100	862
S. 101	864
S. 102	864
S. 103	865
Absence of occupant	865
Applicability and scope	865
Evidence	866
Irregularity	869
Panchas	870
Respectable witnesses	871
Search—Formalities	874
Miscellaneous	875
S. 104	876
S. 106	877
Applicability and scope	878
Appellate Court—Powers of	880
Essentials to be proved	883
Evidence required	884
Forfeiture of Bond	884
Grounds for action under	885
Interpretation of terms	887
Notice to accused	889
Order under specific cases	889
Powers and duty of Court	891
Revision—Interference in	892
Surety's liability	893
Time—Computation of	894
Quantum of punishment	895
S. 107—Applicability	896
Appeal	900
Bail	901
Both parties dangerous	902
Consent of accused—Effect	902
Essentials for action under	904
Evidence required	907
Forfeiture of security	909
Fresh proceedings	911
Grounds for action under	912
Jurisdiction under	914
Lawful acts	918
Limitation on powers under	920
Joint trial	923
Nature of proceedings under	925
Powers and duty of Court	927
Procedure	929
Reference and revision	935
Security under	938
Wrongful acts	938
Object and scope	939
Miscellaneous	940
S. 108	941
S. 109	944
Applicability and scope	945
Concealing oneself—What is	949
Essentials to be proved	951
Grounds for action under	952
Jurisdiction under	954
Power of High Court	955
Sentence	956
Sureties	956
Terms explained	957
Miscellaneous	959
S. 110	961
Applicability and scope	961
Object and scope	965
Appeal	966
Detention	967
Evidence required	967
Evidence—Sufficiency of	971
Evidence of Police	974
Evidence of general repute	976
Evidence of good character	978
Evidence of bad livelihood	979
Exercise of powers—Specific cases	980
Fresh proceedings	984
Habitual offender	985
Joint trial	986
Jurisdiction	989
Notice under	992
Power and duty of Court	994
Practice and procedure	997
Revision	1000
Reputation—What is	1004
Security	1007
Surety	1011
Suspicion—If ground for action	1014
Specific offences	1016
Terms explained	1017
Transfer of cases—Grounds for	1018
Miscellaneous	1019
S. 112	1021
Amendment of order under	1021
Applicability	1022
Bond—Forfeiture	1022
Compliance	1022
Conditional bail	1023
Contents of order	1023
Essentials	1027
Interpretation	1027
Joint trial	1027
Magistrate acting under is a court	1028
Object	1028

	Cols.
Order under—Nature of ..	1028
Order under S. 117 (3) ..	1029
Powers of Magistrate to issue summons, warrants and orders of detention ..	1029
Procedure ..	1030
Public peace ..	1031
Requiring security ..	1031
Right of accused to copy of report ..	1032
Sureties ..	1032
S. 113 ..	1033
S. 114 ..	1033
S. 117 ..	1034
Admission ..	1035
Applicability of S. 256 ..	1036
Bail ..	1036
Bond—Forfeiture ..	1036
Contents of order ..	1036
Evidence ..	1036
Ex parte order before enquiry ..	1041
Further evidence ..	1041
Interpretation ..	1041
Joint trial ..	1042
Order under ..	1046
Order under S. 117 (3) without reading or explaining under S. 112 ..	1048
"Or otherwise" ..	1048
Previous conviction ..	1049
Procedure ..	1049
Proceedings under—Nature of ..	1050
Re-cross-examination ..	1050
Refusal to summon witnesses ..	1050
Revision ..	1050
Scope ..	1051
Security for keeping the peace ..	1052
Sureties ..	1052
Transfer ..	1052
S. 118 ..	1052
Appeal ..	1053
Bail ..	1054
Binding over ..	1054
Double order ..	1056
Enquiry ..	1056
Evidence necessary to support order ..	1056
Procedure ..	1056
Security—Default ..	1057
Security—Fixing amount of ..	1057
Security—Suficiency of ..	1057
Security for good behaviour ..	1058
Security of keeping the peace ..	1058
Several accused ..	1058
Sureties—Fitness of ..	1058
Surety for good behaviour ..	1060
Surety offering house property ..	1060
Surety only in movable property if can be ordered ..	1061
Surety—Magistrate can accept even after accused sent to jail for default ..	1061
Suspect in jail ..	1061
S. 119 ..	1062
S. 120 ..	1064
S. 121 ..	1065
S. 122 ..	1067
Acceptance of surety ..	1067
Fitness of surety—Onus ..	1067
Grounds for rejection of sureties ..	1067
Hearsay evidence ..	1069
Inquiry as to fitness ..	1069
Magistrate's discretion ..	1070
Magistrates' and Sessions Judges' powers	1070
Order under Punjab Restriction of Habitual Offenders Act ..	1071
Pleader certifying sufficiency of surety ..	1071
Power to demand security ..	1071
Sureties—Limitation on ..	1071
Sureties—Rejection of ..	1071
S. 123 ..	1072
Accused in jail ..	1073
Alternative imprisonment ..	1074
Bond after date of secutity ..	1074
Committal ..	1074
Concurrent sentences ..	1075
Delay in Commitment ..	1076
Detention ..	1076
Imprisonment ..	1076
Joint inquiry ..	1078
Reference to Sessions Judge ..	1078
Rehearing ..	1080
Scope ..	1081
Starting point ..	1082
Subsequent order fixing date for furnishing security ..	1082
Surety ..	1082
S. 125 ..	1083
Cancellation ..	1083
District Magistrate's powers ..	1083
Modification ..	1085
Nature of proceedings ..	1085
Review ..	1086
Revision ..	1086
Securety to keep the peace—Power of High Court any District Magistrate ..	1086
S. 127 ..	1086
S. 132 ..	1088
S. 133 ..	1089
Applicability ..	1089
Bona fide claim ..	1092
Cancellation of order ..	1098
Conditional order ..	1098
Costs ..	1100
Dropping proceedings ..	1100
Jurisdiction ..	1100
Jury ..	1104
Local Inspection ..	1108
Local Inquiry ..	1109
Magistrate's extra Judicial investigation ..	1109
Magistrate's own Inquiry ..	1109
Magistrate's powers ..	1109
Market ..	1111
Nature of proceedings ..	1112
Nuisance ..	1113
Obstruction ..	1117
Procedure ..	1119
Public peace ..	1130
Public right ..	1130
Revision ..	1130
Right of party ..	1131
Scope ..	1131
Vague order ..	1133
Validity of order ..	1133
Miscellaneous ..	1134
S. 134 ..	1134
S. 135 ..	1135
S. 136 ..	1136
S. 137 ..	1136
Bona fide claim—Duty of Magistrate ..	1136
Condition order served—Onus ..	1136
Denial of public right ..	1136
Enquiry by Magistrate ..	1137
Evidence recorded under S. 139-A ..	1138
Finding against denial of right ..	1138
Final order ..	1138
Local inspection ..	1138
Local investigation ..	1138
Magistrate if can make order absolute on his personal opinion ..	1138
Magistrate sitting alone without jury ..	1139
Cannot modify order ..	1139
Order not good on abatement of nuisance ..	1139
Order made without enquiry under S. 139-A ..	1139

	Cols.
Power of High Court	1139
Procedure	1139
Public Nuisance	1142
Scope	1142
Transfer to another Magistrate	1142
S. 138	1143
S. 139	1143
S. 139-A	1144
Applicability and scope	1144
Delegation	1145
Dismissal of application	1145
Evidence	1146
Inquiry	1147
Jurisdiction	1150
Jury	1151
Non-compliance with	1151
Object of	1152
Powers and duties under	1153
Procedure	1155
Question of title	1156
Revision	1157
Waiver	1157
S. 140	1157
S. 141	1159
S. 142	1160
S. 143	1161
S. 144	1162
Applicability	1162
Burden of proof	1164
Discretion	1165
Disobediance of order	1165
Dispute about land	1167
Duration of order	1174
Duty of authorities	1175
Duty of Court	1176
Ex parte order	1179
General order	1180
'Hats'	1184
Indefinite order	1185
Interpretation	1186
Jurisdiction	1187
Mandatory orders	1189
Nature of proceedings	1190
Order to abstain from doing certain acts	1191
Order under—Requisites	1192
Powers of Court	1193
Procedure	1196
Processions	1198
'Promulgated'	1199
Public meeting	1200
Rescission and extension	1200
Revision	1203
Scope	1210
Successive orders	1217
Temporary order	1218
Validity of order	1219
Miscellaneous	1222
S. 145	1223
Action under	1224
Amendment of proceedings	1225
Applicability	1225
Arbitration	1229
Attachment	1231
Breach of peace	1235
Burden of Proof	1238
Cancellation and revival	1239
Compromise	1241
Consent	1241
Costs	1242
Crops	1242
Death of party	1243
Debutter estate	1243
Decision of Revenue Court	1244
Decision of Criminal Court	1245
Decree of Civil Court	1247
Defect in procedure	1255
Dismissal for default	1258
Disposal of property	1259
Disputes between landlords, tenants, etc	1260
Dispute concerning water	1260
Dispute about property	1260
Distribution of fees paid by pilgrims	1261
Dropping of proceedings	1261
Due course of Law	1262
Duty of Magistrate	1262
Easements	1272
Effect of order	1272
Emergency orders	1275
Evicted in due course of law	1275
Evidence	1275
Evidentiary value of order	1277
Ex parte order	1277
Final order	1278
Forum	1285
Foundation of jurisdiction	1285
Fresh proceedings	1289
Government of India Act, S. 107	1290
Immovable property	1291
Inconsistent orders	1295
Information	1295
Inquiry	1296
Interpretation	1303
Joint inquiry	1305
Joint possession	1306
Joint property	1311
Jurisdiction	1313
Large areas	1317
Likelihood of breach of peace	1317
Local inquiry	1317
Nature of proceeding	1319
Notice	1320
Object of section	1324
Parties	1326
Pendeney of civil suit	1332
Period of possession	1332
Possession	1336
Powers of Magistrate	1344
Preliminary order	1350
Procedure	1363
Proceedings under	1364
Question of title	1364
Receiver	1367
Reference	1369
Remedy of aggreived party	1370
Review	1371
Revision	1371
Security for keeping the peace	1383
Sine die postponement	1384
Subject-matter of dispute	1384
Transfer of case	1386
Miscellaneous	1388
S. 146	1389
Applicability	1390
Attachment	1391
Civil Court's decision	1393
Civil suit for declaration	1394
Competent Court	1394
Conflicting claims on title	1395
Duty of Magistrate	1395
Ex parte order	1396
Extension of time	1396
Joint property	1397
Jurisdiction	1397
Limitation	1397
Mesne profits	1398
Objects	1398
Parties	1398
Party can be left in possession	1398
Possession through mortgagee	1398

	Cols.
Procedure ..	1399
Receiver ..	1400
Release from attachment ..	1401
Remedies ..	1401
Revision ..	1401
Scope ..	1403
Miscellaneous ..	1403
S. 147—Applicability ..	1404
Costs ..	1405
Easements ..	1405
Exercise of right ..	1406
Fence as obstruction ..	1407
Fishing right ..	1407
Form and contents of order ..	1407
Interim order ..	1408
Interpretation ..	1409
Jurisdiction ..	1410
Mandatory injunction ..	1412
Natural rights ..	1414
Nature of proceedings ..	1414
Order under—Limitation for Civil suit ..	1414
Order to be based on evidence ..	1414
Parties ..	1415
Personal and public right ..	1415
Police assistance ..	1415
Police report ..	1415
Powers of Magistrate ..	1416
Prior decision ..	1416
Privy—If land or water ..	1416
Procedure ..	1417
Proceedings under ..	1419
Public street ..	1419
Revision ..	1420
Right of way ..	1420
Right to recite sankalpams in tank ..	1420
Scope ..	1420
Temple ..	1421
Tolls ..	1422
Water ..	1422
Wells ..	1422
Miscellaneous ..	1423
S. 148	
Costs ..	1423
"Decision"—Meaning ..	1429
Inquiry ..	1429
Local inquiry ..	1429
Local inspection ..	1430
S. 149 ..	1431
S. 151 ..	1431
S. 153 ..	1432
S. 154—Accused right to copy ..	1433
Admissibility of information ..	1433
Applicability ..	1434
Contents of report ..	1436
Evidentiary value of information ..	1437
First information report ..	1441
Omission to record ..	1448
Procedure in admitting information ..	1448
Scope ..	1448
Ss. 154, 155 & 156 ..	1449
S. 157 ..	1457
S. 159 ..	1458
S. 160 ..	1459
S. 161—Any person ..	1461
Applicability ..	1461
Scope ..	1462
Sub-S. 2 ..	1463
Sub-S. 3 ..	1464
Miscellaneous ..	1465

	Cols.
SECTION 162.—	
Applicability ..	1466
Construction ..	1489
"In the course of investigation" ..	1495
Object of section ..	1497
Police diary ..	1500
"Statement" ..	1504
Scope ..	1508
First proviso ..	1519
Second proviso ..	1543
Sub-section 2 ..	1544
Miscellaneous ..	1545
S. 163 ..	1546
SECTION 164—Admissibility of confession or statement	1547
Applicability ..	1549
Certificate ..	1551
Construction ..	1554
Copies ..	1556
Defect in recording ..	1556
Evidentiary value of confession ..	1565
Inspection ..	1573
Jurisdiction ..	1574
Oral confession ..	1576
Procedure ..	1577
Proof ..	1589
Retraction ..	1591
Scope ..	1594
Time and place of recording confession ..	1601
Warning to be given ..	1603
Miscellaneous ..	1610
S. 165 ..	1612
S. 167—Applicability ..	1617
Detention under ..	1618
Magistrate ..	1620
Object ..	1620
Scope ..	1620
Miscellaneous ..	1622
S. 169 ..	1622
S. 170 ..	1623
S. 172—Applicability ..	1624
Police diaries ..	1625
Scope ..	1632
S. 173—Applicability ..	1633
Final Report ..	1634
Further charge ..	1634
Further investigation ..	1635
Order of Magistrate, Nature of ..	1635
Miscellaneous ..	1636
S. 174 ..	1638
S. 176 ..	1639
S. 177—Commitment by or to wrong Court ..	1640
Jurisdiction ..	1641
Ordinarily ..	1644
Trial in wrong Court ..	1645
Transfer of territory ..	1645
Miscellaneous ..	1646
S. 178 ..	1647
S. 179—Applicability ..	1647
Criminal breach of trust ..	1649
Criminal Misappropriation ..	1652
Cheating ..	1653
"Consequence" ..	1655
"Any consequence that has ensued" ..	1656
Defamation ..	1657
Scope ..	1657
Miscellaneous ..	1658
S. 180 ..	1660
S. 181 ..	1661

	Cols.
S. 181 (2)—Applicability and scope	1662
Jurisdiction	1662
Place of accounting	1665
Place of receipt or retention	1667
Revision	1669
Miscellaneous	1669
S. 182.	
Applicability and scope	1671
Abduction	1672
Cheating	1672
Concurrent jurisdiction	1672
Conspiracy	1673
Criminal misappropriation or breach of Trust	1673
Doubt as to place of offence	1673
Objection to jurisdiction	1674
Rioting	1674
S. 183	1674
S. 185	1675
S. 186	1676
S. 188—Absence of certificate	1677
Cure—Subsequent production	1678
Object of certificate	1679
Offence under Child Marriage Restraint Act	1679
Scope and applicability	1680
Trial with certificate	1681
Signing of certificate	1681
Miscellaneous	1682
S. 190.	
Adding accused	1684
Applicability and scope	1684
Complaint	1688
Information	1691
Jurisdiction	1693
Knowledge	1698
Police report	1698
Power of Court	1702
Procedure	1707
Taking cognizance	1711
Revision	1714
Miscellaneous	1715
S. 191.	1715
S. 192—Applicability	1718
Piecemeal transfer	1718
Transfer after framing charge	1719
Transferee Magistrate lacking jurisdiction	1719
Transfer of Magistrate	1720
Transfer	1721
Scope	1722
Miscellaneous	1724
S. 193	1727
S. 194	1728
S. 195—Abatement	1729
Absence of sanction	1730
Applicability	1732
Complaint	1736
Construction	1740
Costs	1740
Court	1741
Delay	1746
Duty of Court	1748
Effect of amendment	1751
Evidence	1753
Form of sanction	1753
Grant of sanction	1754
Jurisdiction	1758
Legality of sanction	1760
Limitation	1763
Notice	1763
Object	1765
Powers of Court	1767
Powers of High Court	1770
Procedure	1771
Refusal of sanction	1776
Revision	1777
Sanction necessary	1779
Sanction not necessary	1783
Scope	1786
Scope and inquiry	1787
Miscellaneous	1788
Sub-section (1)	1791
Sub-section (1) (a)	1794
Sub-section (1) (b)	1805
Sub-section (1) (e)	1836
Sub-section (2)	1850
Sub-section (3)	1851
Sub-section (4)	1865
Sub-section (5)	1865
Old. S. 195 (6)—Appeal	1871
Collector	1872
Court	1872
Dismissal for default	1873
Execution proceedings	1873
Fresh evidence	1873
High Court	1873
Legal Practitioners Act	1874
Limitation	1874
Power of superior Court	1875
Refusal of sanction	1876
Remand	1877
Revision	1878
Revocation	1879
Second Appeal	1880
'Six months'	1881
Small Cause Court	1883
Transfer of case	1883
S. 196.	
Applicability	1896
Sanction	1896
Scope	1901
Miscellaneous	1901
S. 196-A—Absence of sanction	1902
Applicability	1904
Proviso	1907
Scope	1907
Miscellaneous	1909
S. 197—Applicability	1911
Burden of proof	1915
Delegation of power to appoint	1915
Illegal gratification	1917
Interpretation	1920
Judge	1922
Object	1925
Procedure	1926
Public servant	1929
Sanction, contents of	1933
Sanction, essential	1933
Sanction, form of	1937
Sanction, grant of	1938
Sanction not essential	1939
Miscellaneous	1945
S. 198—Applicability and scope	1946
Aggrieved person	1947
Complaint	1950
Non-compliance	1950
Offence if includes abetment	1951
S. 199—Addition of charge under Complaint	1951
	1952

	Cols.
Leave of Court ..	1954
Object of ..	1954
Who can complain ..	1954
S. 200—Complaint ..	1956
Complaint by Court of Public servant ..	1958
Joint complaint ..	1960
Failure to examine complainant ..	1961
Investigation after cognisance ..	1963
Procedure ..	1964
Scope and object ..	1968
Sworn statement ..	1968
Miscellaneous ..	1968
S. 201. ..	1970
S. 202—Applicability and scope ..	1972
Duty of Court ..	1975
Enquiry ..	1978
Examination of complainant ..	1981
Fresh complaint ..	1981
Local investigation ..	1983
Notice to show cause ..	1984
Power of Court ..	1985
Procedure ..	1988
Transfer ..	1993
Revision ..	1994
Power of Police ..	1995
Miscellaneous ..	1997
S. 203—Applicability and scope ..	1998
Civil nature ..	2000
Discretion of Court ..	2002
Dismissal of complaint ..	2002
Duty of Court ..	2004
Fresh complaint ..	2006
Further inquiry ..	2010
Power of Court ..	2012
Procedure ..	2015
Revision ..	2018
S. 204—Commencement of proceedings ..	2020
Duty of Court ..	2020
Powers of Court ..	2022
'Cost of process' ..	2024
Revision ..	2024
Miscellaneous ..	2025
S. 205—Applicability scope ..	2026
Conviction in absence ..	2028
Exemption ..	2028
Miscellaneous ..	2029
S. 206 ..	2031
S. 207 ..	2033
S. 208—Cross-examination—Right of accused ..	2035
Defence evidence—Recording of ..	2037
Prosecution if bound to produce all the witnesses ..	2038
Power and duty of committing Magistrate ..	2041
Miscellaneous ..	2043
S. 209—Commitment ..	2046
Discharge ..	2050
Duty to weigh evidence ..	2052
Jurisdiction to decide nature of offence ..	2055
Jurisdiction to try for lesser offence ..	2056
Object of putting questions. ..	2057
Setting aside discharge order ..	2057
Miscellaneous ..	2059
S. 210 ..	2060
S. 211 ..	2063
S. 212 ..	2065
S. 213 ..	2066
S. 215—Appeal ..	2069
Applicability and scope ..	2069

	Cols.
Case which the Magistrate was competent to try ..	2070
Commitment when not quashed ..	2071
Commitmet when quashed ..	2072
Commitment, essentials ..	2073
Doubts ..	2074
Effect of quashing ..	2074
Evidence ..	2074
Fresh trial ..	2076
High Court—Powers ..	2076
Irregularity in committal ..	2078
Jurisdiction ..	2078
Magistrate not giving reasons for committal ..	2078
Revision ..	2079
Miscellaneous ..	2079
S. 216 ..	2081
S. 217 ..	2081
S. 219 ..	2081
S. 221—Abetment ..	2082
Accused must be told what the law is, he is said to have infringed ..	2082
Adherence to words of section desirable.	2083
Charge ..	2083
Cheating ..	2084
Conspiracy ..	2084
Contempt of Court ..	2085
Conviction for offence not charged ..	2085
Defect or omission in charge ..	2085
Extortion ..	2085
Irregularity ..	2086
Kidnapping and abduction	2086
Murder ..	2086
Objections to charge ..	2087
Rioting ..	2087
Scope ..	2088
Sedition ..	2088
Trespass with the object of theft ..	2088
Two offences ..	2088
Sub-section (7)—Previous conviction ..	2088
Section 222—Abettors ..	2091
Breach of Trust ..	2091
Charge—Intention ..	2092
Contents of charge ..	2092
Dacoity ..	2092
Doubt as to offence ..	2092
Embezzlement ..	2092
Falsification of accounts ..	2093
Joinder of charges ..	2094
Jurisdiction ..	2094
Misappropriation ..	2095
Misappropriation of goods ..	2095
Non-compliance with the provisions ..	2095
Object and scope ..	2096
Particulars ..	2097
Perjury ..	2097
Prevention of Corruption Act, S. (5) (2) ..	2098
Scope ..	2098
Specific sum ..	2098
Subsequent charge for one item ..	2100
Time ..	2101
S. 223 ..	2102
S. 225 ..	2104
Charge ..	2104
Dacoity ..	2104
Defamation ..	2105
Defects or omissions in charge ..	2105
Error what is ? ..	2105
Errors in charge ..	2105
Error of date ..	2105
Falsification of accounts ..	2106

	Cols.
Further framing of charge	2106
Irregularity	2106
Omissions to frame charge	2107
Particulars	2107
Sedition	2108
Unlawful assembly	2108
Miscellneous	2109
S. 226	2109
S. 227—Addition of charge	2112
Alteration of charge	2112
Amendment of charge	2114
Appeal	2115
Applicability	2115
Conspiracy for forgery	2115
Further charge	2115
Information of alteration to accused	2116
Material alteration of charges	2116
Proper procedure	2116
Rights of accused	2116
Time for exercise of powers	2116
S. 228	2117
S. 229	2117
S. 230	2118
S. 231	2118
S. 232	2119
S. 233—Alternative charges	2121
Applicability and scope	2121
Counter cases	2123
Distinct cases	2125
Inquiry	2128
Joinder of accused	2128
Joinder of charges	2130
Mandatory	2138
Misjoinder	2138
None-compliance with	2142
Plurality of Courts	2143
Procedure	2143
Separate trial	2144
Simultaneous trial	2144
Vague charge	2144
S. 234—Breach of trust	2145
Cheating	2147
Continuing offence	2147
Contravention of	2147
Criminal misappropriation	2148
Objective charge	2148
Differeut transactions	2148
Distinct offences	2248
Falsification of accounts	2152
Joinder of charges	2153
Joint trial	2154
Misjoinder	2154
More than three offences	2155
Offences of different kinds	2157
Offences of same kind	2157
Offences under I.P. Code, Ss. 121-A and 123.	2160
One transaction	2160
Passing of counterfeit coins	2161
Procedure	2161
Receiving stolen goods	2162
Scope	2162
Separate trial	2163
Several complainants	2163
Several persons	2163
Single charge	2165
Theft	2165
S. 235—Applicability and scope	2165
Application of S. 403	2168
Joinder of charges	2171
Joint trial	2181
Jurisdiction	2185
Misjoinder	2186
Procedure	2188
Same transaction	2192
Scope	2206
S. 236	2207
Abetment and offence	2207
Alternative charges	2209
Appellate Court	2212
Applicability and scope	2215
Conviction without alteration	2218
Doubt of facts	2219
Sentences	2220
Separate transaction	2220
Subsequent trial	2221
Miscellaneous	2222
S. 237—Abetment and offence	2223
Accused—Right of	2224
Appellate Court	2225
Applicability and scope	2226
Conviction without alteration or further charge	2227
S. 238.	
Abetment	2235
Applicability and scope	2235
Attempt	2238
Cases falling under	2239
Cases not falling under	2241
Irregularity	2242
Minor offence	2243
Miscellaneous	2244
S. 239—Applicability scope and interpretation	2245
Common object	2247
Conspiracy	2249
Gambling	2251
False evidence	2253
Illegality	2254
Irregularity	2258
Joint trial	2259
Misjoinder	2266
Offences falling under Cl. (e)	2268
Power and duty of Court	2271
Principal and abettor	2271
Receiving stolen property	2272
Same transaction	2275
Separate transaction	2286
Separate trial	2288
Theft	2288
Revision	2290
Miscellaneous	2290
S. 240	2291
S. 241	2293
S. 242—Non-Compliance—Effect	2293
Powers and duty of Magistrate	2295
Trial when commences	2296
Miscellaneous	2296
S. 243	2296
S. 244	2299
S. 245	2302
S. 246	2302
S. 247—Absence of complainant	2303
Acquittal	2305
Appearance	2307
Applicability	2307
Death of Complainant	2309
Interpretation	2311
Restoration	2311
Revision	2312
Scope	2313
S. 248	2314
S. 249	2316
S. 250—Appeal	2318
Applicability	2319

	Cols.
Cases within scope	2323
Compensation	2324
Complaint	2326
Complainant	2326
Court which can award compensation	2329
Discretion	2333
False and frivolous charge	2333
Interpretation	2337
Nature and scope of proceedings	2338
Nature of order	2339
Notice	2339
Object	2341
Opportunity to show cause	2342
Procedure	2344
Recovery of compensation	2348
Revision	2349
Scope	2349
Setting aside order	2350
Simultaneous order	2350
Stage for order	2352
S. 251	2355
S. 252. Duty of Magistrate	2356
Interpretations	2357
Powers of Magistrate	2358
Procedure	2359
Process and summons	2361
Miscellaneous	2362
S. 253—Absence of complainant	2363
Fresh complaint	2364
Further enquiry	2364
Interpretation	2365
Orders of discharge	2366
Powers of Magistrate	2367
Procedure	2369
Reasons	2372
Setting aside	2372
S. 254—Applicability and scope	2373
Charge, framing of	2374
Charge, omission to frame	2375
Charge, Powers of Magistrate	2376
Commitment	2377
Judgment after charge	2378
Procedure	2379
S. 255	2380
S. 256—Adjournment	2383
Applicability and scope	2384
Burden of proof	2385
Costs of witnesses	2386
Cross-examination of Prosecution witnesses	2388
Defence evidence	2398
Procedure	2400
Rights of prosecution	2402
Waiver	2403
Revision	2406
Miscellaneous	2406
S. 257—Attendance of witnesses	2407
Expenses of witnesses	2408
Power of Court	2410
Procedure condemned	2411
Refusal to summon	2412
Right of accused	2417
Revision	2420
Miscellaneous	2420
S. 258	2420
S. 259—Absence of complainant—Discharge	2422
Denovo trial—Effect on charge already framed	2423
Death of complainant	2424
Fresh complainant	2424
Joint trial of summons and warrant case	2426
Revival after charge	2426
Revision	2427
Scope	242
Warrant case	242
S. 260—Change to summary trial	2428
Cross-examination	2428
Offences triable summarily	2428
Offences not triable summarily	2430
Summary trial—Grave or complicated cases	2432
Summary trial, jurisdiction	2433
Miscellaneous	2434
S. 261	2435
S. 262	2435
S. 263—"If any"—Scope	2437
Notes of evidence, if part of record	2438
Reasons for conviction	2439
Record of evidence, if to be made	2443
Miscellaneous	2446
S. 264—Notes of evidence	2447
Record of evidence	2447
Reasons for convictions	2448
Substance of evidence	2448
Miscellaneous	2450
S. 265	2450
S. 266	2451
S. 267	2452
S. 268	2452
S. 269	2454
S. 270	2457
S. 271	2457
S. 272	2462
S. 273	2463
S. 274	2463
S. 275	2466
S. 276	2467
S. 277	2473
S. 278	2473
S. 279	2475
S. 282	2476
S. 284	2479
S. 285	2480
S. 286—Burden of proof	2482
Discretion of prosecution	2485
Duty of counsel	2485
Duty of prosecution	2486
Duty to tender all evidence	2488
Function of Government	2491
Hostile witness	2491
Material witness	2492
New witness	2492
Procedure	2494
Right of accused	2494
Right of prosecution	2494
S. 287	2495
S. 288—Applicability	2496
Basis of conviction	2499
Construction	2499
Contradictory statements	2501
Discretion of Court	2501
Evidentiary value of statements	2503
Object of section	2507

	Cols.
Portion of statement	2507
Procedure	2507
Retracted statement	2508
Scope	2510
Statement of approver	2513
S. 289	2514
S. 290	2518
S. 291	2519
S. 292	2521
S. 293	2522
S. 296	2522
S. 297—Charge	2523
Confession	2542
Defective dircction	2544
Duty of Jury	2551
Evidence	2552
Interference	2563
Misdirection	2565
Non-direction	2595
Omission	2603
Procedure	2614
Several accused	2615
Sexual offence	2617
Summing up	2622
Miscellaneous	2633
S. 298—Admissibility and proof of evidence	2633
Opinion of Judge	2638
Question of law	2640
Scope	2643
Miscellaneous	2644
S. 299	2645
S. 300	2648
S. 301	2649
S. 303—Jury's verdict	2651
Procedure	2653
Questioning the jury	2655
Reasons for verdict	2657
S. 304	2657
S. 305	2659
S. 306	2659
S. 307—Evidence	2661
Grounds for reference	2663
Interference with verdict	2668
Powers of High Court	2677
Procedure	2683
Scope	2689
Verdict of Jury	2693
Miscellaneous	2696
S. 308	2697
S. 309—Assessor's opinion	2698
Judgment	2701
Procedure	2702
S. 310	2703
S. 311	2706
S. 313	2706
S. 315	2706
S. 319	2706
S. 324	2706
S. 326	2706
S. 327	2708
S. 331	2709
S. 332	2709
S. 333	2709
S. 337—Applicability	2710
Commitment of approver	2711
Detention	2712
Effect of pardon	2714
Evidence of accomplice	2715
Examination of approver	2716
Pardon, grant of—Validity	2718
Recording of reasons	2720
Scope	2721
Statement of approver	2723
Time for pardon	2724
Withdrawal of jurisdiction—Validity	2725
Miscellaneous	2726
S. 338	2727
S. 339—Certificate	2727
Forfeiture	2728
Joint trial	2730
Onus	2731
Pardon	2732
Powers of Sessions Judge	2732
Procedure	2733
Sanction	2735
Statement	2737
S. 339-A	2740
S. 340—Accused's right to counsel	2741
Advocate (accused)—If can act as counsel	2743
Authority to act	2744
Miscellaneous	2744
S. 341—Applicability	2747
Conviction	2749
Procedure	2750
Report to local Government	2751
Scope of	2752
Miscellaneous	2752
S. 342—Applicability	2753
Construction	2760
Contravention	2764
Duty of Court	2780
Filing of written statement	2786
Joint trial	2790
Object of section	2792
Power of Court	2795
Procedure	2798
Purpose of examination	2807
Refusal to answer	2811
Scope	2812
Time for examination	2817
Miscellaneous	2820
Sub-section (2)	2821
Sub-section (3)	2822
Sub-section (4)	2824
S. 343	2825
S. 344—Applicability	2826
Construction	2827
Costs	2828
Discretion	2830
Inherent power	2833
Jurisdiction	2833
Procedure	2833
Reasonable cause	2834
Remand	2839
Revision	2840
Scope	2840
Sub-section (1). Explanation	2842

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ABBREVIATIONS.

REPORTS.

A.I.R. 1914 All., Bom., etc. .. All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A.M.L.J. .. Ajmer-Merwara Law Journal.
Agra H.C.R. .. Agra High Court Reports.
All. or I.L.R. All. .. Indian Law Reports, Allahabad Series.
All. L. Jour. .. Allahabad Law Journal.
All.W.N. .. Allahabad Weekly Notes.
All. W.R. .. Allahabad Weekly Reporter.
I.L.R. Assam. .. Indian Law Reports, Assam Series.
B.R. .. Bihar Reports.
Beng. L.R. .. Bengal Law Reports.
B.L.J.R. or Bihar L.J.R. .. Bihar Law Journal Reports.
Bom. or I.L.R. Bom. .. Indian Law Reports, Bombay Series.
Bom.H.C.R. .. Bombay High Court Reports.
Bom.L.R. .. Bombay Law Reporter.
Bom.P.J. .. Bombay Printed Judgments.
Bur.L.Jour. .. Burma Law Journal.
Bur. L. R. .. Burma Law Reports.
Bur. L. Tim. .. Burma Law Times.
Cal. or I.L.R. Cal. .. Indian Law Reports, Calcutta Series.
Cal. L. Jour. .. Calcutta Law Journal.
Cal. L. R. .. Calcutta Law Reports.
Cal. W. N. .. Calcutta Weekly Notes.
Cal. W.N. (D.R.) .. Calcutta Weekly Notes (Dacca Reports).
C.P.L.R. .. Central Provinces Law Reports.
Cr. App. Rep. .. Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour. .. Criminal Law Journal.
I.L.R. Cut. .. Indian Law Reports, Cuttack Series.
Cut.L.T. .. Cuttack Law Times.
E.P. .. East Punjab.
I.L.R. E.P. or East Pun. .. Indian Law Reports, East Punjab Series.
F.C.R. .. Federal Court Reports.
F.L.J. .. Federal Law Journal.
I.L.R. Hyd. .. Indian Law Reports, Hyderabad Series.
Ind. App. .. Law Reports, Indian Appeals.
Ind. Cas. .. Indian Cases.
I.L.R. or Rul. .. Indian Rulings or Ruling.
I.T.R. .. Income Tax Reports.
J & K .. Jammu & Kashmir.
J. & K.L.R. .. Jammu & Kashmir Law Reports.
J.L.R. or Jaipur L.R. .. Jaipur Law Reports.
I.L.R. Kar. .. Indian Law Reports, Karachi Series.
K.B. .. (Law Reports) King's Bench Division.
(L.J.) K.B. .. Law Journal Reports, King's Bench.
K.L.T. or Ker. L.T. .. Kerala Law Times.
I.L.R. Lah. .. Indian Law Reports, Lahore Series.
Lah. L. Jour. .. Lahore Law Journal.
Lah. L.T. .. Lahore Law Times.
L.R.A. .. Law Reporter, Allahabad.
Low. Bur. Rul. .. Lower Burma Rulings.
Luck. or I.L.R. Luck. .. Indian Law Reports, Lucknow Series.
Madh. B. or M.B. .. Madhya Bharat.
I.L.R. Madh. B. .. Indian Law Reports, Madhya Bharat Series.
Madh. B.L.J. .. Madhya Bharat Law Journal.
Madh. B.L.R. .. Madhya Bharat Law Reporter.
Mad. or I.L.R. Mad. .. Indian Law Reports, Madras Series.
Mad. H.C.R. .. Madras High Court Reports.
Mad. L. Jour. .. Madras Law Journal.
Mad. L. Tim. .. Madras Law Times.
Mad. L. W. .. Madras Law Weekly.
Mad. W. N. .. Madras Weekly Notes.
M. L. R. or Marwar L. R. .. Marwar Law Reporter.
Moo. Ind. App. .. Moore's Indian Appeals.
Moo. P. C. C. .. Moore's Privy Council Cases.
Mys. .. Mysore.
I. L. R. Mys. .. Indian Law Reports, Mysore Series.
Mys. H. C. R. .. Mysore High Court Reports.
Mys. L. J. .. Mysore Law Journal.
I. L. R. Nag. .. Indian Law Reports, Nagpur Series.
Nag. L. Jour. .. Nagpur Law Journal
Nag. L. R. .. Nagpur Law Reports.
N. W. P. H. C. R. .. North-West Provinces High Court Reports.
Oudh Cas. .. Oudh Cases.
Oudh L. Jour. .. Oudh Law Journal.
Oudh L. R. .. Oudh Law Reports.
Oudh S. C. .. Oudh Select Cases.

Oudh W.N. .. Oudh Weekly Notes.
Pak. Cas. .. Pakistan Cases.
Pak. L. R., Lahore .. Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. .. Indian Law Reports, Patna Series.
Pat. L. Jour. .. Patna Law Journal.
Pat. L. Tim. .. Patna Law Times.
Pat. L. W. .. Patna Law Weekly.
Pat. W.N. .. Patna Weekly Notes.
I.L.R. Patiala .. Indian Law Reports, Patiala Series.
Pepsu L. R. .. Pepsu Law Reports.
I. L. R. Punj. .. Indian Law Reports, Punjab Series.
Pun. L. R. .. Punjab Law Reporter.
Pun. Re. .. Punjab Records.
Pun. W.R. .. Punjab Weekly Reporter.
I. L. R. Raj. .. Indian Law Reports, Rajasthan Series.
R.L.W. or Raj. L. W. .. The Rajasthan Law Weekly.
Rang. or I.L.R. Rang. .. Indian Law Reports, Rangoon series.
Rang. L. R. .. Rangoon Law Reports.
Rat. Qr Rat. Un. Cr. C. .. Ratanlal's Unreported Criminal Cases.
R.D. .. Revenue Decisions.
Sau. .. Saurashtra.
Sau. L. R. .. Saurashtra Law Reporter.
Sind L. R. .. Sind Law Reporter.
S. C. J. .. Supreme Court Journal.
S. C. R. .. Supreme Court Reports.
Suth. W. R. .. Sutherland's Weekly Reporter.
I.L.R. Trav. Co. or T. C. .. Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. .. Travancore-Cochin, Law Reports.
T. L. J. or Trav. L. J. .. Travancore Law Journal.
U. P. L. R. .. United Provinces Law Reports.
Upp. Bur. Rul. .. Upper Burma Rulings.
Vind. Pra. or V. P. .. Vindhya Pradesh.
Weir .. Weir's Criminal Rulings.

Other Abbreviations.

A.C.	..	Appellate Jurisdiction, Civil.
A. Cr.	..	Appellate Jurisdiction, Criminal.
App.	..	Appendix or Appeal.
Appr.	..	Approved.
Art.	..	Article.
B. R.	..	Board of Revenue.
C. A.	..	Court of Appeal.
Civ.	..	Civil.
Cl.	..	Clause.
Cons.	..	Considered.
Cr.	..	Criminal.
Diss.	..	Dissented.
Dist.	..	Distinguished.
D. B.	..	Division Bench.
Expl.	..	Explained.
F. A.	..	First Appeal.
F. B.	..	Full Bench.
F. C.	..	Federal Court.
Foll.	..	Followed.
Illus.	..	Illustrations.
Jour.	..	Journal.
L. P.	..	Letters Patent.
N.	..	Note.
No.	..	Number.
O.	..	Order.
O. C.	..	Original Jurisdiction, Civil.
O. Cr.	..	Original Jurisdiction, Criminal.
Over.	..	Overruled.
P.	..	Page.
Pr.	..	Para.
Pt.	..	Point.
P. C.	..	Privy Council.
Pre.	..	Preamble.
R.	..	Rule.
Ref.	..	Referred or Reference.
Rel. on	..	Relied on.
Rev.	..	Revenue.
S.	..	Section.
S. A.	..	Second Appeal.
S. B.	..	Special Bench.
S. C.	..	Supreme Court.
S. N.	..	Short Notes of cases.
V.	..	Volume Number.

THE FIFTY YEARS' DIGEST

1901—1950

(Civil, Criminal & Revenue)

VOLUME VI

CONTRADICTORY STATEMENTS. See (1) CRIMINAL PROCEDURE CODE, SS. 161 AND 162.

(2) EVIDENCE ACT, SS. 144 AND 145.

(3) PENAL CODE, S. 193.

CONTRIBUTION.

——Co-mortgagors. See TRANSFER OF PROPERTY ACT, SS. 82 AND 95.

——Co-sharer. See CO-SHARER.

——Co-sureties. See CONTRACT ACT, S. 146.

——Co-trustees. See TRUST ACT, S. 27.

——Joint promisors. See CONTRACT ACT, S. 43.

——Joint tort-feasors—Suit for contribution by joint tort-feasor.

Suit in tort—Joint decree against several tort-feasors—One satisfying decree—Suit for contribution against co-judgment-debtor is maintainable to be decided in accordance with equity, justice and good conscience. A.I.R. 1942 Nag. 52=I.L.R. (1942) Nag. 1=1942 N.L.J. 1=200 Ind. Cas. 20.

——Payments by another. See CONTRACT ACT, SS. 43, 69 AND 70.

CONTRIBUTORY LIABILITY. See (1) COMPANIES ACT, S. 158.

(2) TORT.

CONTRIBUTORY NEGLIGENCE. See (1) RAILWAYS ACT.

(2) TORT—NEGLIGENCE.

CONVERSION. See (1) CASTE DISABILITIES REMOVAL ACT.

(2) DIVORCE.

(3) HINDU LAW—SUCCESSION.

(4) MUHAMMADAN LAW—DIVORCE.

(5) MUHAMMADAN LAW—SUCCESSION.

(6) PENAL CODE, SS. 403, 404 AND 405.

(7) SALE OF GOODS ACT, SS. 23, 25 AND 57.

(8) SHIPPING.

(9) TORT.

(10) TRUSTS ACT, S. 53.

CONVEYANCE. See (1) DEED.

(2) SPECIFIC RELIEF ACT, Ss. 14, 15 and 16.

(3) TRANSFER OF PROPERTY ACT, Ss. 8 and 54.

(4) PART PERFORMANCE.

CONVICTION. See (1) CRIMINAL TRIAL.

(2) EVIDENCE, CIRCUMSTANTIAL EVIDENCE.

(3) PRACTICE.

CO-OCCUPANT. See (1) CO-SHARER.

(2) OCCUPANCY HOLDING.

CO-OPERATIVE CREDIT SOCIETIES ACT, (10 OF 1904), S. 6 (2). The Chairman of a Co-operative Credit Society has no right to sue a member of a society in his own name. The suit should be brought by the society itself under S. 6 (2) of the Co-operative Credit Societies Act. (Obsolete). 10 Ind. Cas. 570 (Cal.).

CO-OPERATIVE SOCIETIES. See (i) Co-operative Societies Act (2 of 1912) (Central); (ii) Bengal Co-operative Societies Act (21 of 1940); (iii) Bihar and Orissa Co-operative Societies Act (6 of 1935); (iv) Bombay Co-operative Societies Act (8 of 1925) and (v) Madras Co-operative Societies Act (6 of 1932).

Note.—(The Central Act 2 of 1912 has been repealed in its application to such of those States where there are special enactments. As to the extent of the repeal see the particular State enactments on the subject.)

CO-OPERATIVE SOCIETIES ACT (2 of 1912).

——S. 1—Policy underlying the Act—Construction.

The policy of the Co-operative Societies Act is to save the persons concerned from protracted, expensive and sometimes ruinous litigation of the Civil Courts. At the same time, these special enactments should be strictly construed and the rights of the subject to have recourse to the Courts of Justice should not be unnecessarily surrounded with restrictions. A.I.R. 1935 Lah. 631=38 P. L.R. 355=161 Ind. Cas. 248.

——S. 2 (c)—'Member'—Joint family—If can be member.

A corporation, and therefore a joint family, can be a member of a Co-operative Society. A.I.R. 1938 Mad. 809=1938 M.W.N. 567=(1938) 2 M. L.J. 186=48 M.L.W. 285=178 Ind. Cas. 808.

——S. 2 (c)—'Member'—Joint family member—All members of the family held members.

The manager of a shop belonging to a joint family paid to the Bank on account of the first call from the funds of the shop. The application was made in the name of the shop and the share certificate was issued in the name of his father K who was the head of the family:

Held, that all the members of the joint family became the members of the Bank. There was nothing in the Co-operative Societies Act to prevent a joint Hindu family from becoming a member of the Bank. A.I.R. 1946 Nag. 16=I. L. R. (1945) Nag. 677=1945 Nag. L. Jour. 482.

——S. 2 (c)—Joint family member—Award against minor member—Validity.

The term 'member' in S. 2 (c) of the Co-operative Societies Act, 1912, is wide enough to include a joint Hindu family and an award passed by the Registrar against a joint family consisting of minor members is not invalid merely on that ground.

At any rate, the Court executing such an award has no right to question the validity of the award on this ground. A. I. R. 1933 Nag. 211=142 Ind. Cas. 487.

——S. 2 (c)—Member—Alleged loan taken by person —If proves membership.

If it is true that ordinarily a Co-operative Society lends money only to its members, but where the affairs of the Society have been carried on in regular manner, and it is found that the register produced by Society is a fabricated one, it cannot be held merely on the basis of the alleged loan taken by a person that he must have been a member on the date on which he took the loan. A.I.R. 1940 Lah. 193=42 P.L.R. 112=189 Ind. Cas. 48.

——S. 2 (d)—Officer of Bank—Treasurer of Bank —If an officer.

Treasurer of a Co-operative Bank is one of the officers of the Bank under S. 2 (d). A.I.R. 1946 Nag. 16=I.L.R. (1945) Nag. 677=1945 N.L. J. 482.

——Ss. 2 (d), 43 (1) and Madras Co-operative Societies Act (6 of 1932), S. 51 (1)—'Officer'—Dispute between society and its Vakil—Jurisdiction of Registrar—Vakil, whether 'officer' of society—Position of legal adviser and Vakil distinguished.

In order that a dispute may be dealt with by the Registrar under the Co-operative Societies Act, it must be a dispute between the society and a member in his capacity as member.

The legal adviser of a Co-operative Society is an 'officer' of the Society as defined by S. 2 of the Co-operative Societies Act, but a mere Vakil of a Society is not a 'officer' and a dispute between the Society and its Vakil in respect of acts done by the latter in his capacity as a Vakil does not therefore fall within the purview of S. 43 (1) of the Act of 1912, or S. 51 (1) of the Madras Act of 1932. In a case of this nature, the fact that the Vakil was also a director and legal adviser of the Society, however irregular his conduct may be in occupying that position, cannot affect the question.

In acting in litigation as a Society's vakil, a legal practitioner does not act as an agent of the society, but he occupies the position of a Vakil to his client. Different considerations altogether may arise where the Vakil is a whole time Vakil of Society or a company and receives as his remuneration a fixed salary.

Merely because a legal practitioner is a member of a Society, he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is member, though it is improper for a member of the Bar who is a director of a company or a Society to appear for remuneration for that company or Society in its legal business. A.I.R. 1933 Mad. 682=38 M.L.W. 401=65 M.L.J. 367=56 Mad. 970=1933 M.W. N. 977=145 Ind. Cas. 438. (See also under Madras Co-operative Societies Act, 1932).

——S. 3—'Registrar'—Presumption as to.

By Agricultural Department Notification, dated the 16th December, 1931, made in exercise of the powers conferred by S. 3 of the Co-operative Societies Act, as applied to Berar, the then local Government conferred among other powers the power of a Registrar under Rr. 25 to 27 and 29 to 33 on the Senior Deputy Registrar. Where an award is signed by the Deputy Registrar, it can be properly presumed under S. 114 (e) of the Evidence Act that the person who made the award was the Senior Deputy Registrar, and the award is valid. I.L.R. (1949) Nag. 708=A.I.R. 1949 Nag. 398 =1949 N.L.J. 442.

——Ss. 8 (3), 43 (5)—Bye-law framed by Society and Rule framed by Local Government under S. 8 (3)—Conflict between two, as to procedure to be followed by Registrar subsequent to reference of dispute between member and Society to him—Registrar, whether bound to follow bye-law of the Society.

Ordinarily a rule, which is as effective as a section of the Act, must be followed in preference to a bye-law if there is a conflict between the two. Where, therefore, a dispute is referred to the Registrar under a bye-law of the Society and the Registrar of Co-operative Societies, instead of following the procedure laid down in the bye-law, follows the one laid down in the rules framed under the Act he cannot be said to be acting illegally. A.I.R. 1938 Lah. 8=171 Ind. Cas. 395.

——S. 18—Registered Society—Body corporate—Nature of.

A village Society on registration under S. 18 of the Co-operative Societies Act, 1912, becomes a body corporate and a creditor who has obtained an award under the Act against the Society is not entitled to execute the award against any individual member of the same but only against the Society and its assets.

The principles relating to bodies corporate are the same both as regards companies under what are known as the Companies Acts and incorporated societies under the Co-operative Societies Act.

The objects for which a body corporate comes into existence or the rules or regulations under which the relations of the members inter se are governed can have no possible effect upon the le-

gal conception which arises by the use of the expression "body corporate."

If a corporate body is not registered with limited liability, the members are liable to the full amount of the corporation's debts, but the liability, however, is a liability to contribute with others and such liability can only be enforced upon the winding up and no execution can proceed against a member. A.I.R. 1931 Pat. 321=12 P.L.T. 619=11 Pat. 174=134 Ind. Cas. 421 (F.B.).

——S. 18—Liability of member for debts.

A Co-operative Society is a legal person and its debts are distinct from the liability of its members and they can be reached in winding up proceedings only. (1937) 20 N.L.J. 6.

——S. 19—Applicability of.

Where the money is due to the District Co-operative Bank from a Co-operative Society on account of loans having been advanced by the former to the latter, S. 19, Co-operative Societies Act has no application. A.I.R. 1940 All. 188=1940 A.L.J. 45=1940 A.W.R. 60=I. L. R. (1940) All. 181=188 Ind. Cas. 126.

——Ss. 19 and 20 and C. P. Code, S. 73.

Under S. 73 of the Code of Civil Procedure a Co-operative Society cannot enforce a charge under S. 19 of the Co-operative Societies Act unless there is a decree or charge under S. 20 of the latter Act. 42 Cal. 377=18 C.W.N. 1140=26 Ind. Cas. 81.

——S. 19 (b)—Fat, whether "raw material for manufacture".

Fat intended to be purchased and sold at a profit and not for the purpose of manufacturing some other commodity is not "raw material" within S. 19 (b) of the Act. 3 P.W.R. 1917=19 P.L.R. 1917=39 Ind. Cas. 373.

——S. 21—Musical instruments.

Musical instruments are not industrial implements or machinery and do not come within any other part of the class of articles referred to in the section. 2 U.B.R. (1916) 133=38 Ind. Cas. 414.

——Ss. 20 and 21—Scope.

Sections 20 and 21 of the Co-operative Societies Act, 1912, correspond with Ss. 22 and 23 of the Madras Act (6 of 1932) and Ss. 25 and 26 of the Bombay Act (7 of 1925). A.I.R. 1945 Mad. 507=58 Mad.L.W. 416=(1945) 2 M.L.J. 217.

——S. 21—Adjudication as insolvent.

A person does not cease to be member of the Society by his adjudication as insolvent. A.I.R. 1939 Lah. 275=42 P.L.R. 260=183 Ind. Cas. 532.

——S. 22—Bengal bye-law under R. 17 (b), and S. 39 (1)—Bye-law R. 17 (b), whether in excess of S. 22.

It is a well recognized principle of interpretation of statutes that if the rules framed under the Statute, or bye-laws of any Society framed under the rule, are in excess of the provisions of the Statute or are in contravention of or inconsistent with such provisions, then these provisions must be regarded as **ultra vires** of the Statute and cannot be given effect to.

Hence on the death of a member his interest shall be transferred to his legal representative who is qualified under the Act even though he has not been duly elected as such as provided by the by-laws of a society. A.I.R. 1934 Cal. 537=38 C. W.N. 459=151 Ind. Cas. 165.

——S. 22—Question if a certain person is legal representative of deceased person.

The question whether a certain person who is entitled to be substituted in place of the deceased is a legal representative of the deceased member is not one relating to the business of Society and is not a matter which should be referred to the Registrar. A.I.R. 1934 Cal. 537=38 C.W.N. 459=151 Ind. Cas. 165.

——S. 23—Applicability.

Inasmuch as no member can be called upon to contribute to the debts of the Society until liquidation, S. 23 of the Act applies only to members who cease to be members before liquidation. I.L. R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N. L.J. 252=A.I.R. 1946 Nag. 317.

——S. 23—Applicability—Liability of past member for debt due to registered Society—Limitation.

No doubt S. 23 limits the liability of a past member for the debts of the registered Society, but there is no limitation either in the Act or in the rules under the Act for a debt of a past member due to a registered Society. A.I.R. 1935 Lah. 947.

——S. 23—Liability of past member—Scope—Debts of outgoing members due to Society.

The words "the debts of a registered society as they existed at the time when he ceased to be a member" in S. 23, refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. A.I.R. 1941 Oudh 315=1941 O.W.N. 404=1941 A.W.R. (C.C.) 236=16 Luck. 658=193 Ind. Cas. 524.

——S. 23—"Debts of registered society"—Interpretation.

The words 'debts of a registered society', as used in S. 23, refers only to those debts which the society owes and not to those which are owed to the society. A.I.R. 1937 Lah. 931=40 P.L. R. 422=I.L.R. (1937) Lah. 649=175 Ind. Cas. 840.

——Ss. 23, 42 (2) (b), (d)—Winding up of Society—Period of two years under S. 23, when begins to run.

In winding up of a society, the crucial date is the date of dissolution, and what has to be seen is whether the liability of a past member was subsisting at that time. The period of two years mentioned in S. 23 is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that is, the date on which its registration was cancelled. A.I.R. 1941 Lah. 284=43 P.L.R. 305=I. L. R. (1942) Lah. 379=195 Ind. Cas. 688.

——Ss. 23 and 24—Powers of a Liquidator under.

Under Ss. 23 and 24 of the Act, the liquidator cannot award anything against the estate of a de-

ceased or the past member. (1939) 41 P.L.R. 269.

——S. 24—Applicability.

A judgment-debtor cannot call in aid provisions of S. 24 as an answer to the claim of the decree-holder to execute the decree, since it applies only in liquidation proceedings under S. 42. 84 Ind. Cas. 999=40 C.L.J. 254=A.I.R. 1925 Cal. 203.

——S. 24—Estate of deceased member devolving on his widow under Hindu Women's Rights to Property Act—Extent of liability.

Under S. 34 of the Co-operative Societies Act the estate of a deceased member which devolves by inheritance on his widow under the Hindu Women's Rights to Property Act, is liable to the same extent as it would have been had he been alive. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

——S. 24—Liability of estate of deceased member —Extent.

It does not matter whether a member dies before or after liquidation. His estate is liable for a year after his death, but only for the debts as they existed at the date of his death. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

——S. 24—Liability under, arises only on liquidation of society, but starting point of limitation is date of death.

The liability which S. 24 imposes can never arise till liquidation, though in computing the extent of the liability events prior to the liquidation may have to be taken into consideration should the death occur before that date. But the starting point of limitation is the date of decease. "One year from the time of his decease" means one year from the date of death of the member and not from the date of liquidation. A.I.R. 1946 Nag. 317=1946 N.L.J. 252=I.L.R. (1946) Nag. 474=225 Ind. Cas. 410.

——S. 24—Suit for contribution against heirs of deceased member—Limitation—Starting point.

Under S. 24 of the Co-operative Societies Act, the limitation of one year for a suit by the liquidator against the heirs of a deceased member in possession of his estate for contribution due from him, starts from the date of death of the member and not from the date of liquidation. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252 =A.I.R. 1946 Nag. 317.

——S. 26—Scope and effect—Filing of copies of accounts—Proof that account books are regularly kept, in course of business—Need for—Evidence Act, S. 34.

Under S. 26 of the Co-operative Societies Act the mere filing of copies of the accounts is not enough. The section does not abrogate S. 34 of the Evidence Act. It merely obviates production of the original books of accounts which would otherwise be necessary. Books of accounts which are not regularly kept in the course of business would not come within the purview of S. 26 of the Co-operative Societies Act any more than it would under S. 34 of the Evidence Act. Therefore it is essential to produce evidence aliunde to prove that the books are regularly kept in the course of business. If this is done the entries become evidence, but like all entries in books of account they are not substantive evidence, except as regards admissions against the interests of the maker. They can only be used for corroboration. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

——S. 29—Loan by Co-operative Society before registration — Debtor subsequent to registration acquiescing in it and making payments—Debt, whether binding on parties.

Where a Co-operative Society advances a loan before its registration and subsequent to its registration, the debtor acquiesces in the registration and makes payments towards the principal and interest, it must be inferred that the debtor agreed that the transaction entered into by him with the Society before its registration should be binding upon him and the Society after its registration. A.I.R. 1940 Rang. 145=1940 Rang.L.R. 77=188 Ind. Cas. 768.

——S. 29—Recovery of money from non-member —A contract with a non-member to lend is illegal —But money lent to him can be recovered.

A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced, but if the society pays money on the basis of such contract, it can be recovered on the principle that the obligee at the time of taking the money made an implied contract to repay. 116 Ind. Cas. 552=30 P.L.R. 142=A.I.R. 1929 Lah. 330.

——S. 29—Liability of a non-member debtor.

A bye-law of a Co-operative Society to the effect that the Society shall not sell goods on credit to a non-member cannot have the force of law, but can be regarded only as a domestic matter and it cannot be brought in defence of him for recovery of balance standing against him. 96 Ind. Cas. 351=A.I.R. 1926 Nag. 463.

——S. 33—Resolution declaring certain dividend on preference shares.

Where **prima facie** there was no breach of any provision of the Co-operative Societies Act itself or any of its bye-laws, by the resolution passed at the annual general meeting of the share-holders of a Society declaring a dividend upon the preference shares, such a resolution is not in any way illegal or **ultra vires**, although the profits shown are apparent and not real profits, a considerable portion of the profits being unrealised interest income. The share-holders assembled at the annual general meeting are the best persons to consider and decide as to whether there was any chance of the assets being realised and what dividend, if any, could reasonably be paid on the basis of that expectation. A.I.R. 1938 Cal. 394=42 C.W.N. 461=I.L.R (1938) 2 Cal. 144=181 Ind. Cas. 303.

——S. 42—Winding up.

Synopsis.

1. Effect of winding up.
2. Interpretation.
3. Jurisdiction of Civil Court.
4. Jurisdiction of Liquidator.
5. Order under sub-section 2 (b) relating to contribution.

6. Position of a Liquidator.
7. Powers of a Liquidator.
8. Procedure.
9. Scope.

1. Effect of winding up.

——S. 42—Debts of Society—Member's liability.

A Co-operative Society being a statutory corporation, is a legal person and its debts are distinct from the liability of its members which members can only be reached by creditors of the corporation in winding up proceedings. A.I.R. 1938 Nag. 434=1938 N.L.J. 82=I.L.R. (1938) Nag. 604=178 Ind. Cas. 293.

2. Interpretation.

——S. 42—"Touching the business of the society" includes disputes arising out of particular transactions and disputes between members and officers.

The words of S. 42 are very general and do not merely refer to a dispute regarding the internal management of the affairs of a society or disputes in regard to the principles which would regulate the conduct of business. But a dispute arising out of any particular transaction would not be outside the scope of the section. A dispute between a member and the committee or a dispute between a member and an officer is admittedly within the purview of the section. Also a dispute between a member who happens to be an officer on the one hand and the committee or an officer on the other, does fall within the words of the section. 72 Ind. Cas. 838=17 M.L.W. 346=1923 M.W.N. 222=32 M.L.T. 321=A.I.R. 1923 Mad. 481=44 M.L.J. 382. (**See also** Madras Co-operative Societies Act, 1932).

——S. 42—Dispute between a society and its member—Civil suit is barred.

In cases of dispute between members of Society no action lies in Civil Court. The object of the Act is to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means and it will be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive and protracted litigation. 71 Ind. Cas. 722=A.I.R. 1924 Lah. 418.

——S. 42 (b)—"Member", meaning of.

"Member" obviously means member at the date of the dissolution of the Society in S. 42 (b). A.I.R. 1939 Lah. 275=42 P.L.R. 260=183 Ind. Cas. 632.

——S. 42 (2) (b)—"Contribution".

The word "contribution" in S. 42 (2), pre-supposes an existing liability. A.I.R. 1942 Lah. 237=44 P.L.R. 376=I.L.R. (1943) Lah. 553=202 Ind. Cas. 689.

——S. 42 (2) (b) and (6)—"Past member", meaning of.

A "past member" in S. 42 (2) (b), means a past member liable for the debts under S. 23. A.I.R. 1937 Lah. 912=175 Ind. Cas. 759.

——S. 42 (2) (b)—"Past member" meaning of.

The term "past member" does not mean a "deceased member". It means a person who is alive at all material times but who has ceased to be a member of the society otherwise than by death. A.I.R. 1946 Nag. 317=1946 N.L.J. 252=I.L.R. (1946) Nag. 474=225 Ind. Cas. 410.

——S. 42 (2) (b)—"Contribution" in S. 42 (2) (b), meaning of—Whether means debt owed by member to society—Liability of person owing debt, if can be determined by Liquidator.

In S. 42 (2) (b), the word "contribution" means payment by each of the members of his share in any common loss or liability of the Society. Evidently, therefore, a debt owed by an individual member to the Society will not be such a payment in any circumstances. It is clear, therefore, that under S. 42 (2) (b) the Liquidator has no jurisdiction to determine the liability of a person in relation to a debt alleged to have been owed by him to the Society. A.I.R. 1937 Lah. 931=I.L.R. (1937) Lah. 649=40 P.L.R. 422=175 Ind. Cas. 340.

3. Jurisdiction of Civil Court.

——S. 42 (6)—Contributory order of liquidator against member of Society without jurisdiction—Order can be challenged by way of suit in civil Court—But it cannot be questioned in proceedings for its execution in civil Court.

Section 42 (6) affords no immunity in respect of action taken without jurisdiction.

When a liquidator acts without statutory sanction his acts can be challenged in the civil Court. Therefore, if a contributory order passed by the liquidator against a member of the society under S. 42 is without jurisdiction it can be challenged by means of a suit in the civil Court. But it cannot be questioned in the proceedings under S. 42 (5) for execution of the order as a decree in the civil Court unless the fact that the order was without jurisdiction is apparent on the face of the order or capable of being gathered without the necessity of an enquiry into facts. A.I.R. 1946 Nag. 161=I.L.R. (1946) Nag. 60=1946 Nag. L. Jour. 28=225 Ind. Cas. 125.

——S. 42 (6)—Intention.

S. 42 (6) is intended to prevent litigation in the Civil Courts in regard to the validity of the actions and decisions of a liquidator under the Act except in respect of certain specified orders which are appealable to a District Court or which may be enforced as decree of Court. It was never intended to preclude a suit by a person against a fellow member of the society when the plaintiff's property has been utilized by the defendant. 84 Ind. Cas. 964=3 Bur.L.J. 191=2 Rang. 325=A.I.R. 1925 Rang. 38.

——S. 42 (6). Assam Rules, R. 41 (e), (f) and (j).

Civil suit for declaration that order of contribution made by liquidator is null and void, is not maintainable if there is no question as to the validity of the dissolution of a Co-operative Society. A.I.R. 1944 Cal. 245=47 C.W.N. 384=I.L.R. (1943) 2 Cal. 186=215 Ind. Cas. 33.

——S. 42 (6)—Where a Liquidator of a Co-operative Society acts within his powers in passing an award, the Civil Courts cannot go into the question whether the amount was correctly assessed by him.

A.I.R. 1941 Lah. 284=43 P.L.R. 305=I.L.R. (1942) Lah. 379=195 Ind. Cas. 688.

——S. 42 (2) (b) and (6)—Where the Liquidator passes an order determining the amount of contribution payable by a past member to the Co-operative Society, the order can be questioned in a Civil Court. A.I.R. 1940 Mad. 831=I.L.R. (1940) Mad. 929=52 L.W. 131=(1940) 2 M.L.J. 241=194 Ind. Cas. 769. (See also Madras Co-operative Societies Act, 1932).

——S. 42 (6)—Civil Court has jurisdiction to go into the question whether the Liquidator has jurisdiction to make the award. (1939) 41 P.L.R. 269.

——S. 42 (6)—By S. 42 (6), the Liquidator is entitled to determine the contribution to be made by the members and past members of the Society. But if a party denies that he is a member, he is entitled to have that decision determined by the Court. A.I.R. 1937 Cal. 643=176 Ind. Cas. 221.

——S. 42—Jurisdiction of Civil Court.

A Civil Court has no jurisdiction to question the legality of the acts of a Liquidator under S. 42 in matters connected with the dissolution of a registered Society. A.I.R. 1934 Oudh 431=11 O.W.N. 1060=18 R.D. 444=151 Ind. Cas. 414.

——S. 42 (6)—Liquidator exceeding his powers under S. 42—Legality of his order, if can be determined by Civil Court.

The jurisdiction of the Civil Courts is ousted in those cases alone where the act of the Liquidator is within S. 42 and where it is found that the Liquidator exceeded his power and conducted himself in a manner not permissible under the law, the Civil Courts can go into the matter in order to determine the legality of the order.

Where a person was proceeded against by the Liquidator in a summary manner under S. 42 (2) (b) as a debtor to the society and not as a member contributing to the assets of the society, the act of the Liquidator was clearly beyond his power and a civil suit by such a person that he is not so liable is maintainable and he is entitled to a decree. A.I.R. 1937 Lah. 931=I.L.R. (1937) Lah. 649=40 P.L.R. 422=175 Ind. Cas. 840.

——S. 42—If a Liquidator's act or order is shown to be ultra vires, that is, outside the powers conferred on him by law as a Liquidator, the Civil Court can then intervene.

The admission of a member to a Co-operative Society cannot be by a unilateral act on the part of the Society. A.I.R. 1931 Nag. 48=130 Ind. Cas. 820.

——S. 42 (6)—Jurisdiction of Civil Court.

A person claiming not to be a past member of a Society liable under S. 23, has a right to have his claim investigated by a Civil Court. A.I.R. 1937 Lah. 912=175 Ind. Cas. 759.

——S. 42 (6)—Dispute as to membership.

Where a person against whom an order is made in the winding up of a Co-operative Society disputes his membership of the Society, the Civil Courts have jurisdiction to decide the question. S. 42 (6) of the Co-operative Societies Act does not deprive the jurisdiction of the Civil Court to decide such a question. A.I.R. 1933 Lah. 442=34 P.L.R. 717=14 Lah. 703=144 Ind. Cas. 264.

——S. 42—Jurisdiction of Civil Court—Liquidator of Co-operative Society levying contribution on a member.

Where a Liquidator levied contribution on a member of a Co-operative Society towards the assets of the society, and the member submitted to the order but brought a civil suit to realize the amount:

Held, that the Civil Court had no jurisdiction to entertain the suit. A.I.R. 1934 Oudh 431=11 O.W.N. 1060=18 R.D. 444=151 Ind. Cas. 414.

——S. 42 (6)—Application by one of the debtors to be declared insolvent.

There is nothing in S. 42 (6), express or implied, to prevent the Court from entertaining the application of one of the debtors of a co-operative society which is in liquidation for being declared insolvent. In deciding whether such a debtor should or should not be adjudicated an insolvent, the Court is not dealing with any matter connected with the dissolution of the Society, nor will the dissolution be necessarily interfered with by reason of adjudicating such a debtor to be an insolvent. The Official Liquidator can press his claim against the insolvent in the same way as the other creditors will do. A.I.R. 1934 Pat. 290=149 Ind. Cas. 96.

——S. 42 (2)—Liquidator—Order of—Suit for declaration.

A Civil Court cannot entertain a suit for a declaration that an order of the liquidator under S. 42 (2) of the Act is ultra vires and thus cannot be executed. 4 O.L.J. 583=44 Ind. Cas. 353.

——S. 42 (6)—Validity of award—If could be questioned in execution.

A Court executing an award cannot question its validity and it has no power to do anything except to execute the award as if it were a decree of the executing Court. 97 Ind. Cas. 288=8 L.L.J. 310=27 P.L.R. 706=A.I.R. 1926 Lah. 547. See also A.I.R. 1933 Nag. 211=142 Ind. Cas. 487.

——S. 42 (6)—Validity of award—If could be questioned in execution.

Executing Court can go behind the order passed by the Liquidator under S. 42 (2) (b) and inquire if it has been passed within the limits of jurisdiction and can refuse to execute it, if it is found to be without jurisdiction. A.I.R. 1942 Lah. 237=44 P.L.R. 376=I.L.R. (1943) Lah. 553=202 Ind. Cas. 689. [Reverses A.I.R. 1940 Lah. 280=189 Ind. Cas. 370=42 P.L.R. 126.]

——S. 42 (6)—Action of Liquidator without jurisdiction—Remedy of aggrieved person—Objection, if can be taken in execution proceedings.

S. 42 (6) of the Co-operative Societies Act affords no immunity in respect of action taken by a Liquidator without jurisdiction. The forum for raising the objection is not the executing Court unless there are exceptional circumstances patent on the face of the decree or closely allied to it circumstances which do not necessitate an enquiry into facts. Where in a case there is nothing whatever from which it might be assumed that the action of the liquidator was without jurisdiction, the remedy of a person having a genuine grievance lies by way of a suit for a declaration and not by an objection in execution proceedings. I. L. R. (1946) Nag. 60=225 Ind. Cas. 125=1946 N.L.J. 28=A.I.R. 1946 Nag. 161.

4. Jurisdiction of Liquidator.

——**S. 42**—Liability of member of Co-operative Society to contribute to assets of Society in event of its being dissolved before or during the member's insolvency is a debt provable, in insolvency—Liquidator neither proving debt nor having it excluded from schedule under S. 33, Provincial Insolvency Act—Complete discharge granted under S. 44 (2), Provincial Insolvency Act—The Liquidator has no jurisdiction to assess the contribution of the insolvent as member of the society under S. 42 (b), Co-operative Societies Act, after the complete discharge. The fact that the liability of the member did not materialize till some time after adjudication is immaterial. A.I.R. 1942 Lah. 237=44 P.L.R. 376=I.L.R. (1943) Lah. 553=202 Ind. Cas. 689. [Reverses A.I.R. 1940 Lah. 280=189 Ind. Cas. 370=42 P.L.R. 126.]

——**S. 42 (2)—Essentials of Liquidator's jurisdiction.**

The essentials of the Liquidator's jurisdiction under S. 42 (2) are: (1) that the person concerned must be a member, or a past member of the Society, and (2) that he is jointly liable with other members to contribute to the assets of the Society, to meet the losses which it has incurred. If these or any of these conditions are satisfied, the Liquidator has authority to determine the amount and his decision cannot be questioned in any Court. But if, for instance, he makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the Society, or whose liability to contribute had otherwise been extinguished by operation of law, he has clearly acted in excess of his jurisdiction and his order is a nullity and therefore, incapable of execution. A.I.R. 1942 Lah. 237=44 P.L.R. 376=I. L. R. (1943) Lah. 553=202 Ind. Cas. 689.

——**S. 42—Disobedience of summons—The order of liquidator is final.**

The order of the liquidator under S. 42 is final. Thus if the liquidator passes order of imprisonment for disobeying the summons to appear and to deliver certain documents the civil Court in execution of the order cannot go behind it and investigate its legality and if the order is thus enforced there is no error of jurisdiction on the part of the Civil Court and revision to High Court does not lie. Even if the persons summoned are not ordered to give security before they are directed to be imprisoned, the order of imprisonment does not cease to be an order under S. 42 (3). 120 Ind. Cas. 908=7 Rang. 533=A.I.R. 1930 Rang. 18.

——**S. 42—Injunction against liquidator—Civil Court has no jurisdiction to grant injunction against liquidator restraining him.**

Where in the course of the liquidation of a Co-operative Society registered under the Co-operative Societies Act (1912) the liquidator called upon each member of the Society under S. 42, Cl. (2), sub-Cls. (b) and (e), to contribute towards assets of the Society, the amount due by them each to the Society and applied to the Deputy Commissioner to have the money due by each member of the Society recovered from him as if it was an arrear of land revenue, and the members sued for an injunction prohibiting the liquidator to do so.

Held, that the liquidator was acting in a matter connected with the dissolution of a registered Society, and even if his order was wrong as the order was one within S. 42 of the Act, it could not be questioned in a civil Court. 94 Ind. Cas. 40=A.I.R. 1926 Nag. 379.

——**S. 42 (2) (b)—Applicability—Claim for contribution against heirs of deceased member—Remedy of liquidator.**

S. 42 (2) (b) of the Co-operative Societies Act is limited to "members" and "past members". It has no application to claim for contribution against the heirs of a deceased member. In such a case, the liquidator's only remedy is by way of civil suit. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

——**S. 42 (e) and (b)—Directions in S. 42 (2) (e) are mainly directory—Debt due to society in liquidation—Liquidator, if can make order under S. 42 (2) (e), having force of decree in respect of debt—Such debt, if contribution within S. 42 (2) (b).**

Section 42 (2) (b) and also S. 42 (2) (e), Co-operative Societies Act, must be read as a whole. The directions given in cl. (e), S. 42 (2) were intended to be mainly administrative. A Liquidator has no power under S. 42 (2) (e) to make an order having the force of a decree in respect of a debt due to a society in liquidation. Such a debt is not included in contributions mentioned in S. 42 (b). The claims against the society unless they have been accepted by the Liquidator and the claims on behalf of the society except in regard to matters which are expressly reserved for determination by the liquidator must be finally settled by means of civil suit. A.I.R. 1941 Lah. 355=43 P.L.R. 446=196 Ind. Cas. 688.

——**S. 42 (2) (f) and (6)—Order of Liquidator directing member to pay non-existing debt—Legality—Jurisdiction of Civil Court.**

Under S. 42 (2) (f) of the Co-operative Societies Act, the Liquidator is no doubt quite competent to order payment of individual debts that a member might owe to a Co-operative Society. But if he does not care to look into the accounts and consider whether a debt is outstanding or is already satisfied and order a member to pay a non-existing debt, his order is illegal and **ultra vires,** and the Civil Court has jurisdiction to set it aside. I.L.R. (1948) Nag. 216=A.I.R. 1949 Nag. 25=1948 N.L.J. 212.

——**S. 42 (b)—Member of joint family taking loan from Society — Dissolution of Society—Award against other members of family.**

Where a member of a joint Hindu family joins a Co-operative Society and obtains a loan from it, if the joint family as such has not been brought on the list of members of the Society, the Registrar has no jurisdiction to make an order for contribution against the other members of the family even if the debt was borrowed for family purposes. A.I.R. 1931 Nag. 48=130 Ind. Cas. 820.

5. Order under Sub-S. (b).

——S. 42 (2) (b)—Order passed without notice to member, if without jurisdiction.

An order under S. 42 (2) (b), without notice to the party against whom it is made is without jurisdiction and a nullity. A.I.R. 1942 Lah. 237 =44 P.L.R. 376=I.L.R. (1943) Lah. 553=202 Ind. Cas. 689.

——Ss. 42 (2) (b) and 24—Claim for contribution —When arises.

No claim can be made for contribution either against a member, a past member or the estate of a deceased member until the assets and liabilities of the Society are determined. It is only when all the assets and liabilities are known and a proper balance is struck between the two that it is possible to determine whether the Society is in debt at all and if so to what extent. If it can pay off its debts from existing assets no claim for contribution can be made. That is only a last resort when all else fails. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

——S. 42 (2) (b)—Contribution.

Member of Co-operative Society applying in insolvency after society has gone into liquidation and obtaining his discharge. A decree passed by liquidator under S. 42 (2) (b) cannot be executed against the insolvent even if the Liquidator was competent to make a decree and the liability could not be challenged by the executing Court because it was a decree made by a competent Court, as the liability must be deemed to have disappeared by force of S. 44 (2), Provincial Insolvency Act. A.I.R. 1941 Lah. 314=43 P.L.R. 422=198 Ind. Cas. 627.

——S. 42 (2) (b)—Order under—When could be made.

Contributory order can be made only after the assets of the Society are ascertained. First the assets of the individual debtors should be realized. The contributory order made before such realization is ultra vires and cannot be executed. 1941 N.L.J. 412.

——S. 42 (2) (b)—"Past member"—Meaning of.

The term "past member" is not defined in the Act but it cannot mean a "deceased member". Therefore it must mean a person who is alive at all material times but who has ceased to be a member of the Society otherwise than by death. I.L.R. (1946) Nag. 474=225 Ind. Cas. 410=1946 N.L.J. 252=A.I.R. 1946 Nag. 317.

6. Position of a liquidator.

——Ss. 42, 43—Liquidator is "public officer" within S. 2 (17) (h), C. P. Code and in suit against him notice under S. 80, C. P. Code, is essential—S. 2 (17) (d), C. P. Code, 1908, does not apply.

A liquidator who has been appointed by the Registrar under section 42 to wind up a Society and the terms of whose appointment are regulated by the Rules framed by the Punjab Government under S. 43 is a "Public Officer" within the meaning of S. 2 (17) (h), C. P. Code. Consequently in a suit against him, notice under S. 80, C. P. Code, made by several debtors to meet the debt. Order

The appointing authority being not a Court of Justice but the Registrar of Co-operative Societies, the Liquidator is not an officer of a Court of Justice and, therefore, Cl. (d) of sub-S. (17) of S. 2, C. P. Code, is not applicable to him. A. I.R. 1942 Lah. 287=44 P.L.R. 540=I.L.R. (1943) Lah. 389=203 Ind. Cas. 363.

——Suit against Liquidator—Notice under S. 80, C. P. Code.

Where the Liquidator is the manager of Co-operative Central Bank and is paid a salary by that institution and had been appointed a liquidator under S. 42 (1), Co-operative Societies Act, by order of the Registrar, Co-operative Societies and has powers mentioned in S. 42 (2) and as Liquidator is not paid any allowance, his duties being quasi-judicial and he is appointed by Government and performs public duties, he is an officer in the service of Government when acting as Liquidator and is therefore a "public officer" as defined in S. 2 (17) (h), C. P. Code, and requires notice under S. 80 of the Code. A.I.R. 1939 Nag. 232 =1939 N.L.J. 215=182 Ind. Cas. 514.

7. Powers of a liquidator.

——Ss. 42 (b), 21—Society dissolved — Certain members adjudged insolvents.

Where certain members of a Co-operative Society are adjudged insolvents before the society is dissolved and a Liquidator is not appointed until after the discharge of the insolvents, the liability of the insolvents as members of the Society is not provable under the terms of S. 34 (2), Provincial Insolvency Act. Under S. 42 (b), it is the Liquidator alone who can ascertain and fix the liabilities of the members. Therefore until a Liquidator is appointed, it cannot be said that there is any debt or liability—certain or contingent —which can affect the members. The Liquidator is not, therefore, debarred from fixing the liability of the insolvents as members, under the provisions of the Provincial Insolvency Act. A.I.R. 1939 Lah. 275=42 P.L.R. 260=183 Ind. Cas. 632.

——S. 42—Only Liquidator can collect assets of Society from its members and distribute them rateably among creditors.

Under S. 42, the Liquidator is the only person competent to collect the assets of the Society from its members and distribute them rateably among the creditors. A.I.R. 1938 Nag. 434=1938 N. L.J. 82=I.L.R. (1938) Nag. 604=178 Ind. Cas. 293.

——S. 42—Powers of a Liquidator—Arrest for arrears.

A Liquidator of a co-operative bank can arrest the heir of a deceased member of a co-operative society for an arrear due from his deceased father. 107 Ind. Cas. 243=26 A.L.J. 95=9 A.I.Cr.R. 16=8 L.R.A.Cr. 173=29 Cr.L.J. 244=A.I.R. 1928 All. 128.

——S. 42 (5)—Powers of liquidator—Powers of Civil Court—Appeal against Civil Court's order.

The liquidator cannot order that the debtors are jointly and severally liable for each other's mortgage, but may determine the contribution to be passed by liquidator under S. 42, must be enforced is essential.

by Civil Courts. No appeal lies from the Civil Court's order under this section. 40 All. 89=15 A.L.J. 863=42 Ind. Cas. 968.

8. Procedure.

——S. 42—Liability of a member—When to be determined.

In winding up of a Society, the crucial date is the date of dissolution, and what has to be seen is whether the liability of a past member was subsisting at that time. A.I.R. 1941 Lah. 284=43 P.L.R. 305=I.L.R. (1942) Lah. 379=195 Ind. Cas. 688.

——S. 42, Cls. (b), (d)—Proceedings under—Non-compliance with order—Executability.

Proceedings taken before the Liquidator under S. 42, Cls. (b) and (d) are to some extent in the nature of quasi-judicial proceedings, and in order to arrive at any conclusion on the question of the determination of the liabilities of any member of a Society, some evidence is required to be taken, by the rules framed by Local Government.

Where the procedure laid down in the rules is not complied with in passing an order under S. 42, Cls. (b) and (d), an application for execution of the order is not competent. A.I.R. 1933 Cal. 631=37 C.W.N. 177=145 Ind. Cas. 834.

——S. 42—Registered Society—Winding up—Liquidator—Order passed by liquidator to wind up assets—Revision.

The Civil Court cannot interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Act, (1912) in order to collect the assets of the society from persons who, he thinks, are responsible to account to him for the assets. 22 Bom.L.R. 732=57 Ind. Cas. 423.

9. Scope.

——S. 42—Scope of—Claim for contribution against heirs of deceased member on liquidation—Suit is proper remedy.

Section 42 is limited to members and past members. It has no application to claim for contribution against heirs of deceased member. Therefore on liquidation of a society the only remedy which the liquidator has against the heirs of a deceased member for contribution is by way of a suit and that is the proper remedy. A.I.R. 1946 Nag. 317=1946 N.L.J. 252=I.L.R. (1946) Nag. 474=225 Ind. Cas. 410.

——S. 42—Liability of Co-operative Society—How to be enforced—Winding up proceedings and not separate suit.

A liability incurred by a Co-operative Credit Society formed under the Co-operative Societies Act can be enforced only by the procedure of winding up contained in the Act and not directly by suit of a creditor. A.I.R. 1933 Bom. 191=35 Bom.L.R. 282=57 Bom. 319=147 Ind. Cas. 1233.

——S. 42 (2) (b), (6)—Liquidation of Society—Denial of liability as member—Jurisdiction of Civil Courts to consider whether a person is liable as a past member.

Section 42 (6) does not take away the jurisdiction of Civil Courts to determine whether a person against whom an order for conribution has been passed by the Liquidator as a past member had ceased to be a member more than two years before the date of the liquidation. Clause 2 (b) of the said section empowers the Liquidator only to determine the contribution to be made by the members and past members. It does not empower him to determine whether a member who denies his liability as a past member is liable as a past member. A.I.R. 1936 Mad. 574=1936 M.W.N. 470=70 M.L.J. 604=43 L.W. 730=59 M. 895=170 Ind. Cas. 312.

——S. 42—Rules under (Bengal), R. 25—Non-compliance with—Effect.

Contravention of R. 25 framed by the Provincial Government under the Act, which provides that any loan exceeding Rs. 1,000 granted by a society should be communicated to the Registrar does not make any such loan invalid. A. I. R. 1945 Cal. 350=49 C.W.N. 377.

——S. 42—Suit by members.

A civil suit for refund of money realised from plaintiff under the provisions of S. 42 (4) (a) of the Co-operative Societies Act as amended by U. P. Act (3 of 1919) with S. 149 of U. P. Land Revenue Act is barred by the provisions of S. 233, (m) of the U. P. Land Revenue Act. 101 Ind. Cas. 626=49 All. 701=25 A.L.J. 521=8 L.R. A. (Rev.) 183=A.I.R. 1927 All. 532.

——S. 42—Jurisdiction of Civil Court—One member of Executive Committee cannot sue others to recover sums which he is made to pay to the liquidator.

In the course of liquidation of a co-operative society the liquidator directed payment of Rs. 1,000 by each of two members of the Executive Committee of the Society. These two gentlemen sought to recoup themselves by suing the other members of the society for the recovery of these sums,

Held, that the attempt on the part of these two members of the Executive Committee to pass on their liability to the other members of the society was a matter connected with the dissolution of the society and that consequently it was not a matter in respect of which the Civil Court had any jurisdiction. 103 Ind. Cas. 644=31 C.W.N. 739=A.I.R. 1927 Cal. 578.

——S. 42—A civil suit by a member of the Society against the purchaser for declaration that the property attached and sold for debt due from him was not liable to be sold is not barred by S. 42. 103 Ind. Cas. 131=23 N. L. R. 66=A. I. R. 1927 Nag. 217.

——S. 43—Arbitration.

——S. 43—Arbitration.

Synopsis.

1. Arbitration.
2. Execution of awards.
3. Interpretation of terms.
4. Local Rules—Validity.

(a) Bengal Rules.
(b) Bihar Rules.
(c) Central Provinces Rules.
(d) Madras Rules.
(e) Punjab Rules.
(f) U. P. Rules.

1. Arbitration.

——S. 43 (2) (l) and R. 22 (1)—Applicability—Conditions—Suit by assignee from Co-operative Society to recover loan—If barred.

Before R. 22 (1) of the rules framed under S. 43 (2) (l) of the Co-operative Societies Act can apply, two conditions must co-exist: (1) the dispute must touch the business of the registered Society and (2) the dispute must be one between members or past members of the Society, or persons claiming through a member or past member **inter se** or the dispute must be one between a member or past member, or persons so claiming on the one hand and the committee or any officer of the Society on the other. Where a Co-operative Society assigns to the plaintiff who is a non-member, a loan advanced by it to the defendant, a suit by the plaintiff for the recovery of the loan from the defendant is not excluded from the jurisdiction of the Civil Court by the provisions of R. 22 (1), as neither of the conditions mentioned above are fulfilled. 50 C.W.N. 7.

——S. 43—Embezzlement by Secretary—Award by Registrar against minor heirs—Jurisdiction of Registrar.

After the death of the Secretary of a Co-operative Credit Union, the Committee of the Union passed a resolution that the Secretary had received certain sums and had not entered them in the registers of the Union. The resolution was treated as a reference to arbitration and the Registrar gave an award for the whole amount against the minors and widow. There was no agreement on behalf of the minors to refer the dispute to arbitration. The minors brought a suit for declaration that the decree passed by the Registrar was legally void and ineffectual and was a nullity:

Held, that as the dispute was one between the Committee and its officer, it could not be referred to the Registrar for decision under the rules under S. 43 (2) (l) of the Co-operative Societies Act, and the award was not binding on the minors. A. I.R. 1932 Lah. 53 (54)=32 P. L. R. 780=133 Ind. Cas. 883.

——S. 43—Arbitration under the Co-operative Societies Act and Arbitration Act, 1940.

A reference to arbitration under the provisions of the second schedule of the C. P. Code, is entirely distinct from the procedure contemplated by R. 20 of the Rules. (Obsolete). 86 Ind. Cas. 585=47 All. 374=23 A. L. J. 129=6 L. R. A. (Civ.) 208=A.I.R. 1925 All. 356.

——S. 43 (2) (l)—Arbitration—Wrong decision of arbitrators is to be appealed against to Registrar—Civil Courts cannot interfere.

Where a dispute lies between a Co-operative Society and a member who is dead, proceedings can be continued, or entertained between the Society and the legal representatives of the deceased debtor, and the arbitrators would be competent to decide who were the legal representatives of the deceased and would have jurisdiction to decide that question, even though they might come to a wrong conclusion. If a wrong conclusion is arrived at with regard to a particular person, then that person has a remedy under the Act of filing an appeal, to the Registrar and the Civil Courts have no jurisdiction to interfere. 96 Ind. Cas. 350=28 Bom.L.R. 598=A.I.R. 1926 Bom. 352.

——S. 43—Suit referred to arbitrator—Subsequent suit in Civil Court questioning the reference to, appointment of and procedure adopted by, arbitrator—Maintainability.

An award was made by an arbitrator in a suit filed under the Co-operative Societies Act:

Held, that the Civil Court could entertain a suit to have the award declared invalid questioning the reference to arbitration, appointment of arbitrator and the procedure adopted by an arbitrator. A.I.R. 1934 Cal. 23=37 C.W.N. 843=60 C. 1207=149 Ind. Cas. 220.

——S. 43—Award—Award aginst sons of deceased member as representing his estate can be passed but not personally.

A Co-operative Society has complete powers to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. So, if the Registrar passes an award against the sons of a deceased member personally, the Civil Court has complete jurisdiction to set aside the award. 88 Ind. Cas. 671=6 P.L.T. 452=1925 P.H.C. C. 231=A.I.R. 1925 Pat. 575.

2. Execution of Awards.

——S. 43—Award—Executability.

A Court which has the power to execute an award under R. 34 framed under S. 43, Bombay Co-operative Credit Societies Act has the power to transfer it for execution to another Court. 64 Ind. Cas. 337=46 Bom. 128=23 Bom.L.R. 909 =A.I.R. 1922 Bom. 377.

——S. 43—Miscellaneous—Appeal.

An order refusing to execute an award under the Co-operative Societies Act holding that it was a mere nullity is appealable. 97 Ind. Cas. 288=27 P.L.R. 706=A.I.R. 1926 Lah. 547.

——S. 43—Award against Society of unlimited liability—Method of enforcement—Execution against properties of individual members—Validity.

Where an award is made against a Society of unlimited liability, the award can only be enforced either by attachment of the property belonging to the Society as a society, or, if this is not enough, by proceedings to wind up the Society. The award is not enforceable in such a case directly by execution proceedings against the properties of individual members. A sale of properties of individual members in execution proceedings purported to be taken against them is a nullity and void **ab initio**.

It is settled law that the provision under the Co-operative Societies Act and rules together with the provisions on the same lines contained in the bye-laws of the Society to the effect that the liability of the members shall be joint and several, is a provision only concerning their liability to the Society and as between themselves. 2 D.R. 256. (As to society constituted on the basis of unlimited liability. **See** 1932 M.W.N. 18.)

——S. 43—Award—Death of person before institution of proceedings relating to award — Award against him—Execution.

An award granted under the Co-operative Societies Act is to be executed in the same manner as a decree of a Civil Court and where the defendant dies long before the institution of proceedings relating to the award under the Act, the award passed against him is a nullity and cannot be executed. Where such an application for execution is dismissed but the District Judge on appeal directs the execution to proceed, revision against his order is maintainable, since the question goes to the root of the jurisdiction, the decree being a nullity and, therefore, no Court having jurisdiction to execute it. A.I.R. 1937 Lah. 63=39 P.L.R. 139=169 Ind. Cas. 879.

——S. 43 (2) (1)—Mortgage in favour of society —Award made by Registrar, if mortgage decree —Successive execution—Claim for refund of realisation in prior execution—C. P. Code, S. 47—Applicability.

Even in the case of a mortgage in favour of a Society, the award made by the Registrar can in no sense be a mortgage decree. Under S. 43 (1), the dispute referred to the Registrar must be a dispute between the members of the Society and the Committee. The Registrar has no power to decide disputed claims of priority or to make a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption.

A certain property was mortgaged by **A** in favour of **C**. Certain huts standing on the land were not included in the mortgage. **A** then executed a second mortgage in favour of a Co-operative Bank. This mortgage included the huts. **C** obtained a decree on his mortgage and purchased the property in execution thereof. Neither **A** nor the Bank exercised the right to redeem. The Bank applied to the Registrar of the Co-operative Credit Societies and obtained an award and in execution thereof applied for the sale of the huts and offered a bid of Rs. 200. **A's** brother then filed a petition asking for stay of further proceedings on the ground that he was the real owner of the huts and that he had filed a suit to establish his right. The Bank promptly withdrew its offer and declined to bid and the execution case was finally dismissed for default. The Bank then applied for attachment of **A's** salary. On **A's** objection under S. 47, C.P. Code, that he should be given credit for the value of the huts on the ground that the huts had disappeared owing to the default of the Bank as it failed to redeem the prior mortgage and to preserve the land as security for its debt and in the first execution proceedings after making an inadequate bid had allowed the execution case to be dismissed for default:

Held, that (i) as under the terms of the award the Bank was first to put up to sale not the property but **A's** equity of redemption, the award could not be said to be a mortgage decree;

(ii) that **A** could not claim the value of the huts inasmuch as the Bank owed no duty to **A** to redeem the prior mortgage but was entitled to do so if it thought it desirable to protect its own interest. The loss of the land was no more due to the failure of the Bank to redeem than it was to the failure of **A** himself to redeem. Nor did the Bank owe any duty to **A** to offer any sum or bid at all;

(iii) that even if the Bank had been guilty of the neglect of any duty which it owed to **A**, the latter's claim must fail, in view of the fact that the huts were actually removed by **A's** brother at his own instigation and with his connivance. A.I.R. 1942 Cal. 290=I. L. R. (1941) 2 Cal. 551=201 Ind. Cas. 585.

——S. 43 (2) (1)—Allegation that award was made without jurisdiction—Objection, if can be raised in execution proceedings.

Where it is alleged that an award made under the Co-operative Societies Act was made without jurisdiction or was not within the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in execution proceedings started in pursuance of the award, the objector's remedy being an appeal to the Registrar. A.I.R. 1939 Lah. 40=41 P. L.R. 225=180 Ind. Cas. 242.

——S. 43—Rules under, R. 18—Appointment of guardian for minor debtor—Extension of guardianship in execution proceedings—Duty of executing Court.

No procedure is provided in R. 18 for conducting the inquiry either by the Registrar or by the arbitrator for the appointment of a guardian for the minor debtor. It would, therefore, be unsafe to rely on the appointment of a guardian by a Registrar in the summary proceeding and to extend it to the execution of a payment order in a Civil Court, which should, by its very nature, be governed by the C.P. Code. Hence it would be just that whenever an executing Court is approached to carry out the payment order of the Registrar and there are minors in the case, the execution Judge should act under O. 32 of C.P. Code and appoint a proper person to protect the interests of the minors concerned. A.I.R. 1945 Pesh. 39=1945 Pesh. L. J. 39=221 Ind. Cas. 591.

——S. 43—Rules under—Validity.

Rules framed under S. 43 of the Act are not **ultra vires** merely because they deprive a mortgagor of his right to a period of six months to pay up the mortgage decree. A.I.R. 1933 Nag. 211 =142 Ind. Cas. 487.

——S. 43 (2) (1) and rules under—Award by Registrar, Co-operative Societies.

An award made by the Registrar, Co-operative Societies, under the rules framed under S. 43 of the Co-operative Societies Act, was as follows:— "I, therefore, in this my award order that the Jawala Bazar Co-operative Society consisting of the following members or past members, all of whom are jointly and severally liable for the debts of the Society pay at once".

Held, that the award was against the Co-operative Society alone and not against its members. A.I.R. 1938 Nag. 434=I.L.R. (1938) Nag. 604 =(1938) N.L.J. 82=178 Ind. Cas. 293.

——Ss. 43, 44—Award by Registrar against society as well as members individually—Names of individual members mentioned—Sale held in execution

of award—No objection by judgment-debtor—Sale, if void.

Under the Co-operative Societies Act and the rules and regulations thereunder, the Registrar has clearly the power to pass an award not only against the society but also its members individually. He can pass two awards one against the society in favour of the bank and another against each member of the society in favour of the society. But where he does not pass two distinct awards but a consolidated award both against the society and its members and mentions the names of all the members of the society, it can bear the interpretation that the award is both against the society and the members. It may be irregular in form but that would not invalidate the award. There is a presumption that the award was made against both the society and its individual members in accordance with the usual preliminary formalities and if it is not objected to by the judgment-debtor at any time, the sale held thereunder cannot become void. A.I.R. 1943 Nag. 7=1942 N.L.J. 462=I.L.R. (1942) Nag. 685=202 Ind. Cas. 512.

3. Interpretation of terms.

——S. 43—Interpretation.

The second sentence of sub-R. (1) of R. 14 is not beyond the rule making powers granted by S. 43. 103 Ind. Cas. 768=1927 M.W.N. 581=A.I.R. 1928 Mad. 210.

——S. 43—"Business" includes election of officers.

Having regard to the very wide form in which S. 43 and the rules made under it are couched, it should be held that the word "business" was not intended to be confined to money business. The election of its officers is certainly a part of the business of the society and the intention of the Act was that this and any dispute of a similar character should be referred for the decision of the Registrar or the arbitrator appointed by him in accordance with the rules made under S. 43 and not to the Civil Court. 86 Ind. Cas. 585=23 A.L.J. 129=47 All. 374=A.I.R. 1925 All. 356.

——S. 43 (2) (l)—'Dispute'—Society holding treasurer responsible for embezzlement—Latter contending that he was not concerned with embezzlement.

Where a Co-operative Society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has throughout contended that he was not concerned with the alleged embezzlement, there is clearly a dispute between the treasurer and the Society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. A.I.R. 1939 Lah. 301=42 P.L.R. 273.

——S. 43 and Madras Co-operative Societies Act (1932), S. 51 (1) (b) (c)—Officer of Society.

Legal adviser of a Co-operative Society is an officer of the Society within the meaning of both the Acts. But a mere vakil of the Society is not an officer and a dispute between the Society and its vakil in respect of acts done by the latter in his capacity as a vakil does not, therefore, fall within the purview of S. 51 (1) or S. 43 of the Act of 1912. A.I.R. 1933 Mad. 682=38 M.L.W. 401=65 M.L.J. 367=56 Mad. 970=145 Ind. Cas. 438.

4. Local Rules—Validity.

(a) Bengal Rules.

——S. 43 (Bengal) R. 22 (1)—Bye-law providing that society may buy up preference shares at par—Power of compulsory purchase, if given—Resolution to buy up all preference shares—Validity—Suit for declaring resolution ultra vires, if barred.

Where a bye-law of a company provides that the company 'may buy out at par preference shares' the bye-law only means that it shall be lawful for the company to make such a purchase; it does not give it power to make a compulsory purchase. A further provision that the number of shares to be bought in any year shall be decided by a majority at a general meeting, does not also make it compulsory.

Where a Co-operative Society in pursuance of such a bye-law passes a resolution for buying up all preference shares, a suit by a person holding preference shares in the society for a declaration that the resolution is **ultra vires** and for an injunction restraining the society from acting on it, is not barred by Bengal rule 22 (1) framed under S. 43, Co-operative Societies Act. A.I.R. 1932 Cal. 317=36 C.W.N. 414=59 Cal. 1165=139 Ind. Cas. 506.

——S. 43 (Ben.) R. 22 (1), (6)—Award—Jurisdiction of executing Court to enquire into competency of award—Disputes between member and society—Arbitration—Scope of R. 22 (1).

Rule 22 (6) framed under S. 43 of the Co-operative Societies Act is not meant to take away the jurisdiction of the executing Court to enquire into the competency of an award made under the provisions of the section, on the ground of jurisdiction.

Rule 22 (1) is not confined to such disputes as are referable to membership only, but covers all disputes between a Co-operative Society and a member. Hence a dispute arising from a transaction entered into by two members as brokers is referable to arbitration. A.I.R. 1933 Cal. 267=36 C.W.N. 121=55 C.L.J. 89=143 Ind. Cas. 471.

——S. 43, (Bengal) R. 22—Award—Civil Court, if can interfere even if it is erroneous—Attempt to go behind award.

Once an award has been made under the Co-operative Societies Act, even though it may be anomalous and erroneous, the Civil Court has no power to interfere with it. It is beyond the Court's power to go behind the award and utilize the powers of the Court under S. 151, C. P. Code to obtain some sort of alteration which in its opinion would be in the ends of justice. (1936) 164 Ind. Cas. 802=40 C.W.N. 89.

——S. 43, (Bengal) R. 22, (1) (7)—Dispute between past member and Bank, whether dispute between past member and Committee—Objection to jurisdiction.

Where a past member of a society takes out a loan from the Co-operative Bank, the dispute

regarding this loan is a dispute between a past member and a Committee within R. 22 (1) framed by Government under S. 43, Co-operative Credit Societies Act, and the dispute cannot be referred to arbitration but should be referred to the Registrar. But where such dispute was referred to the arbitration and no objection was taken before him or before the Registrar in appeal, the objection cannot be taken in the revision against the execution. (1936) 163 Ind. Cas. 591=39 C.W.N. 1301.

——S. 43, (Beng.) R. 22 (6)—If ultra vires.

Rule 22 (6) framed by the Bengal Government under S. 43, Co-operative Societies Act is not **ultra vires** of the Local Government. A.I.R. 1940 Cal. 198=70 C.L.J. 492=I.L.R. (1940) 1 Cal. 82=188 Ind. Cas. 213.

——S. 43 (Bengal) R. 22 (6)—If ultra vires.

Rule 22 (6) of the Bengal rules which declared the decision of the appellate tribunal final and bars the jurisdiction of Civil Courts is not **ultra vires.** A.I.R. (1940) Cal. 162=70 Cal.L.J. 489.

——S. 43, (Bengal) R. 22 (6)—Decision of arbitrator wrong in fact or in law—Interference.

The decision of the arbitrator may be wrong in fact or in law, but that is not a ground which would entitle the Civil Courts to interfere in the matter. A.I.R. 1940 Cal. 198=70 C.L.J. 492 =I.L.R. (1940) 1 Cal. 82=188 Ind. Cas. 213.

——S. 43, (Beng.) R. 22 (6)—Award granting claim against sureties though prima facie time-barred—Award confirmed in appeal by Registrar.

Where an award has granted claim against sureties though the claim was **prima facie** time-barred as against them and the award is confirmed in appeal to Registrar, the order of Registrar though erroneous in law is not one without jurisdiction. Hence, his decision cannot be re-opened in Civil Court. A.I.R. 1940 Cal. 162=70 C.L.J. 489.

——S. 43 (2) (1), (Bengal), R. 22 (2), (5) and (6)—Setting up of tribunal, original or appellate, to decide disputes relating to liability of members to society or inter se expeditiously and cheaply—Rules whether ultra vires—Dispute concerning financial obligation of members to society, if dispute concerning business of society—Jurisdiction of special tribunal, whether exclusive—Parties, if can take proceedings in Civil Court.

The setting up of a tribunal, original or appellate, for the decision of disputes which may arise in connection with the liability of members to the society or **inter se** expeditiously and cheaply would be carrying out the objects of the Co-operative Societies Act. If the Local Government by rules sets up such a tribunal on the view that proceeding in a Civil Court would be more lengthy and dilatory, such rules are not **ultra vires.** It may be that such rules may not come within the express terms of any of the different clauses of sub-S. (2), S. 43 of the Act, such as Cl. (1) or Cl. (s); these clauses are only illustrative, but they would derive their life and support from the general power conferred on the Local Government by sub-S. (1) of the said section. Neither the inaritistic language employed in Cl. (1) nor the limited scope of Cl. (3) should be allowed to restrict the extent of the rule making power to implement the avowed objects of the Act.

The words "concerning the business of a society" occurring in S. 43 (2) and Cl. (1) in R. 22 (1) cannot be limited to disputes concerning the internal management of the society. The principal business of a society, being to finance its members, a dispute concerning the financial obligations of its members to the society would be a dispute concerning the business of the society. The use of the word "committee" in S. 43 (2), Cl. (1) and R. 22 (1) is sufficient to indicate a dispute with the society itself, and enable proceedings to be initiated and carried on before the authority referred to therein in the name of the society.

The purpose of the Legislature as embodied in cl. (1) of S. 43 (2), Co-operative Societies Act, clearly is that when the Registrar gives directions for "arbitration," the parties would have no right to have recourse to any alternative proceeding, much less to the comparatively expensive procedure of litigation in the Civil Courts. The words "arbitration" and "award" in S. 43 (2), Cl. (1) have been used merely to signify a special tribunal and the order of a special tribunal, as contradistinguished from a Civil Court and the decree of Civil Court respectively. That special tribunal may or may not, in all respects, or substantially conform to the characteristics of an arbitration tribunal strictly so-called. The conferment of a right of appeal from the decision of such a tribunal does not involve any inherent inconsistency. If it is within the objects of the Act to set up a special tribunal for the decision of disputes, the power to create such a tribunal includes the power to set up an appellate authority, which would create more confidence and a greater sense of security in the disputants. Clause (s) of S. 43 (2) is not the only provision giving rule-making power to set up a tribunal of appeal. As the Local Government has been given power to create by rules a special tribunal to decide disputes of the nature and between the parties mentioned in S. 43 (2), cl. (1), the jurisdiction of such special tribunal, would be exclusive. Clause (1), gives that indication, when it says that the Registrar, if he so chooses, may direct that the dispute shall be referred to arbitration. In giving by sub-R. (6) of R. 22 a finality to the decision of the special tribunal, the Local Government did not transgress its powers, but carried out the implication of cl. (1) as well as of general law.

The sub-Rr. (2), (5) and (6) of R. 22 framed under S. 43 (1) are therefore not **ultra vires** and a Registrar has power to appoint a single arbitrator to decide a dispute filed before him.

There would be a dispute, so long as a claim is asserted by one party and denied by the other, be the claim a false or a true one, or whether it ultimately turns out to be false or true. A.I.R. 1938 Cal. 327=42 C.W.N. 391=I.L.R. (1938) 2 Cal. 103=68 C.L.J. 353=178 Ind. Cas. 363.

——S. 43 (Bengal). R. 22 (7)—Award made by Inspector of Societies as arbitrator—Necessity of filing in Court—Award, whether requires stamp.

An award given by the Inspector of Co-operative Societies appointed as arbitrator by the Registrar of Co-operative Societies under R. 22 of the Rules framed by the Bengal Government under S. 43 of the Co-operative Societies Act, has the force of a decree and before it can be enforced as a de-

cree, it is not necessary to file it in Court as in the case of awards by arbitrators appointed by the contract of parties.

Such awards need not be stamped. A.I.R. 1933 Cal. 695=37 C.W.N. 649=60 Cal. 906=147 Ind. Cas. 177.

——S. 43, (Bengal) R. 22 (6)—Award without jurisdiction or in violation of rules—Interference by Civil Court.

If the award, is without jurisdiction, the Civil Court can certainly declare it to be a nullity. Even if the arbitrator was validly appointed, the award can still be a nullity, if there was violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is essential for creating jurisdiction in the arbitrator but the fundamental rules attaching restraint to the exercise of authority by the arbitrator, are equally mandatory and a violation of them would nullify the award. A.I.R. 1940 Cal. 198=70 C.L.J. 492=I.L.R. (1940) 1 Cal. 82=188 Ind. Cas. 213.

——S. 43, (Beng.) R. 22—Jurisdiction of Civil Court, if ousted—Provisions, if inconsistent with provisions of Arbitration Act—Filing of award, if necessary—Art. 178, Limitation Act, if applies.

The whole scheme of the provisions of R. 22, sub-Rr. (1) to (7) framed under S. 43, is to oust the jurisdiction of the Civil Court throughout the arbitration proceeding and the application to the Civil Court is necessary only for the purposes of enforcing the award which has been given the same force and effect as the decree of a Civil Court. The machinery and the procedure indicated by these provisions are totally inconsistent with the provisions contained in Chap. II of the Arbitration Act. Consequently, the Civil Court has got no jurisdiction to appoint an arbitrator in a proceeding under R. 22 as framed under S. 43 of the Co-operative Societies Act, as it can certainly do under S. 8 of the Arbitration Act, nor can it remove an arbitrator as can be done under S. 11. Paragraph 3 of Sch. I of the Arbitration Act, is inapplicable to a proceeding for arbitration of a dispute relating to co-operative societies. Art. 178, Limitation Act thus has no application and the amended provision regarding limitation as it occurs in Sch. 4, Arbitration Act is also inapplicable. A.I.R. 1943 Cal. 255=I.L.R. (1943) 2 Cal. 431=47 C.W.N. 478=208 Ind. Cas. 196.

——S. 43, (Beng.) R. 22—Award under—Date of award—Execution application within three years from date of communication of award to party.

In the case of an award made under R. 22 of the rules framed under the Co-operative Societies Act the date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby and not the date of the decision of the arbitrator. An execution application filed within three years of the date on which award is communicated to the party will be within time. A.I.R. 1941 Cal. 152=I.L.R. (1940) 2 Cal. 460=194 Ind. Cas. 35.

——S. 43, (Beng.) R. 22—Suit for declaration that constitution of Board of Management of Society is illegal and that it could not function or call extra ordinary general meeting of share-holders and that resolution passed in such meeting is ultra vires.

A suit for a declaration that the constitution of the Board of Management of a Co-operative Society was illegal, that it had no authority to function or to call an extra-ordinary general meeting of the share-holders, and that the resolution passed at the meeting thus convened was itself ultra vires is not a dispute between a member and the Committee touching the business of the Society. The dispute relates to the constitution of the Board of Management itself and its powers to convene an extraordinary general meeting of share-holders and is not a matter which is withdrawn from the Civil Courts by R. 22 of the Rules made by the Local Government under S. 43. A.I.R. 1938 Cal. 394=I.L.R. (1938) 2 Cal. 144 =42 C.W.N. 461=181 Ind. Cas. 303.

——S. 43, (Beng.) R. 28—Whether ultra vires.

The limits within which the rule-making powers of the Local Government could be exercised, are contained in sub-S. (1) of S. 43. Sub-S. (2) simply sets out by way of illustration certain matters, on which rules are considered desirable. It does not, in any way, limit the powers given by sub-S. (1) and the items mentioned therein do not exhaust the list of matters, on which rules might be framed by the Local Government. It cannot, therefore, be held that simply because there is no specific item mentioned in S. 43 (2), relating to distribution of profits in case of Societies with limited liability, R. 28, which was framed by the Local Government with a view to carry out the purpose of the Act as laid down in S. 33, is ultra vires. A.I.R. 1938 Cal. 394=I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=181 Ind. Cas. 303.

——S. 43, (Beng.) R. 28—Applicability of R. 28 (3) framed under S. 43.

Rule 28 (3) framed under S. 43, refers to the auditor's report and not to his oral evidence. A.I.R. 1938 Cal. 394=I.L.R. (1938) 2 Cal. 144=42 C.W.N. 461=181 Ind. Cas. 303.

(b) Bihar Rules.

——S. 43, (Bihar) R. 12—Liability of member to pay, disputed — Dispute, whether one touching Society—Registrar's award, whether without jurisdiction.

The disputed liability of a member to repay money due to a Co-operative Society is a dispute touching the business of the society, and, being a dispute between one member and the remaining members, it is covered by cl. 1 of R. 12 of the Rules framed under the Act which provides for such disputes between the members inter se; consequently, an award by the Registrar against the member who has borrowed money is not without jurisdiction. A.I.R. 1936 Pat. 225=14 Pat. 292 =17 P.L.T. 403=162 Ind. Cas. 32.

——S. 43, (Bihar) R. 12—Claim of society against non-members—Mode of enforcement—Decision, if can be executed against non-member as a decree.

Under R. 12 of the rules framed under S. 43 of

the Co-operative Societies Act, it is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be executed as a Civil Court decree. The society must enforce in the regular course any claim which it may have against outsiders. The decision of the Registrar so far as affects a non-member is a nullity as being made without jurisdiction. This question must be considered by the Court executing the decision if it is raised by the person affected. A.I.R. 1934 Pat. 145=15 P. L.T. 111=148 Ind. Cas. 730.

——S. 43 (2) (d)—Rajpur Co-operative Society in Bihar—Bye-laws of—Joint family can be member of Society through one of its members.

There is no provision in the bye-laws of the Rajpur Co-operative Society in the Province of Bihar precluding a joint family from becoming member of the Society through one of its members. A.I.R. 1938 Pat. 315=19 P.L.T. 328=4 B.R. 661=176 Ind. Cas. 49 (F.B.).

(c) Central Provinces Rules.

——S. 43—C. P. Government Rules under—R. 26—Dispute.

Mere willingness of the debtor to discharge his debt does not mean that there is no dispute. The dispute arises when the demand made for the payment is not immediately met and cannot be recovered without recourse to law. A.I.R. 1946 Nag. 16=I.L.R. (1945) Nag. 677=1945 N.L.J. 482.

——S. 43—Rules framed by C. P. Government, R. 26—Joint family members in corporate capacity becoming treasurers of society—Liability undertaken as treasurers can be treated as domestic dispute and Registrar had jurisdiction to decide dispute.

Where persons, as a joint family and in their corporate capacity, are members of the bank and the liability arises in their capacity as treasurers they cannot exonerate themselves from the liability by discarding their character as members. As members of the society they are bound to fulfil the obligation which they have undertaken as treasurers of the society and in that sense a dispute arising between them and the society can well be treated as a domestic dispute between the members on the one side and the society on the other. The Registrar of the Co-operative Societies has therefore jurisdiction to decide the dispute. A.I.R. 1946 Nag. 16=I.L.R. (1945) Nag. 677=1945 N.L.J. 482.

——S. 43—Rules under C. P. Government, R. 26—'Business', meaning of—Investing or depositing funds of society, if business.

The Co-operative Societies Act does not define the expression "business of the Co-operative Society". That expression is not restricted to the dealing with the members of the society only but it includes business which the Co-operative Society is, under the law empowered to transact. In the absence of any restriction on the scope of the meaning of the word "business" used in R. 26 framed under S. 43 by the Provincial Government (C. P.) it must be understood in its natural and ordinary sense as covering any acts which are essential for the functioning of the corporate body. It cannot, therefore, be said that the investing or depositing of its funds is not a business of the society only because it happens to be with strangers. The safe deposit of the fund is essential to enable the society to command resources to grant loans to its members at any time. Hence the investment or deposit of its funds cannot be isolated from the general business of the Co-operative Society. A.I.R. 1946 Nag. 16=I.L.R. (1945) Nag. 677=1945 N.L.J. 482.

——S. 43—C. P. and Berar Rules, R. 26—"Business"—If includes election disputes.

The word "business" used in R. 26 of the C.P. and Berar Rules, includes election disputes relating to Co-operative Societies, and they can be referred only to the Registrar, Co-operative Societies for decision. 1950 N.L.J. 501.

——S. 43—C. P. and Berar Rules, R. 26—Dispute regarding election of directors of Provincial Bank—Reference by elected representative of member Bank—Validity.

Under R. 26 of the C. P. and Berar Rules, a dispute regarding the election of directors of the Provincial Bank can be validly referred to the Registrar by a representative elected by a Central Bank which is a member of the Provincial Bank, as such a person comes in the category of a person claiming through a member. 1950 N.L.J. 501.

——S. 43—C. P. and Berar Rules, R. 26—Opinion expressed by Registrar on a point in his executive capacity—If bars subsequent reference under R. 26 on same point.

An opinion expressed in the past by the Registrar, Co-operative Societies, on a point in his executive capacity without hearing both the parties, does not act as a bar to a subsequent reference of the same point for his decision under R. 26 of the C. P. and Berar Rules. 1950 N.L.J. 501.

——S. 43—Rules framed under. R. 32—Correction of award—Power of Registrar.

Although by reason of R. 32 of the Rules framed under the Co-operative Societies Act no Court can sit in judgment over a decision by the Registrar, the Registrar is not powerless to correct an award, at least if there is some mistake or error apparent on the face of the record. There is nothing to prevent parties from applying for a fresh award on the ground that the former one was taken under a mistake. I.L.R. (1949) Nag. 31=A. I. R. 1949 Nag. 313=1949 N.L.J. 340.

——S. 43 (2) (l)—R. 33 (C. P.)—Enforcement of award—Sale of property—Lis pendens.

Award can be enforced as a decree or in the manner of recovery of land revenue—Application under R. 33 for enforcement as in the manner for recovery of land revenue under C. P. Land Revenue Act, S. 128 (g)—Transfer of property—Subsequent attachment and sale—Under S. 128 (g), transferee is not affected by doctrine of **lis pendens**. A.I.R. 1945 Nag. 281=1945 N.L.J. 510=I.L.R. (1945) Nag. 651.

——S. 43—C. P. and Berar Rules, R. 33—Award in form of final decree not preceded by preliminary decree—Legality. See C. P. CODE, O. 34. 1949 N.L.J. 442.

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——S. 43 (C. P.), R. 33—Rule recognises that award, decision or order of Registrar, is not decree.

Rule 33 of the rules made by C. P. Government under S. 43 does not say that an award by the Registrar is a decree. The rule, therefore, recognises that the award, decision or order of the Registrar is not a decree. There is a vast difference between an award being deemed to be a decree and an award being executable as a decree. A.I.R. 1941 Nag. 243=1941 N.L.J. 254=I.L.R. (1942) Nag. 636=199 Ind. Cas. 765.

(d) Madras Rules.

——S. 43 (Madras), R. 14—Purchase pending execution proceedings for sale of mortgaged property under award made by Registrar—Lis pendens—Registrar, whether 'Court'—Execution proceedings in Court — Power of Registrar to pass mortgage decree — Execution Court — Power to question validity of such decree.

The Registrar of Co-operative Societies acting under R. 14 of the rules framed under the Co-operative Societies Act is a 'Court' for the purposes of S. 52 of the T. P. Act.

At any rate, when once the award made by him has been put before a competent Civil Court in execution and the Court directs the sale of mortgaged property, any purchase during such proceedings will be subject to the rule of **lis pendens**.

Section 52 of the T. P. Act lays down a general rule of **lis pendens** to avoid multiplicity of suits and the principle applies whether S. 52 is in terms applicable or not.

Whether the Registrar of Co-operative Societies is empowered to pass a mortgage decree or not when such a decree has been passed and it is sought to be executed, the executing Court cannot refuse to execute the decree; nor could it amend it in any way as it cannot be said that the decree is in such cases on the face of it passed without jurisdiction. A.I.R. 1934 Mad. 40=38 M.L.W. 880=1933 M.W.N. 1398=66 M.L.J. 90=57 Mad. 426=148 Ind. Cas. 1098.

——S. 43 (Madras), R. 14—According to R. 14, the Registrar to whom a dispute touching a debt due to a society by a member is referred has power to administer oaths, to require the attendance of all parties concerned and of witnesses and to require the production of all books and documents relating to the matter in dispute. By the same rule the Registrar is required to give a decision in writing and when it is given, the decision may be enforced on application to the Civil Court having jurisdiction over the subject-matter of the decision as if it were a decree of Court.

Assistant Registrar acting under R. 14 is therefore a "Court" within the meaning of S. 195. Criminal P.C. A.I.R. 1930 Mad. 869=1930 M.W.N. 689=59 M.L.J. 229=32 L.W. 273=32 Cr.L.J. 219=129 Ind. Cas. 72.

——S. 43 (Madras), R. 14 (4)—Society's bye-laws providing that legal proceedings by or against the society may be in name of the President—President served with notice for appearance but deliberately evading appearance—Requirements of R. 14 (4) held sufficiently complied with and that there was no ground for a writ of certiorari. 1932 M.W.N. 18.

——S. 43 (1) (Madras), R. 14 (5)—Collector acting under R. 14 (5), whether a Court—Application to Collector to enforce decision of Registrar—Limitation Act (9 of 1908), Sch. 1, Art. 182 (5) (b).

A Collector acting under R. 14 (5) of the rules made under the Co-operative Societies Act, is not a Court and an application made to him for execution of a decision of the Registrar of Co-operative Societies is not an application to a Court so as to save limitation under Art. 182 (5) of the Limitation Act.

Where there is a change of President in a society, there is no question of any devolution of interest by operation of law from the first President in the second President inasmuch as the society is the real party. A.I.R. 1936 Mad. 150=1936 M.W.N. 25=43 M.L.W. 58=70 M.L.J. 31=59 Mad. 257=160 Ind. Cas. 520.

——S. 43, (Madras) R. 15 (7) — Execution — Award filed in Civil Court under R. 15 (7) (c)—Limitation Act (9 of 1908), Arts. 182, 181.

An award under the Co-operative Societies Act attracts all the provisions of the C. P. Code, in the matter of execution. If it attracts all the provisions of the Code with regard to execution, it must, of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award, when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. The provisions of S. 48 of the C. P. Code, must therefore apply. S. 48 provides that a decree shall run for a period of twelve years, provided, of course, that steps in execution are taken at intervals of not more than three years as required by Art. 182, Limitation Act. If S. 48 applies, it follows that the appropriate Article is 182 and not Art. 181. If Art. 182 does not apply but Art. 181 does, there would be a conflict as Art. 181 fixes a period of three years and S. 48, a period of twelve years. A.I.R. 1940 Mad. 635=51 M.L.W. 189=(1940) 1 M.L.J. 268=1940 M.W.N. 147=I.L.R. (1940) Mad. 649=191 Ind. Cas. 226 (D.B.). [Overrules A.I.R. 1937 Mad. 31=1936 M.W.N. 1198=44 L.W. 720=71 M.L.J. 759=I.L.R. (1937) Mad. 495=167 Ind. Cas. 223.]

(e) Punjab Rules.

——S. 43, (Punjab) R. 7—Award given by an arbitrator against the representative of the deceased debtor—Whether affects the estate of the deceased only—Jurisdiction of Civil Court.

The mere fact that the minor was not properly represented before the arbitrator does not give sufficient ground to Civil Courts to entertain a suit for declaration that the award was not binding on the minor.

An award against the representative of a deceased debtor affects only the estate of the deceased in the hands of the representative and not the representative personally. A.I.R. 1933 Lah. 376=146 Ind. Cas. 565.

——S. 43, (Punjab) R. 18—Award—Execution of, time-barred—Second reference of same dispute to arbitration—Subsequent award, if can be enforced—Suit to declare—Second award void.

The executing Court held that the execution of

an award between a society and its member was time-barred and the society again referred the same dispute to arbitration and obtained an award:

Held, that the subsequent 'dispute', alleged by the society to have been referred to arbitration, was one which under the rules made under S. 43, Co-operative Societies Act, could only be decided by the executing Court, for it related wholly to the discharge of the award. The proceedings of the executing Court were subject to the ordinary laws and if a society neglected to execute an award within time, its right to have the award enforced was lost and that was an end of that dispute and there was nothing left to be referred to arbitration. Consequently, a suit to declare the second award void was maintainable.

Where an award given by an arbitrator is not one which could be given under the provisions of the Co-operative Societies Act, it is open to a person aggrieved to obtain a declaration restraining its enforcement against him. A.I.R. 1936 Lah. 901=38 P.L.R. 1113=I.L.R. (1937) Lah. 92=168 Ind. Cas. 49 (D.B.).

——S. 43, (Punjab) R. 18, Cls. (a) and (b)—Dispute between members, held to be one concerning the business of the Society—Award—Executing Court's refusal to execute—Failure to exercise jurisdiction—Revision.

Where the dispute in question between three persons who were all members of a Co-operative Society related to a transaction which took place between one of them and the Society and the books of the Society showed that certain money had been borrowed by him from the Society but it had in reality been misappropriated by the other two, one of whom was the Secretary:

Held, that this was clearly a dispute "concerning the business" of a Co-operative Society between three of its members and, therefore, under Cl. (a) of R. 18 of the rules under the Act, any party to this dispute was competent to refer it to the Registrar who, under Cl. (b) of that rule, had the power to nominate an arbitrator to settle it. An order of the executing Court refusing to execute an award on the dispute was open to revision as the Court failed to exercise the jurisdiction vested in it by law. A.I.R. 1936 Lah. 786=165 Ind. Cas. 511.

——S. 43, (Punjab) R. 18—Scope of—Intention of Legislature—Rule made under powers delegated by statute, not made in pursuance of purpose for which it is given—Civil Court, if can question its validity.

The rules framed under S. 43 of the Co-operative Societies Act must be read together and then it becomes clear that the intention was to make all awards appealable and the use of the singular word in one sub-rule and the plural in another is due to unskilful drafting only.

Per **Coldstream, J.**—It is doubtful where a rule purporting to be made under powers delegated by a statute of the Indian Legislature is clearly not made in pursuance of the purpose for which power to make it was given, if Courts are precluded from questioning its validity merely because the Act itself declares that rules made under a section of the statute shall have effect as if enacted in the Act itself. A.I.R. 1937 Lah. 673=39 P.L.R. 460=168 Ind. Cas. 483 (D.B.).

——S. 43 (1), (Punjab) R. 18 — Suit between society and members—Civil Court, if has jurisdiction to entertain.

The Civil Court has no jurisdiction to entertain a suit between a society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1), Co-operative Societies Act. A.I.R. 1937 Lah. 268=174 Ind. Cas. 310.

——S. 43 (1), (Punjab) R. 26 (e)—Scope of—Liquidator summoning person, whether has power to ask for security from such person or impose sentence of imprisonment or fine for failure to furnish security.

Rule 26 (e) of rules framed under S. 43 (1), Co-operative Societies Act, restricts the powers given by S. 32, C. P. Code, to those given in the sub-rule. Hence in whatever capacity a person may have been summoned, the Liquidator has no power either to ask for security or to impose a sentence of imprisonment or fine for his failure to furnish security. A.I.R. 1939 Lah. 357=I.L.R. (1939) Lah. 192=41 P.L.R. 503=40 Cr.L.J. 791=183 Ind. Cas. 414.

——S. 43—Rules framed under R. 18—Payment order of Registrar sent to Civil Court for execution—Appointment of guardian for minor by Registrar—Executing Court—If must appoint guardian. 221 Ind. Cas. 591=1946 Pesh. (Rul.) 9.

(f) U. P. Rules.

——S. 43, (U. P.) Rr. 20 (7), 20 (12) (i)—Violation of R. 20 (7)—Effect—Failure to appeal.

The provisions of R. 20 (7) (i), (ii) and (iii) of the rules framed by the U.P. Government under the Co-operative Societies Act, refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities.

Even if the award is invalid on the ground that it was ante-dated or had been made after the expiration of the time fixed for making the award and withiut obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting aside the award is by means of an appeal to the Assistant Registrar as provided by R. 20 (12) (i). If no such appeal is preferred within limitation, the award becomes final and conclusive between the parties. A.I.R. 1941 Oudh 315=1941 O.W.N. 404=1941 A.W.R. 236=16 Luck. 658=193 Ind. Cas. 524 (D.B.).

——S. 43, (U. P.), R. 20 (12) (ii)—Bar of jurisdiction of Civil Court—Reference to arbitration pending—Fresh reference to another arbitrator.

The bar of jurisdiction of a Civil Court created by R. 20 (12) (ii) of the Co-operative Societies Rules is not absolute but limited only. A Civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction.

Where a dispute referred to arbitration is still pending, a fresh reference to another arbitrator is not competent and must be disregarded as of no legal effect upon the rights of the parties. A.I.R.

1941 Oudh 315=1941 O.W.N. 404=1941 A.W. R. 236=16 Luck. 658=193 Ind. Cas. 524 (D.B.).

——S. 43 (2) (1)—U. P. Co-operative Society Rules (1937), R. 115—Death of member owing money to society—Dispute as to whether certain person was representative referred to arbitration—Arbitrator, if can pass personal decree against such person—Suit for declaration by such person that property was not liable to attachment under such decree, if barred by S. 233 (m), U. P. Land Revenue Act (3 of 1901).

A dispute arose on the death of a member of a co-operative society, who owed money to the society, whether certain person was the representative of the deceased. The matter was referred by the Registrar to an arbitrator who passed a personal decree against the person. The person instituted a suit for declaration that the personal decree was null and void and that the property attached in execution of it was not liable for attachment:

Held, that the arbitrator had no jurisdiction to pass a personal decree.

Held also, that the suit was not barred by S. 233 (m), U. P. Land Revenue Act. A.I.R. 1940 All. 482=1940 A.L.J. 588=1940 A.W.R. 419=192 Ind. Cas. 337.

——S. 43, (U. P.), R. 137 (i), interpretation—Whether invests debt due to Co-operative Bank with character of land revenue due to Crown—Claim by bank of substantive right of priority.

All that R. 137 (1), framed by U.P. Government under S. 43, Co-operative Societies Act, lays down is that the Collector can adopt the same methods for the realisation of the money as he can adopt for the recovery of an arrear of revenue; in other words, that he can adopt such of the processes laid down in S. 146, U. P. Land Revenue Act, as may be applicable. But this does not invest the debt due to the District Co-operative Bank with the character of land revenue due to the Crown. It merely provides a summary procedure for the realisation of the money. The method or procedure which can be adopted for the recovery of the money is one thing and the substantive right of priority is another. A.I.R. 1940 All. 188=1940 A.L.J. 45=1940 A.W.R. 60=I. L.R. (1940) All. 181=188 Ind. Cas. 126 (D.B.).

——S. 44—Agriculturist's house—If exempted from sale.

Agriculturist's house is not exempt from sale for debts due to the Society. 103 Ind. Cas. 131=23 N.L.R. 66=A.I.R. 1927 Nag. 217.

——S. 44—Decree against Co operative Society, whether can be executed against members before winding up.

As in the case of companies registered under the Companies Act, so in the case of societies registered under the Co-operative Societies Act, the members are not liable to have execution issued against them in respect of judgments obtained against the society. The liability of the members can only be enforced upon a winding up. A.I.R. 1934 Mad. 181=39 L.W. 143=66 M.L.J. 475 =1934 M.W.N. 329=150 Ind. Cas. 172 (D.B.).

——S. 49—Bye laws—Validity—Liability of son for debts due by father to Bank of which he was a member—Construction of bye-law 12.

A person who became a member of a Village Co-operative Bank by election to it after the death of his father was held liable for all debts due to the Bank by his father who was a member at the time of his death over and above the assets received by him from his father under Bye-law 12 framed by the Bank which ran "Election of an heir or successor-in-interest gives successor all rights and subjects him to all liabilities possessed or incurred by his predecessor-in-interest towards the Bank". Such a bye-law was held not ultra vires. 18 O. C. 157=31 Ind. Cas. 724.

——S. 51—Award by Registrar—Enforcement by Civil Court other than High Court—Limitation Act (9 of 1908), Art. 182.

By statute the award of the Registrar under S. 51 of the Co-operative Societies Act is given the same status as a decree of a Civil Court for the limited purpose of execution and the provisions of law relating to the enforcement of decrees of such Courts, including the law of limitation applicable for such enforcement, will apply by necessary implication. So when a question of limitation arises as to the enforcement of an award of the Registrar of the Co-operative Society, the Court before which the application for its enforcement is made will have to apply the Article applicable for the enforcement of the final decree of that Court. Where the execution is by a Civil Court, other than the High Court, the Article applicable is Art. 182, Limitation Act. A.I.R. 1939 Mad. 304=49 L. W. 143=1939 M.W.N. 397=(1939) 1 M. L. J. 695=185 Ind. Cas. 230.

CO-OPERATIVE SOCIETIES RULES. See CO-OPERATIVE SOCIETIES ACT, S. 43—LOCAL RULES.

CO-OWNER. See CO-SHARER.

COPARCENER. See HINDU LAW.

CO-PARTNER. See (1) C. P. CODE, O. 30, R. 9.

(2) CONTRACT ACT, SS. 239 TO 266.

(3) PARTNERSHIP ACT.

COPIES. See (1) C. P. CODE, O. 41, R. 1.

(2) CRIMINAL PROCEDURE CODE, S. 548.

(3) EVIDENCE ACT, S. 65.

(4) LIMITATION ACT, S. 12.

CO-PLAINTIFF. See C. P. CODE, O. 1, R. 4.

CO-PLAINTIFF. See (1) PRACTICE.

(2) C. P. CODE.

CO-PRISONER, EVIDENCE OF. See EVIDENCE ACT, S. 30.

CO-PROPRIETORS. See (1) CO-SHARER.

(2) PRE-EMPTION.

COPYRIGHT AND COPYRIGHT ACTS.

Synopsis.

1. Nature of right.
2. Infringement—What constitutes.
3. Passing off actions.
4. Particular cases of copyright.
5. Remedies for infringement—Injunction.
6. Practice.
7. Copyright Acts. (English Act of 1911 as applied to India and Indian Act 3 of 1914).

COPYRIGHT. See (1) COPYRIGHT ACT, 1911 (1 & 2 GEO. 5, CH. 46, AS APPLIED TO INDIA).

(2) COPYRIGHT ACT (3 OF 1914).

1. Nature of right.

COPYRIGHT ACT, 1911 (As applied to India).

——S. 1 (2)—Copyright—What is.

"Copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever and the "copyright in a work" shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything, the sole right to do which is conferred on the owner of the copyright. A.I.R. 1934 Lah. 777=37 P.L.R. 466=16 Lah. 103=153 Ind. Cas. 1020 (D.B.).

——Ss. 1 and 2—Ideas, if protected by laws of copyright—Distinction between copyright and patent.

The laws of copyright do not protect ideas, but they deal with the particular expression of the ideas. The protection of ideas falls not within the laws as to copyright, but within the patent laws. Unlike the owner of a copyright, a patentee has the sole right to use his invention within certain limits, and if anybody uses that patent, although he has made independent investigations, he infringes the patent. But in the case of copyright, that is not so. It is always possible to arrive at the same result from independent sources, and the fact that the defendant produces something like the plaintiff's earlier work does not necessarily create an infringement; it must be shown that the defendant has derived his work from the plaintiff's. A.I.R. 1938 All. 266=1938 A.L.J. 390=I.L.R. (1938) All. 370=1938 A. W. R. 209=176 Ind. Cas. 118 (D.B.).

——Copyright—Creation—New edition.

It will not create copyright in a new edition of a work of which the copyright has expired merely to make a few amendations of the text or to add a few important notes. To create a copyright by alterations of the text these must be extensive and substantial, practically making a new book. With regard to notes, in like manner they must exhibit an addition to the work, which is not superficial or colourable, but imparts to the books a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the most proper sense of the word. 83 Ind. Cas. 101=48 Bom. 308=28 C.W.N. 613=22 A.L.J. 473=2 Pat.L.R. 137 =5 L.R.P.C. 57=51 I.A. 109=A.I.R. 1924 P. C. 75=46 M.L.J. 637 (P.C.).

——Copyright—Succession to.

Whether a right of survivorship would or would not apply to a copyright in books published by one co-parcener, the right can be inherited by the heirs of the author who owned the copyright. 61 Ind. Cas. 394=43 All. 412=19 A.L.J. 180=A.I.R. 1921 All. 95.

——Copyright—Waiver of—What amounts to.

A member of a Board of Studies who prepares a syllabus of studies at the request of the Board which is afterwards published with alteration by the board for the information of the public, has by his action in submitting unreservedly the results of his labour and skill before the Board, gives up any right to copyright in the publication. Where a person does a literary work (at request) for another with full knowledge that the latter will publish them as a matter of course, and the latter publishes the same brushing aside, the desire of the plaintiff that he should be allowed the copyright for the work or that he should be suitably remunerated for the same, the publication amounts to complete waiver by the latter person of whatever rights he may have had in the work in the interests of the general public. 38 All. 484=14 A.L.J. 724=34 Ind. Cas. 357.

2. Infringement—What constitutes.

——Copyright—Infringement—What amounts to.

In the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so to use all the materials open to him. The true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at, for the purpose of producing his work; that is, in fact merely to take away the result of man's labour or in other words, his property. The principle applies to maps, guide books, street directories, dictionaries, to compilation of scientific works and other subjects, and applies to a selection of poems. 83 Ind. Cas. 101 =48 Bom. 308=28 C.W.N. 613=22 A.L.J. 473 =2 Pat.L.R. 137=5 L.R.P.C. 57=51 I.A. 109 =A.I.R. 1924 P.C. 75=46 M.L.J. 637 (P.C.).

——Copyright—Infringement—What is.

Copyright would be infringed under S. 2 (1), English Copyright Act, by making any cinematograph record of a musical work, in which copyright existed, without the consent of the owner of the copyright. A.I.R. 1937 Bom. 472=I.L.R. (1937) Bom. 724=39 Bom.L.R. 654=172 Ind. Cas. 408.

——Copyright—Infringement of — Essentials — Burden of proof.

In a suit for injunction for infringement of plaintiff's copyright in his almanac it was found that the tables given in the parties' almanacs agreed except in minutes and seconds, that the calculations were admittedly worked out on makrand and that there were other almanacs resembling that of the defendants.

Held, that these findings were not sufficient to establish infringement, and that in previous years the defendants purchased information for their almanacs from plaintiff did not affect the case. The weakness of the defence does not compensate

for want of proof of the plaintiff's allegations. 95 P.L.R. 1910=8 Ind. Cas. 497.

3. Passing off actions.

——Copyright and passing off—Use of title to mislead public.

It cannot be said that in no circumstances can there be a 'passing of' by the use of the same title for a literary, artistic or musical work though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of cases. It is not impossible that there might be "passing off" of such a nature that persons might pay to go to a performance of the defendant's work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's Common law rights and a disturbance of his business interest. But the thing said to be passed off must resemble the thing for which it is passed of. A frying pan cannot be passed off as a kettle.

Where a talkie film uses the title of a song but the theme of the film is different from that of the song and the song is not sung at any performance, there is no 'passing of.' A.I.R. 1940 P.C. 55=21 P.L.T. 355=52 L.W. 10=187 Ind. Cas. 449 (P.C.).

——Copyright—Musical composition—Talkie film adopting title of song but not repeating in any form its words — Whether infringement of performing right in musical composition—Passing off—Such use of title, if constitutes "passing off".

There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. But where not a word of the song is repeated in any form in the talkie film except that the title is thrown on the film at the outset, this does not constitute infringement of performing right in musical composition. A.I.R. 1940 P.C. 55=21 P.L.T. 355=52 L.W. 10=187 Ind. Cas. 449 (P.C.).

4. Particular cases of copyright.

——Copyright—Panchangam — When copyright exists in—Agreement by compiler to prepare manuscripts year by year and to deliver it to a publisher with the sole right of publishing it for five years—How far an assignment of copyright—Breach of contract by compiler and publication of his manuscripts by a third Party — Right to challenge and claim damages for breach of contract and infringement of copyright—Essentials—Recovery of damages for breach of contract—Effect on right to damages for infringement of copyright.

A panchangam if it was nothing more than a handy extract from published official tables, may not constitute an original literary work. But where it is found that it is an original composition worked out by a series of calculations based on a fairly elaborate set of rules in the knowledge of which the compiler is a specialist, it must be held that the work is an original literary work for the purposes of the Copyright Act of 1911.

Where such a compiler enters into an agreement with another for printing and publication for a period of five years of the panchangam to be cast by him year by year, an equitable assignment of each manuscript as and when it came into existence is created and the assignee has, notwithstanding the absence of a legal assignment, a right to challenge the publication of such manuscript by a stranger and maintain an action for damages provided the legal owner of the copyright is impleaded in the suit.

Where the compiler in breach of his agreement delivers the manuscript to a third person who publishes the same unless it is pleaded and proved that the third person instigated or procured the breach he cannot be made liable in damages for the breach.

Notwithstanding the fact that he had successfully claimed damages for the breach of contract which led to the infringement, the equitable assignee of the sole right to publish the work is entitled to sue for damages for the infringement of that right by a third person. I.L.R. (1947) Mad. 768=60 L.W. 317=A.I.R. 1948 Mad. 139=1947 M.W.N. 561=(1947) 1 M.L.J. 382.

——Copyright—Selections and notes and abridgment—Selection from non-copyright book is not entitled to protection—Use of notes of other people in preparing one's own notes on a text is not illegal unless such use is unfair—To copy certain pasages and omit others to reduce size is not abridgment.

Skill and labour by themselves will not make up for the want of originality, while there is nothing original in picking out for publication, portions of a work which is not copyright. A few instances of similarity in the explanation of classical names does not necessarily constitute an infringement of copyright. In law a selection of passages from a non-copyright work is not entitled to protection.

Any person writing notes on any text may fairly look at all the existing notes and so long as he does not make any use which may be called unfair he can use them in preparing his own independent notes. It is difficult to lay down any general rule on this point. It must be decided as a question of fact in each case. The notes as a whole must be considered. The word 'original' should be so construed as to give to the person who has used his brain the benefit of that use as far as possible. Independent labour must be apparent, and the reduction of the size of a work by copying some of its parts and omitting others, confers no title to authorship; and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge in the

legal sense of the word is to preserve the substance, the essence of the work, in language suited to such a purpose; language substantially different from that of the original. To make such an abridgment requires the exercise of the mind; labour, skill and judgment are brought into play and the result is not merely copying. To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied, but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author. 65 Ind. Cas. 187=23 Bom.L.R. 1299=A.I.R. 1921 Bom. 463.

——Copyright—Picture—Infringement of copyright—Test.

A person acquires a copyright in the picture when he publishes the picture of the image of a deity with some variations in details for which he is indebted to his own imagination and anyone who publishes a picture with the same variations is guilty of infringement of copyright.

In cases of this nature, there is no better way of detecting the piracy in an alleged infringing work than by making a careful examination of it to see whether any of the deviations and mistakes which the artistic license permits in the original have been reproduced into alleged infringing copy. A.I.R. 1945 Bom. 51=46 Bom.L.R. 679=219 Ind. Cas. 98 (D.B.).

5. Remedies for Infringement.

——Copyright—Infringement—Principle applicable—Book containing verbatim copy of plaintiffs' book—List of contents exactly duplicated—Paragraph from foreword copied out—Prima facie case, if made out—Civil P. C. (Act 5 of 1908), O. 39, R. 2.

A book which contains selections from the works of different authors could be the subject-matter of copyright, the true principle applicable to such cases being that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work, and so take away the result of other's labour, or in other words his property. Where, therefore, the defendants have published a book containing plays which are a **verbatim** copy of the plaintiffs' book, the list of contents in the plaintiffs' book is exactly duplicated in the defendants' book and a whole paragraph from the foreword of the plaintiffs' book has been accurately copied out in the introduction of the defendants' book, **prima facie** case is made out for issue of a temporary injunction. A.I.R. 1935 Lah. 282=156 Ind. Cas. 841.

——Suit for infringement of copyright—Grant of temporary injunction—Principles—No irreparable injury—Order for keeping accounts, sufficiency of—C. P. Code (Act 5 of 1908), O. 39, R. 2.

The plaintiffs were the proprietors of the **Lahore Law Times**, a monthly Journal in which the judgments of the Financial Commissioner of Lahore in revenue cases decided by him from 1921 where published. In 1932 the defendants compiled, printed and published a book called **"Current Punjab, Case Law Part C., Revenue Rulings (Consolidated), 1914—1931"**. Shortly after the publication of the defendant's book, the plaintiffs brought a suit alleging that the defendants had infringed their copyright by copying from the plaintiffs' journal a large number of judgments of the Financial Commissioners for the years 1921—1931, and praying for issue of a perpetual injunction restraining the defendants from infringing the plaintiffs' copyright and directing them to render account of copies of the "Revenue Rulings" published by them. The plaintiffs also prayed for issue of a temporary injunction restraining the defendants from selling any copies of their book till the decision of the suit. The trial Court dismissed this application being of opinion that "it was difficult for him at that stage to grant the temporary injunction without going further into the merits of the case". He, however, passed an order directing the defendants to keep regular accounts of the publication and sale of their book and to produce them in Court, if and when required for inspection and audit, if necessary. The plaintiffs appealed:

Held, that on the facts of the case, the plaintiffs had failed to make out a case for issue of a temporary injunction restraining the defendants from selling their books, pending the disposal of the suit. The injury with which the plaintiffs said they were threatened was not irreparable and the trial Judge had amply safeguarded their interest by directing the defendants to keep separate and regular accounts of the sale of their book which they should produce in Court, if and when called upon to do so. A.I.R 1933 Lah. 448=34 P.L.R. 249=149 Ind. Cas. 984.

——Temporary injunction — Guiding principles — Specific Relief Act (1 of 1877), S. 56 (f), applicability of—Jurisdiction of Court in issue—Granting temporary injunction before deciding question of jurisdiction.

A Court before which a question of jurisdiction is raised has the power to issue an **interim** injunction without first deciding finally the question of **jurisdiction.**

Inasmuch as under the Copyright Act, 1914, one of the remedies available for an infringement of copyright is by way of injunction, the principles enunciated in Cl. (f) of S. 56, Specific Relief Act, cannot in any way interfere with the discretion of the Court in regard to the granting of temporary injunction in an action for infringement of copyright.

In order to justify a temporary injunction in such an action, it is not necessary that the plaintiff should prove that there is no other remedy by which he could protect imself or that unless the defendant is restrained forthwith, irreparable injury or inconvenience might result to the plaintiff. On the other hand, in doubtful cases where the question as to the legal right is one on which the Court is not prepared to pass an opinion or the legal right being admitted, the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right, or to order the motion to stand over until the legal right has been tried. In determining which of these two alternatives it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may

arise from granting or withholding the injunction. A.I.R. 1931 Lah. 624=132 Ind. Cas. 586.

6. Practice.

——Copyright—Action in respect of infringement —Procedure—Infringement—Minute scrutiny of similarities and dissimilarities involved — Case should be tried with aid of experts.

In a case of alleged infringement of copyright, which involves minute scrutiny of alleged similarities and dissimilarities and extensive and lengthy comparison, it is not only proper but essential that the case should be tried with the aid of experts who might be appointed Commissioners to investigate and report similarities. A.I.R. 1938 All. 266=1938 A.L.J. 390=I.L.R. (1938) All. 370 =1938 A.W.R. 209=176 Ind. Cas. 118.

——Copyright—Passing off—Proof required.

Before a case of passing off can be proved, it must be shown that the public connect a particular title with a particular work written by a particular author. Again as to get up it must be shown that a particular style of printing or illustration indicates to the public that the work is of such a particular author. A.I.R. 1938 Cal. 594=42 C.W.N. 541=178 Ind. Cas. 106.

——Copy right—Violation of right.

The author of a book, the subject-matter of which is arranged in a new way, totally different from earlier works on the subject, can get a copyright in the book. An injunction can be granted when there has been a clear infringement of the copyright, and profits earned by defendants may be awarded as damages. 61 Ind. Cas. 394=43 All. 412=19 A.L.J. 180=A.I.R. 1921 All. 95.

——Copyright—Violation of, remedy for.

Where **P** purchased the right to publish and sell 90 songs composed by **D** and shortly afterwards **D** sold 40 of these to **M** who published the same and sold them, **held,** that **P** was entitled to sue **M** for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. 12 M. L. W. 151=59 Ind. Cas. 229=1920 M.W.N. 426=39 M.L.J. 341.

——Copyright—Sale of Songs—Right to publish and sell—Sale when complete—Undertaking to revise songs—Damages.

The author of certain songs composed in Tamil and sold the right to publish and sell them and receive the purchase money therefor, but undertook to make corrections and revise the songs before publication. The author subsequently sold the same songs once against surreptitiously to a 3rd person for consideration, *held,* the first purchaser acquired a valid title to the composition and was entitled to restrain the author and his subsequent purchaser from infringing his rights therein by publishing and selling any of the songs purchased by him and to damages from the author. 39 M.L.J. 341=(1920) M.W.N. 426=12 L. W. 151=59 Ind. Cas. 229.

——Suit for damages for infringement of—Co-owner made defendant on ground that he gave licence for which he had no authority to defendant No. 1—Suit against co-owner.

Where in a suit for damages for infringement of copyright, a co-owner was made defendant No. 2 on the ground that he gave a licence to defendant No. 1 to print, publish and sell the books and that the co-owner had no authority to do it:

Held, that no order could be passed against defendant No. 2 for an account of the money received by him and the suit must be dismissed as without any cause of action. A.I.R. 1934 Cal. 668=38 C.W.N. 604=152 Ind. Cas. 835.

——Copyright — Infringement — Catalogue, illustrations in—Copyright in a portion of a publication how far protected—Fraud on the public—Mis-statements—"Puffing statements".

The fact that the copyright in some of the illustrations in the plaintiff's catalogue is vested in other persons does not preclude him from suing to restrain an infringement of such of the illustrations as he has the copyright in it. 6 Ch. 462, foll. The objection that the catalogue contained certain statements which were not strictly accurate (no case of fraud on the public having been made in the written statement) was held to be no answer to an action to prevent infringement of the copyright, such statements being held to be in the nature of puffing statements—p. 87 of Copinger's Law of Copyright (4th edn.) It was not sufficient for a defendant merely to give an undertaking not to publish in future those illustrations which he admits to be infringements of copyright. He ought to have, at the commencement of the suit, offered to consent to an injunction being recorded regarding them. (1908) 12 C.W.N. 753 =35 C. 463.

7. Copyright Acts. (English Act of 1911, etc.).

——Copyright Act (Irish) (1911)—Operation of.

The Copyright Act (1911), continues to be in force in Ireland after the coming into operation of the constitution in December, 1922. 1930 A.C. 377=99 L.J.P.C. 116=124 Ind. Cas. 894=A.I.R. 1930 P.C. 314=32 P.L.R. 20 (P.C.).

——Canadian Copyright Act (1921), S. 42—Pictures printed before 1st January, 1924 and copyright enjoyed in respect of them before 1924 in England — No copyright obtained before 1924 in Canada — Copyright if can be claimed in Canada after 1924.

Section 42 of the Canadian Copyright Act is obviously a transitional enactment designed to prevent the loss of rights existing before 1st January, 1924. It achieves this by conferring on those who enjoyed pre-existing rights, the substituted rights defined by the new Act. The pre-existing copyright enjoyed must have been copyright in Canada, for the statute in substituting "copyright as defined by this Act" for the pre-existing copyright is plainly conferring a new Canadian copyright in place of a previous Canadian copyright. Consequently a publisher residing in England and claiming copyright after 1924 in Canada in respect of certin pictures printed before 1st January, 1924, in respect of which he enjoyed copyright in England before but not caring to get one in Canada, cannot get any relief. A.I.R. 1937 P.C. 326=171 Ind. Cas. 406 (P.C.).

——Copyright Act (1 and 2, Geo. 5, Ch. 46)—Abridgment—Merely selecting passages and knitting them together does not constitute abridgment—Raw material or the original works are open for consultation for all—Use of another's labour and skill only is prohibited.

To constitute a true and equitable abridgment, the

entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the individuality employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent, and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgement requires the exercise of mind and labour, skill and judgment brought into play, and the result is not merely copying. To constitute a proper abridgment the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. The mere process of selecting passages from works readily accessible to the public is not. but difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is sufficient to give the character of an "original literary work" to the selection. 83 Ind. Cas. 101=48 Bom. 308=28 C.W.N. 613=22 A.L.J. 473=2 Pat. L. R. 137=5 L.R.P.C. 57=51 I.A. 109=A.I.R. 1924 P.C. 75=46 M.L.J. 637 (P.C.).

——Copyright—English and Indian Law—Fine Arts—Copyright in English Act (25 and 26, Vic. Ch. 68).

The Fine Arts Copyright Act (25 and 26, Vic., Ch. 68) does not extend to any part of the British Dominions outside the United Kingdom. (1903) A. C. 496, Foll. In England before the Statute of Anne (8 Anne, Ch. 19) there was no copyright at common law for an author, or a publisher in his productions. 4 H.L.C. 815; 19 Bom. 557, Foll. 22 Bom. L.R. 808=57 Ind. Cas. 592=44 Bom. 720.

COPYRIGHT ACT (1911).

——S. 1—"Original", meaning—'Original' does not relate to ideas but to their expression.

The word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of "literary work" with the expression of thought in print or writing. The originality which is required relates to the expression of the thought but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author. 83 Ind. Cas. 101 =26 Bom.L.R. 292=51 I.A. 109=5 L.R.P.C. 57 =2 Pat.L.R. 137=22 A.L.J. 473=28 C. W. N. 613=48 Bom. 308=A.I.R. 1924 P.C. 75=46 M. L.J. 637 (P.C.).

——Ss. 1 and 2—In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where the theme of the film is different from that of the song, there **is no ground in copyright law to justify the claim to prevent the use of the title of the song for the** film which is too unsubstantial to constitute an infringement, especially when used in so different a connection. A.I.R. 1940 P.C. 55=21 P.L.T. 355= 1940 M.W.N. 677=52 L.W. 10=187 Ind. Cas. 449 (P.C.).

——Ss. 1 and 2—"Authorization" of publication —Copyright of ordinary photograph of an actress taken by film company for its own purpose and with its own apparatus belongs to that company—Another company engaging same actress and placing order for advertisement with owner of cinema journal—Owner of journal publishing advertisement with photograph of that actress reproduced from original.

The copyright of ordinary photograph of an actress as a stationary figure when taken by a film company for its own purpose and with its own apparatus belongs to that company.

Where another film company which has engaged that actress has placed an order for advertisement with the publisher of a cinema journal and the publisher inserts in the advertisement a photograph of the actress which is reproduced from one taken by the first company, there is 'authorization' by the second company of the infringement of the copyright if the proprietor of that company either knew or had reason to anticipate or suspect that the owner of the cinema journal would publish the photograph of the actress in infringement of the copyright.

[What is "authorization" explained.] A.I.R. 1939 Rang. 266=1939 Rang.L.R. 121=183 Ind. Cas. 625.

——Ss. 1 and 2—Person compiling book with great labour—Other person instead of searching into common sources, adopting former's arrangement and subject-matter—Copyright, if infringed —Addition of additional information, if makes any difference.

The compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken and subjects it to such revision and correction as to produce an original result.

No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. Where the plaintiffs have compiled their book with considerable labour from various sources and digested and arranged the matter taken by them from other authors and the defendant instead of taking the pains of searching into all the common sources and obtaining his subject-matter from them availed himself of the labor of the plaintiffs and adopted their arrangement and subject-matter, such a use by the defendant of the plaintiffs' book cannot be regarded as legitimate. A.I.R. 1938 All. 266=1938 A.L.J. 390=I.L.R. (1938) All. 370=1938 A.W. R. 209=176 Ind. Cas. 118.

——Ss. 1 and 2—Traditional poems given literary form—Result is original literary work—Passing off—Essentials to be proved.

To give the traditional poems even the primitive literary form demands considerable powers of adoptation and polishing, and the result is an original literary work within the meaning of S. 1 of the Copyright Act.

Before a case of passing off can be proved, it must be shown that the public connect a particular title with a particular work written by a particular author.

Again as to get-up, it must be shown that a particular style of printing or illustration indicates to the public that the work is of such a particular author. A.I.R. 1938 Cal. 594=42 C.W.N. 541=178 Ind. Cas. 106.

——Ss. 1 and 2 (1) (iv)—Infringement of—When constituted—Books like Elementary Geography.

In a suit for injunction on the ground of infringement of copyright of a book, if the defendant, who undoubtedly is at liberty to draw upon common sources of information, saves himself the trouble and labour requisite for collecting that information by adopting the plaintiff's work with colourable variation, he is guilty of infringement of plaintiff's copyright even though the plaintiff's work is based on materials which are common property:

Held, that the book, being a book on Elementary Geography, could not but give the same information which is to be found in all such books on the subject. The materials, unless the book was intended to contain incorrect, inadequate or incomplete information, must necessarily be the same. The passages complained of, of similarity, were few in number. The defendant had to express himself in the best possible manner suited to his readers, and so he could not possibly avoid the similarity. He was not bound to be unhappy in his choice of expressions, only to avoid resemblances and it was open to him to adopt words and expressions even though the plaintiff may have used them before, so long as he did not in fact intend his book to resemble the plaintiff's book or as long as such words or expressions were not of the plaintiff's coinage. It was true that in a few passage out of those complained of the coincidences were so great that there was no room for doubting that the defendant owed them to the plaintiff's book. But in borrowing them, it was far from clear that the defendant was aiming at a resemblance or that a colourable imitation had been produced. In cases of this nature it is not merely one or two passages here and there that count; it is the general impression that is left on one's mind that is to be regarded. (1936) 163 Ind. Cas. 576=39 C.W.N. 945=61 C.L.J. 573.

——Ss. 1 and 2—Abridgment of original work before 1914—If infringement—Infringement takes place on sale of every book—Abridgment of original work done in 1908—Right of abridgment of in 1912 to defendant—Defendant publishing it in 1926.

An abridgment of a work could not, up to the year 1914, be an infringement of a copyright, if the abridgment was a fair and *bona fide* one and did not amount to a reprinting of the work of the author. The position is now considerably changed in view of the wider language employed by the Legislature in the Act of 1914. Now in order to decide whether a fair abridgment of the original work is or is not an infringement of copyright, the test is whether or not it is a reproduction of the work or a substantial part of it in any material form whatsoever. It may be that up to a certain limit when an abridgment is no more than a mere short synopsis or index to other work, there would be no infringement. On the other hand, when an abridgment is on such an extensive scale as to amount to a reproduction of a substantial part of the original work in a material form, it would undoubtedly be an infringement of the copyright. An infringement takes place not only when a book is reprinted, but also when a book in respect of which a copyright exists is sold. Therefore, there is a fresh cause of action on the sale of every book.

In 1908, Dr. King brought out a treatise, called "A Digest of Marshall's Principles of Economics," being a digest of a well-known book "Principles of Economics" by Professor Marshall. Dr. King's treatise was printed and published in Ajmere, and this treatise was purchased in 1912 by the defendant from Dr. King and having reprinted it published it in 1926. The plaintiff, the widow of Professor Marshall, brought a suit for damages for infringement of the copyright:

Held, that Dr. King did not infringe any copyright in 1908, when he brought out the digest. The digest lawfully became his property and he was entitled to dispose of it. The title to it was acquired by defendant in 1912 before the Act of 1914, came into force. In reprinting the old edition of 1908, defendant reprinted his own book which had lawfully become his property and had not, therefore, infringed the copyright of the plaintiff. A.I.R. 1934 All. 922=3 A.W.R. 255=154 Ind. Cas. 207 (D.B.).

——Ss. 1 and 2—Existence of copyright not denied—Representation and performance of the works.

Where the existence of copyright in certain book is not denied, then the representation and performance of the works of the author by the defendants amounts to an infringement of copyright under Ss. 1 and 2, Copyright Act of 1911. A.I.R. 1934 Cal. 671=38 C.W.N. 611=155 Ind. Cas. 867.

——Ss. 1 and 2—Printing of books, if necessary to infringe copyright before Copyright Act.

(Obiter).—In order to infringe the plaintiff's copyright in books, it was not essential that the defendant should print the books even before the Copyright Act of 1911. A.I.R. 1934 Cal. 671=38 C.W.N. 611=155 Ind. Cas. 867.

——Ss. 1 and 2—Infringement—Tests—Expert evidence.

In the case of two literary works, similarities like omissions of plan, of phrases and of mistakes and similar intrinsic evidence derived from a comparison of the works may be sufficient to establish a case of copying, even if the direct evidence is all the other way and appears to be evidence that can be accepted but such evidence must be of the most cogent force before it can be accepted as against the oath of respectable and responsible people whose evidence otherwise would be believed by the Court. The suggested similarities can be explained by the nature of the work, which has common elements, and by the fact that both writers must have had recourse to authorities which were common to both.

In copyright cases, it is not permissible to admit as evidence the opinion of literary gentlemen that the defendant did copy from the plaintiff's books. It does not come within the domain of expert testimony at all. A.I.R. 1933 P.C. 26=64 M.L.J. 193=37 L.W. 314=1933 A.L.J. 393=142 Ind. Cas. 815 (P.C.).

——S. 2—Advertisement to sell copyright—Place of suit—Imperial Copyright Act, S. 2, read with Indian Copyright Act, S. 2.

An advertisement claiming a right to sell a copyright is an infringement of the copyright and furnishes a cause of action to the party aggrieved at the place where the advertisement is circulated. A.I.R. 1945 All. 55=I.L.R. (1945) All. 20=1944 A.L.J. 496 (D.B.).

——S. 2—Expert evidence.

The Court should be reluctant to sit as an expert to decide the question of infringement of copyright without the aid of the expert evidence. But in a case capable of construction the Court should exercise a *prima facie* judgment upon it. The proper course in ordinary circumstances in such cases is to get the opinion of such experts who may be appointed as Commissioners to investigate and report on the matters in issue. 81 Ind. Cas. 754=39 C.L.J. 134=A.I.R. 1924 Cal. 595.

——S. 2 (1)—Innocence no defence.

Innocence is no defence to a charge of infringement of copyright under S. 2 (1). The offence is complete even if the offender authorises the performance of a musical piece without any knowledge of infringing the rights of any other person. 1930 A.C. 377=99 L.J.P.C. 116=124 Ind. Cas. 894=32 P.L.R. 20=A.I.R. 1930 P.C. 314 (P.C.).

——S. 2 (3)—Burden of proof.

The defence of having had no reasonable ground for suspecting that the performances would be infringement of copyright should be, under the terms of the sub-section, proved by the defendants affirmatively. 1930 A.C. 377=99 L.J.P.C. 116=124 Ind. Cas. 894=A.I.R. 1930 P.C. 314=32 P.L.R. 20 (P.C.).

——S. 2 (3)—'Private profit'—Proceeds applied for relief of rate-payers.

Where a local body authorised the performance of a musical piece without the permission of the appellant company who had the sole performing rights thereof, in the public stand and charged a fee for admission of the hearers, *held,* that although the profit, if any, made would only be applicable in relief of the rate-payers, nevertheless the local body was acting for its private profit within the meaning of the sub-section. Macg Copyright cases. (1917-23), p. 309, Foll. 1930 A.C. 377=99 L.J.P.C. 116=124 Ind. Cas. 894=32 P.L.R. 20=A.I.R. 1930 P.C. 314 (P.C.).

——Ss. 2, 13—Copyright—Infringement—Attempt to sell copyright.

The language of S. 2 of the Imperial Copyright Act is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempted sale and the aggrieved party can in such a case claim a declaration and if necessary an injunction under S. 13. The law in India is also the same, since under S. 2 of the Indian Copyright Act, the Imperial Copyright Act is applicable to this country except in so far as it has been modified by the Indian Act. A.I.R. 1945 All. 55=I.L.R. (1945) All. 20=1944 A.L.J. 496.

——S. 2 (2)—New book, a result of further studies and researches—Fresh incidents and details.

Every man can take what is useful from the original work, improve and give to the public the whole, comprising the original work, with the additions and improvements; and in such a case, there is no invasion of any right. But a copy, much less a servile copy, of a work cannot be allowed. Where, therefore, the new book is a work produced after further studies and researches by the author and represents a maturer art and a greater wealth of details which are the result of researches made by the author into works which had existed before as well as those which came into existence after the first work had been written and published, there is no infringement of copyright. A.I.R. 1934 Lah. 777=16 L. 103=37 P.L.R. 466=153 Ind. Cas. 1020.

——S. 2 (1), (iv)—Taking two poems from each work of a poet.

The proviso (iv) to S. 2 (1) of the Copyright Act was not intended to protect a person who brings out an unauthorised edition of a poet's poems by taking out two poems out of each of the many works published by him separately.

Quaere.—Whether when a number of poems are brought out in one volume, the whole volume is to be considered a literary work of the author or whether each separate poem in that volume is to be considered a separate literary work. A.I.R. 1933 All. 474=1933 A.L.J. 791=55 A. 564=148 Ind. Cas. 127.

——Ss. 3, 6—Order expunging entry under S. 6—The Press and Registration of Books Act (25 of 1867), S. 18—Catalogue of books kept at Bombay—Jurisdiction of the Calcutta High Court.

The High Court of Calcutta has jurisdiction to order the expunging of entries in the catalogue of books kept in Bombay under S. 18 of the Press and Registration of Books Act (20 of 1867). (1905) 1 C.L.J. 278=9 C.W.N. 591. On appeal *See* 10 C.W.N. 134=33 Cal. 571.

——S. 5 (2)—Assignment—Work incomplete when document assigning copyright is drawn up.

There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it, the document refers to a future work, copyright cannot be transferred by it. A.I.R. 1939 Lah. 433=41 P.L.R. 879=185 Ind. Cas. 65.

——S. 5 (2)—Assignment of copyright, registration of, if compulsory.

There is no provision in the English Copyright Act making the registration of a deed of assignment compulsory. If the Indian Legislature had intended to depart from the provisions of the English Act, one would have expected some provision as to compulsory registration being made by Act (3 of 1914), but there is no such provision in that Act. A.I.R. 1939 All. 305=1939 A.L.J. 71=1939 A.W.R. 121=I.L.R. (1939) All. 275=182 Ind. Cas. 84.

——S. 5 (2)—Assignment and publishing agreement—Author granting publishers exclusive licence to print, publish and sell his works in particular part of world but reserving to himself ownership of copyright of volume.

Where an author agrees to grant the publishers the sole and exclusive licence to print, publish and sell his works in book form in English language in certain parts of the world, reserving the entire copyright of the volume and all other rights, as his property, the agreement merely amounts to a publishing agreement and cannot be regarded as an assignment of copyright. A.I.R. 1938 Lah. 173=I.L.R. (1938) Lah. 84=40 P.L.R. 622=177 Ind. Cas. 341.

——S. 5—Assignment—Sale of first edition of novel—Whether amounts to assignment of interest in copyright until last copy is sold—Publication of novel in another form—Whether amounts to infringement of purchaser's rights.

The first defendant, an author, sold to the plaintiff the first edition of his novel which was to consist of 1,100 copies in a certain size. Thereafter he arrang-

ed with the second defendant to publish the same novel as part of a collection of his novels and it was so published. The plaintiff sued for an injunction restraining the defendants from publishing or selling the collection containing the novel:

Held, that the sale of the first edition of 1,100 copies amounted to an assignment of an interest in the copyright until the last copy was sold and that until then, the purchaser (plaintiff) had the exclusive right to the copyright, at any rate, as far as the right to publish the novel in any form was concerned and that as a right of property was sold, the second defendant was not entitled to infringe that right. A. I.R. 1935 Cal. 508=39 C.W.N. 224=62 C. 57==157 Ind. Cas. 790.

——S. 6—Presumption.

An irrebutable presumption arises that an alleged work is a work in which copyright subsists and that the plaintiff is the owner where the defendant does not dispute the existence of copyright. 81 Ind. Cas. 754=39 C.L.J. 134=A.I.R. 1924 Cal. 595.

——Ss. 6, 7—Remedies given by sections, if alternative—Owner of copyright getting damages under S. 6, whether entitled to damages under S. 7.

Though the remedies given by S. 6, Copyright Act, are not alternative to those given by S. 7, it must often happen that where an owner of copyright obtains damages under the former section, he can recover nothing further in respect of damages under the latter. Where the amount of damages awarded under S. 6 covers the price for permission to publish the work the author is not entitled to damages also under S. 7. A.I.R. 1938 Lah. 173=I.L.R. (1938) Lah. 84=40 P.L.R. 622=177 Ind. Cas. 341.

——Ss. 6, 14—Press and Registration of Books Act, S. 18—Jurisdiction of High Court—Persons aggrieved—Trial on affidavits.

The High Court of Calcutta as successor of the Supreme Court of Calcutta, has jurisdiction to deal with an application under S. 6, Indian Copyright Act, to have a name expunged from the catalogue of books kept at Bombay under the provisions of Act (25 of 1867); and a judge appointed by the Chief Justice under S. 14 of the Charter Act to take the work of the original side of the Court has jurisdiction to try the case. Where a person gets his name registered in a catalogue of books in fraud of the rights of the proprietor of a copyright, such proprietor is a person aggrieved within the meaning of S. 6 of Act (20 of 1847). When a case of this nature is clear upon the merits, the Court is justified in disposing of it upon affidavit evidence. An application under S. 6 of Act (20 of 1847), complaining of the infringment of a copyright is a smmary proceeding in respect of infringement within the meaning of S. 14 of the Act, and therefore the entry of the applicant's name in the book of registry at the office of the Home Department of India is necessary before such proceeding can be commenced. (1905) 2 C.L.J. 511=10 C.W.N. 134=33 C. 571, on appeal from 1 C.L.J. 278=9 C.W.N. 591.

——S. 7—Copyright owner, if can recover infringing copies unsold and actual price of copies sold.

Under the statutory provision of S. 7, all infringing copies of any work in which copyright subsists, or of any substantial part thereof, become the property of the owner of the copyright. He has, therefore, a right to recover the possession of the infringing copies unsold and the price of the copies sold. The infringing copies which have been sold being regarded as the property of the owner, he is entitled to the money for which they were actually sold. A.I.R. 1938 All. 266=1938 A.L.J. 390=I.L.R. (1938) All. 370=1938 A.W.R. 209=176 Ind. Cas. 118.

——Ss. 7, 12—Infringement at Lahore—Defendant a resident of Lahore—Demand for surrender at Aligarh—Jurisdiction of the Court at Aligarh to entertain suit.

A suit for infringement of copyright can be brought only in the Court within the local limits of whose jurisdiction the cause of action arises or the Court within whose limits the defendant resides. The defendant, a resident of Lahore, printed a book, and the plaintiff alleged he had a copyright. The plaintiff resided at Aligarh, where he instituted a suit for damages. *Held,* that the cause of action arose at Lahore and the Court at Aligarh had no jurisdiction to entertain the suit. Section 12 of the Indian Copyright Act, 1847, does not require a person in possession of pirated copies of a book to deliver them to the proprietor of the copyright at any place selected by the latter. The place of residence of the person making the demand is beside the question. *Semble.*—S. 12 of the Copyright Act applies as much to the innocent possessor of a pirated copy as to the printer and publisher in possession of a whole edition or pirated copies of a book and the same duty is cast upon both. (1909) 7 A.L.J. 923=33 A. 24=7 Ind. Cas. 101.

——S. 14 (Proviso)—Copyright in published work unless registered—Refusal of registration unlawfully.

In the case of a published book, there is no right to sue on account of piracy except where the copyright has been registered and subsists under Statutory provisions. The proviso to S. 14 of the Indian Act does not in substance differ from the English Act. The law both in England and India is the same. It is enough if there has been registry before suit, though after the infringement complained of. An unlawful refusal by the registrar to register cannot amount to registration. (1906) 29 M. 292.

——Ss. 19 and 2 (1)—Broadcast of musical work in its performance—Broadcasted performance at receiving end, if in public and unlicensed will be infringement of copyright at that place.

The acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance is a performance (public or private) of the work within the meaning of the Copyright Act. The sole right of the owner of the musical work is to perform it *in public,* and anyone may perform the work in private. The original performance in the studio may be and generally will be, a performance in private. In such a case, the broadcasted performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place. If there is merely a broadcast from the studio where the piece is performed in private, there is obviously no performance in public at all. A broadcast **per se** is not an acoustic representation of the work. A broadcast to all and sundry listeners will include hotels and other places of entertainment or refreshment which, if not forbidden, will perform the piece to a number of mem-

bers of the public: and such a performance will be a public performance within the meaning of the Copyright Act by the owners or occupiers of those places. Whether the studio performance is public or private if the persons who are responsible for that performance are also responsible for the broadcasting of the piece there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud speaker and thus to perform the piece in public. The question as to the position of the broadcaster in such a case so far as regards infringement, is answered by the language of S. 1 (2) of the Act. It is sufficient to show that they have "authorised" the performance in public of the works, and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. A.I.R. 1940 P.C. 111=6 B. R. 726=188 Ind. Cas. 237 (P.C.).

——Ss. 19, 2 (1)—Cinematograph record of musical work in which copyright exists, without consent of owner—Previous consent of owner of copyright, necessity of.

Section 19 of the English Copyright Act does not in terms provide that the copyright under S. 19, only exists where a record is made with the consent of the owner of the copyright in the original work, if such a person exists. But the section should be limited to a lawful making of a record. It cannot be supposed that the Legislature which had conferred by the earlier sections of the Act the right to restrain the reproduction of a literary, dramatic or musical work by mechanical means without the consent of the owner of the copyright, intended by S. 19, to confer copyright on an infringer of the owner's right. Therefore, the copyright conferred by S. 19 on the owner of the plate from which the record is made, pre-supposes that that plate came into existence lawfully. If that is so, then, where the original work is the subject-matter of copyright, it necessarily follows that the consent of the owner of that copyright must be obtained to the making of the plate, and if such consent must be obtained, obviously it would be lawful for the owner to refuse such consent and if the owner is entitled to refuse his consent, it is legitimate for him to give his consent subject to certain conditions, and those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under S. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate. A.I.R. 1937 Bom. 472=39 Bom.L.R. 654=I.L.R. (1937) Bom. 724=172 Ind. Cas. 408.

——S. 24—Prosecution for infringement of copyright—Burden of proof of subsisting copyright.

Where a person complaining of infringement of his copyright produces the book and the certificate of registration of the copyright, the burden of proving that the portion of the book which had been copied by the accused was also contained in a previous book published by the accused's father and that the complainant had, therefore, no subsisting copyright at the time of the infringement is on the defence.

Under S. 24 of the Copyright Act, 1914, a new copyright is substituted for the old copright provided a copyright was in existence when the Act of 1914, came into force. In the case of a prosecution for alleged infringement of copyright of a book published before 1914, the question to be considered is, therefore, not whether the copyright under Act of 1847, was subsisting at the time of infringement but whether it was subsisting when Act 3 of 1914, came into force. A.I.R. 1931 All. 353=32 Cr.L.J. 814 =1931 A.L.J. 304=131 Ind. Cas. 865.

——S. 24—(20 of 1947), S. 3—Evidence Act. S. 114.

Absence of provisions in the new Act to grant to owners of existing copyright, right at least as valuable as the rights given under the old Act, does not bar the admissibility of evidence under S. 114 of the Evidence Act to prove such right. 16 Cr.L.J. 673= 30 Ind. Cas. 721 (Mad.).

——S. 25—Certificate by Secretary of State—Effect—Whether extends Imperial Act to Dominion where it is not in force.

The certificate of the Secretary of State under S. 25 (2), Imperial (English) Coppright Act, cannot extend the Imperial Act to Canada. His certificate has merely the effect of bringing into operation the provision that Canada should for the purposes of the rights conferred by the Imperial Act (but for those purposes only) be treated as if it were a Dominion to which the Act extended. The Imperial Act conferred no rights in Canada and it was only for the purposes only) be treated as if it were a Dominion was to be treated as if the Act extended to it. This can only mean that although under S. 1, a Canadian author writing in Canada would not, when the imperial Act was passed, have any copyright under the Imperial Act, the effect of the certificate would be that such an author would become a person entitled to "the rights conferred" by the Imperial Act. That is to say Canadian authors are to have the same rights under the Imperial Act, within the area to which that Act extends, as they would have if the Act extended to Canada, but they have no rights in Canada under the Imperial Act. A.I.R. 1937 P.C. 326= 171 Ind. Cas. 406 (P.C.).

COPYRIGHT ACT (3 OF 1914).

——Law reports—Extracts by Reporter.

A plaintiff's copyright is infringed when the defendant reproduced not only the judgments but also parts of plaintiff's reports not forming parts of judgments, and extracts and facts collected by the plaintiff from the records of cases. The reporter has no copyright in the reports of judgment but he has the protection of the Law in selecting and reporting cases which he obtains by expenditure of time, labour and money. 18 C.W.N. 1078=26 Ind. Cas. 30.

——S. 3—Construction.

All laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. Under the guise of the copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge. A.I.R. 1934 Lah. 777=16 Lah. 103=37 P.L.R. 466=153 Ind. Cas. 1020.

——S. 6—Alternative relief—Prayers in the alternative—Damages whether can be awarded under both sections.

Where in a case of infringement of copyright the plaintiff asked for damages under S. 6 on the footing of the loss sustained and in the alternative under S. 7 for the delivery of the unsold infringing copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded

damages under S. 6 and also decreed delivery of the unsold copies, *held*, that the plaintiff could not claim damages under S. 7 also.

Quaere, whether the Court was justified in awarding damages under S. 6 and also ordering delivery of the unsold copies when the prayers had been cast in the alternative. 51 C.L.J. 243=34 C.W.N. 540 =126 Ind. Cas. 197.

——S. 7—"Copy", definition.

A copy has been defined as that which comes so near the original as to suggest the original to the mind of the spectator. It is always a question of fact that the Court will examine the degree of resemblance. (1905) 1 Ch. 519 and A.I.R. 1925 Cal. 220, Foll. 33 C.W.N. 172=112 Ind. Cas. 784=11 A.I.Cr.R. 484=30 Cr.L.J. 16=A.I.R. 1928 Cal. 359.

——S. 7—Copyright of pictures—Infringement of copyright of pictures—Test.

In deciding whether there is an infringement of copyright in pictures, the question is whether the offending pictures are copies of substantial portions of the copyright pictures. The figures may have been reduced in the offending pictures and slight modifications may have been introduced or the clothes and colours may have been different but it is sufficient if the main figures have an identical pose. 33 C.W.N. 172=112 Ind. Cas. 784=11 A.I.Cr.R. 484=30 Cr.L.J. 16=A.I.R. 1928 Cal. 359.

——S. 7—Infringement—Colourable imitation—Question of fact.

The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether a work is a colourable imitation of another is a question of fact. Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement. 51 C.L.J. 243=34 C.W.N. 540= 126 Ind. Cas. 197.

——S. 7—Re-trial—Cr. P. Code, S. 439—Accused acquitted by trial Court under wrong view of law—Retrial was ordered.

Where the offence alleged to have been committed by the accused was one under S. 7, Copyright Act (1914), and the trial Court took a wrong view of the law and acquitted accused,

Held, that in a case where the Court has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his position as author of this book, which will be pirated by another who will secure for himself the gains that ought legitimately to go to the petitioner, a retrial should be ordered. 105 Ind. Cas. 669=26 M.L.W. 489=1927 M.W.N. 772=39 M.L.T. 328=28 Cr. L.J. 957=A.I.R. 1927 Mad. 981=53 M.L.J. 529.

——S. 7—Where the criminal proceedings for infringement of copyright of books were started by an order from which it did not appear under which clause of S. 7 of the Copyright Act the accused was being tried and also the accused himself did not know it:

Held, that the accused did not have a fair trial. A.I.R. 1934 Pat. 522=1 B.R. 14=36 Cr.L.J. 30= 16 P.L.T. 138=152 Ind. Cas. 248.

——S. 7 (a)—The offence is complete as soon as the book infringing the copyright is printed and the consequence contemplated in S. 179, Cr. P. Code are not necessary for the completion of the offence. 28 P.R. 1916, Cr.=18 C.L.J. 353=38 Ind. Cas. 737.

——S. 7 (a)—Copyright—Translation.

Though copyright might not include the exclusive right of transaction, the author of a book, who made a translation of it is entitled to copyright in it as if it were an original work. 13 A.L.J. 636=16 C.L.J. 656=30 Ind. Cas. 480.

——Ss. 7, 8—Scope.

The complainant alleged in his complaint that certain pictures were entrusted to the accused for the preparation of blocks and printing them, that he clandestinely used the said blocks for printing more pictures and that he did not return the blocks:

Held, that complaint disclosed an offence under Ss. 7 and 8 and its dismissal, on the ground that the dispute is of a civil nature, could not be sustained. A.I.R. 1942 Mad. 124=1941 M.W.N. 871.

——S. 10—So far as the order under S. 10 (1) of the Copyright Act is concerned, there is a special appeal provided by Cl. (2). A.I.R. 1934 Pat. 522 =36 Cr.L.J. 30=16 P.L.T. 138=152 Ind. Cas. 248.

——S. 13—Jurisdiction of Madras City Civil Court.

The Act restricts jurisdiction to hear a suit or proceeding relating to copyright to the High Court or the District Court. Madras City Civil Court has no jurisdiction to entertain and try a suit for infringement of a copyright. A.I.R. 1937 Mad. 94=173 Ind. Cas. 452 (2).

——S. 14—Non-registration, effect.

Where the action in respect of infringement of copyright was commenced when the Act of 1914 was in force, the non-registration of the copyright does not effect dismissal of the action. 26 M.L.W. 489= 1927 M.W.N. 772=39 M.L.T. 328=28 Cr.L.J. 957=105 Ind. Cas. 669=A.I.R. 1927 Mad. 981= 53 M.L.J. 529.

CORONER.

See CR. P. CODE, S. 174.

CORONERS ACT (4 OF 1871).

——S. 19—Use of statement in trial.

A statement of a person on oath in the course of an inquest by the Coroner cannot be used against him during his trial for an offence suspected to have been committed by him in the same proceedings for which the inquest is held. 50 Bom. 56=28 Bom.L.R. 79= 27 Cr.L.J. 433=93 Ind. Cas. 225=A.I.R. 1926 Bom. 144.

A statement of an accused, a suspect, made at an inquest before a Coroner is clearly admissible, either as a confession under S. 26 or as a statement made by a party to a proceeding under Ss. 18 and 21 of the Evidence Act. 50 Bom. 111=28 Bom.L.R. 111 =27 Cr.L.J. 466=93 Ind. Cas. 690=A.I.R. 1926 Bom. 151.

——S. 20—A statement by an accused, a suspect, on oath before a Coroner in inquest proceedings after warning given to him by the Corner that he is not bound to make a statement is admissible in evidence against the accused at the trial of the accused. A. I.R. 1926 Bom. 151, Foll.; A.I.R. 1926 Bom. 144, Diss. from. 107 Ind. Cas. 272=30 Bom.L.R. 86 =9 A.I.Cr.R. 494=29 Cr.L.J. 234.

——S. 20—Use of voluntary statement.

There is no provision of law which renders a statement made voluntarily by an accused, a suspect, in inquest proceedings before a Coroner inadmissible

against the accused on his trial for the offence. 30 Bom.L.R. 84=10 A.I.Cr.R. 419=29 Cr.L.J. 651 =110 Ind. Cas. 107=A.I.R. 1928 Bom. 52.

——Ss. 24, 25, 26, 29—Prisoner's Act, Ss. 2, 11 —Cr. P. Code, Ss. 213, 214, 477, 488, 213, Sub-S. 2—Coroner's inquisition—Commitment to High Court Sessions—Jurisdiction of Presidency Magistrate to try or enquire—Acquittal or discharge by Magistrate—Bail—Jurisdiction of High Court.

The Coroner has powers to commit to the High Court, but a commitment by him does not oust the jurisdiction of the Presidency Magistrate either to enquire into the case and to commit, or to try the case himself when the offence is one triable by him. An inquisition drawn up by a Coroner has the effect of a valid commitment to the High Court in its ordinary original criminal jurisdiction when the High Court accepts the inquisition and the High Court officers drawn up charges in accordance with the same. Where during enquiry by the Magistrate bail has been allowed by him and subsequently the coroner after the verdict of the jury, refuses bail and commits the accused to jail, the only Court which has power to grant bail is the High Court. Any order of acquittal or discharge made by the Magistrate will be operative subject to the discretion of the High Court, when subsequently considering the Coroner's inquisition. (1903) 7 C. W.N. 889=31 Cal. 1.

——S. 25—Coroner's decision—Effect and value of —Admissibility in evidence. *See* EVIDENCE ACT, S. 42, 47 Bom.L.R. 997=A.I.R. 1946 Bom. 184.

——S. 29—Interference of High Court—Coroner cannot make reference to High Court—Interested party can apply to High Court for interference—High Court will interfere only in cases of technical defects.

Bombay High Court has, subject to the provisions of the Coroners Act, all the powers which the Court of King's Bench had with reference to the inquisitions when the High Court was constituted. There is no provision in the Act enabling the Coroner to make a reference to the High Court. But any party interested in or affected by the inquisition may apply to the High Court either amending or quashing the verdict of the jury. Under S. 29 the High Court can amend the inquisition only in cases of technical defects. High Court will not quasi an inquisition merely on the ground that the findings of the jury are against the evidence in the case. 51 Bom. 300= 29 Bom.L.R. 196=28 Cr.L.J. 385=100 Ind. Cas. 1041=7 A.I.Cr.R. 477=A.I.R. 1927 Bom. 163.

CORPORATE BODY OR BODY CORPORATE.

See (1) CORPORATIONS.
(2) COMPANY.
(3) STATUTORY BODIES.

CORPORATIONS.

Synopsis.

1. **Extent of powers.**
2. **Liability of.**
3. **Local Bodies and Municipalities.**
4. **Statutory bodies.**
5. **Social clubs.**

——Corporation. *See* (1) C. P. CODE, O. 29.
(2) COMPANIES ACT.
(3) LOCAL BODIES.
(4) LOCAL DISTRICT COUNCILS, MUNICIPALITIES AND SELF-GOVT. ACTS.

1. Extent of powers.

——Corporation Discretionary power—Exercise of—Interference by civil Court, when justified.

Where a Local Body has power to order the filling up of a tank for sanitary purposes, if there were materials before the Local Board to come to such a conclusion it is not for the civil Court to enquire into the sufficiency or otherwise of those materials or to interfere with the conclusion of the Board on the ground. The Court would itself have come to a different conclusion. But the Local Board cannot exercise this power in a capricious, wanton, arbitrary or unreasonable manner or in a manner which could not have been in the contemplation of the Legislature or for an ulterior or an indirect purpose. If it does so the civil Court has an undoubted jurisdiction to restrain the Local Body from such an abuse of its powers. 11 Mad. 341; 26 Cal. 811; 22 Bom. 230; 12 Bom. 490; 33 Bom. 334; 28 Mad. 520, Foll. (1920) M.W.N. 748=12 L.W. 585.

——Corporation—Member—Expulsion of, from Committee—Rules of natural justice.

The Committee before expelling a member must make a fair enquiry into the truth of the alleged facts, after giving him notice that his conduct is about to be enquired into and giving him an opportunity of defending himself. To determine whether a tribunal, exercising a punitive jurisdiction on an alleged charge of misconduct, whereby a man may be deprived of his property, has given a sound decision, the Court has to investigate whether they have observed the rules of natural justice and the particular statutory or other rules, if any prescribed for their guidance. The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with, to his disadvantage without having an opportunity of making his defence, and that the decision must be arrived at in good faith with a view to the common interest of the institution concerned. And a Court of Justice will not interfere with their decision if the above conditions are satisfied. 47 Cal. 623=31 C.L.J. 247= 56 Ind. Cas. 556.

——Corporation—Managing Committee—Quorum.

Quorum for a Managing Committee can be fixed by the body which elected the Managing Committee. The Managing Committee may fix it if empowered. 40 Mad. 941=5 L.W. 419=(1917) M.W.N. 389= 33 M.L.J. 348=38 Ind. Cas. 528.

——Corporation—Mode of transacting business —Circulation—Dismissal of officer—Enquiry.

The ordinary way of bodies in the position of a Corporation to transact business is, at a meeting and assuming that it is open to them to transact some of the business in circulation they have no such power as regards matters such as suspension or dismissal of free-hold officers under their superintendence as to which their authority must be strictly construed. 30 M.L.J. 619, Foll. Even if the matter of suspension or dismissal could properly have been dealt with in circulation that could only have been by

consent of all the members and any one of them would have had the right to insist on the question being dealt with, at a meeting. 41 Mad. 357=33 M. L.J. 660=(1917) M.W.N. 839=22 M.L.T. 454 =7 L.W. 85=43 Ind. Cas. 205.

——Corporation—Powers of the majority—Alteration of constitution.

A corporation can no doubt do what is incidental to the purpose of its business, but it cannot travel outside that purpose. If the matter related merely to the internal management without in any way affecting the fundamental basis of incorporation, the decision of the majority would bind the minority, however galling it may be; but in a matter affecting the very constitution of the association, even one dissentient is enough and the majority has then no power to alter the central conditions of the society, unless such a power is specially reserved and proved. 53 Mad. 737=59 M.L.J. 770=33 M.L.W. 113=129 Ind. Cas. 235=A.I.R. 1931 Mad. 12.

——Corporations — Powers — Natural limitations.

The general limitation as to all statutory powers of public functionaries is that the orders issued under it are reasonable and not inconsistent with the Act. 9 S.L.R. 126=33 Ind. Cas. 675.

——Corporation—Body Corporate—Acts of High Officials—Use of power.

High and responsible officers appointed by Government to carry out the purposes of an Act like Bombay City Municipal Act, are not expected to act perversely. 12 Bom.L.R. 274=5 Ind. Cas. 213.

2. Liability of.

——Corporation—Criminal liability.

Corporation is liable for acts requiring no *mens rea* punishable with fine and contemplated in the Articles of Corporation as being capable of being performed by the Corporation or intimately connected with its legal obligations. 83 Ind. Cas. 697=26 Cr.L.J. 137 =16 S.L.R. 169=A.I.R. 1921 Sind 142.

3. Local Bodies and Municipalities.

——Corporation—Local Board circulation of notice of resignation not issued at the Board meeting not valid.

A Local Board being a body corporate is other than and much more than the sum of its individual members.

Its business therefore can be transacted only at its duly constituted meetings. Giving notice of resignation under S. 16 is one such business of the Board and can be transacted at a meeting of the Board. By circulating the notice of the resignation to each member and upon its receipt by each member, the resignation does not take effect, although acceptance of resignation is not necessary under S. 16. The President of a Local Board issued notice of his resignation to each member and its receipt was acknowledged by them. The Government also by its order expressed its view that the resignation took effect.

Held, that the order of Government was not conclusive but expressed only an opinion of the Government and it did not prevent a Court of law from coming to a contrary conclusion. There was no proper notice of resignation and therefore resignation did not take effect. 113 Ind. Cas. 462=28 M. L.W. 695=2 Mad. Cr.C. 49=30 Cr.L.J. 164=52 Mad. 446=12 A.I.Cr.R. 103=A.I.R. 1929 Mad. 8=56 M.L.J. 157.

——Corporation—Local Authority—Powers of.

The power given to a local authority to do a certain act cannot be questioned in a civil Court on the ground of its having been exercised through malice. 48 All. 560=24 A.L.J. 682=95 Ind. Cas. 1030= A.I.R. 1926 All. 538.

——Corporation—Formation of Taluk Boards explained.

It is not the appointment of members that constitutes the Taluk Board, its constitution is created by the Act and the notifications. The eventuality of all the seats not being filled at some time or another is contemplated by the Act. The act of a Taluk Board would not be illegal, even if a vacancy, occurring after its formation, remained unfilled. Every seat need not be filled even at the first constitution of the board in order to make it a legally constituted body. A corporation may exist by common law, by Royal Charter by authority of Parliament, by prescription, or by custom, and not otherwise. "A corporation is not invalid merely because at the moment of its creation it does not in fact exist, so long as it is capable of coming into existence". "Where the corporation consists of a head and members, they may be appointed after the foundation". 70 Ind. Cas. 987=17 M.L.W. 656=1923 M.W.N. 78=32 M.L.T. 114=A.I.R. 1923 Mad. 360=44 M.L.J. 161.

——Corporation—Municipal body—Use of discretion—Capricious Act—Remedy.

A body like Municipal Committee must take extreme care not to abuse their powers; the person injured by such abuse has a cause of action when injury results and the Municipal Committee must make compensation for further unlawful proceedings. 6 N.L.R. 53=6 Ind. Cas. 431.

——Corporation — Municipality—Ownership—Streets and drains—Municipal towns.

Streets and drains are vested in Municipalities for purposes for which they are constituted. Their right is no easement but a special kind of property previously unknown to the law and created by statute. The Municipalities cannot give up the right of the public or affect their rights of way over the streets but this does not affect adverse possession by a stranger. The construction of a pial over a drain is an adverse act and 12 years' enjoyment extinguishes the right of the Municipality on the space of the pool and 60 years' enjoyment the right of the Government. 38 Mad. 6=12 M.L.T. 405=23 M.L.J. 479=(1912) M.W.N. 1080=17 Ind. Cas. 158.

——Corporation—Municipality—Powers cannot stop public streets.

A strong presumption arises that the legislature did not intend, by the general powers it gives to the Municipality that it should discontinue or stop up public streets, that they should use that power for a purpose which contravenes the intention shown by S. 122. It rests upon any one who supports the action of the Municipality to show that it had statutory authority to divert a portion of a public street for such a purpose. A Municipality has no ower to authorize the use of a part of the street for the purpose of keeping logs of wood for sale. 50 Bom. 674=28 Bom.L.R. 1033=27 Cr.L.J. 1160=97 Ind. Cas. 744=A.I.R. 1926 Bom. 535.

——Corporation—Auction sale held on behalf of Municipality and confirmed by President in a meeting becomes a contract.

The word "contract" as used in Ss. 30 and 31 of

the C. P. Municipal Act must be taken in its ordinary meaning. Where a Municipal Committee sold certain grass by auction to the plaintiff as the highest bidder and the sale was confirmed in a resolution of the municipality and the memorandum of auction was signed by plaintiff (highest bidder) and the Vice-President and Secretary of the Municipality.

Held, that the contract as contemplated by Ss. 30 and 31 was complete. 78 Ind. Cas. 1052=A.I.R. 1924 Nag. 227.

4. Statutory Bodies.

——Corporations—Powers of.

The powers of statutory person are regulated by statute and the Court should regard that, as impliedly prohibited, which is not expressly or by necessary implication conferred on him. (1920) Pat. 187=1 P.L.T. 304=5 P.L.J. 347=57 Ind. Cas. 583.

——Corporation—Statutory body.

Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. 75 Ind. Cas. 506=37 C.L.J. 589=A.I.R. 1923 Cal. 675.

——Corporate act.

Election of a Chairman and Vice-Chairman of a School Board is a corporate act. 107 Ind. Cas. 446=23 S.L.R. 128=A.I.R. 1928 Sind 126.

——Corporation—Powers given to, under statute—Construction of.

The powers of a statutory Corporation are to be construed very strictly and to this extent that what is not expressly permitted to be done by it, is forbidden. 11 Ind. Cas. 665, Foll. 36 Mad. 113=21 M. L.J. 790=(1911) 2 M.W.N. 95=10 M.L.T. 168=11 Ind. Cas. 669.

——Corporation—Statutory body—Abuse of powers—Remedy in civil Court.

Where a statutory body invested with powers of land acquisition for a city improvement scheme, proposes an acquisition solely with a view to claim exemption fee from the owners, its action is *ultra vires* and the owners have a right to sue for redress in the civil Court. 47 Cal. 500=32 C.L.J. 65=24 C. W.N. 881=11 L.W. 566=38 M.L.J. 511=18 A. L.J. 521=22 Bom.L.R. 586=2 U.P.L.R. (P.C.) 98=56 Ind. Cas. 32 (P.C.).

[On appeal from 36 Ind. Cas. 749.]

——Corporation—Bye-law—Validity of—Jurisdiction of civil Court.

A Court has no jurisdiction to interfere with the bye-law of Municipal bodies unless they are either *ultra vires* as exceeding their statutory powers or invalid as being repugnant to the general principles of law. Courts should support them if possible by a benevolent interpretation. Bye-laws of public bodies working for profits are on a different footing from those of the public representative bodies acting under statutory powers. The former may be disallowed if unreasonable. 13 Bur.L.T. 107=59 Ind. Cas. 545.

5. Social Clubs.

——Social Club—Social Club not registered as a corporate body—Debts incurred by such club—Only members who actually contracted or authorised the contracts are liable—Liability is personal.

A club is merely a term of convenience. It is a short method of designating a certain body of persons who meet together for social or recreative purpose. But the club is not a corporate body and has no existence in the eye of the law and it is so far incapable of contracting or entering into any legal relations with other persons and bodies. Merchants who deal with such a club which is not registered as a body politic do so at their own risk and the only persons they can hold liable for their debts are such officials of the club as had actually contracted with them and possibly such directing bodies or such members of the club as may be shown to have authorised or approved of the contracts, Creditors cannot by any device make those secretaries or managers who have not entered into contracts with them or ratified such contracts, liable under the contracts and they cannot by any device, *e.g.*, by any application under O. 1, R. 8, turn what is not a corporate body into a corporate body and so render members of clubs who are not personally liable for such contracts so liable. 88 Ind. Cas. 784=18 S.L.R. 93=A.I.R. 1925 Sind 244.

——Community.

A person can make himself liable to a community by agreeing to pay a certain sum of money to it. An indefinite body like the Vysia community of Mogarala can own property. Case-law discussed. 72 Ind. Cas. 95=1923 M.W.N. 237=A.I.R. 1923 Mad. 434=44 M.L.J. 240.

——Corroboration. *See* (1) CR. P. CODE, S. 164.

(2) CRIMINAL TRIAL.

(3) EVIDENCE ACT, SS. 27, 30, 114, ILL. (B) AND 133.

CO-SHARERS.

Synopsis.

1. **Abadi.** (See also LANDLORD AND TENANT—ABADI).
2. **Accounting.** (See also ACCOUNTING AND CO-SHARERS—LIABILITY TO ACCOUNT).
3. **Action against trespassers.** (See also CO-SHARERS—TRESPASSERS).
4. **Adverse possession.** (See also UNDER ADVERSE POSSESSION, LANDLORD AND TENANT AND LIMITATION ACT).
5. **Buildings on common land.** (See CO-SHARERS—RULES AND LIABILITIES).
6. **Constitution and compensation.** (See CO-SHARERS—RIGHTS AND LIABILITIES).
7. **Dispossession.**
8. **Exclusive possession.**
9. **Fraud.**
10. **Injunction.**
11. **Joint possession.**
12. **Lambardar.**
13. **Lease.**
14. **Liability to account.** (See also CO-SHARERS—ACCOUNTING).
15. **Mutual relations.**
16. **Notice.**
17. **Ouster.** (See also CO-SHARERS—ADVERSE POSSESSION).
18. **Partitiin.**
19. **Party wall.** (See also EASEMENTS).
20. **Pre-emption.** (See under PRE-EMPTION).

21. Rights and Liabilities. (See also CO-SHARERS—MUTUAL RELATIONS).
22. Shamilat land.
23. Sir land.
24. Suits by.
25. Suits for possession.
26. Suits for Rents and Profits.
27. Trespassers—Rights against.
28. Who are co-sharers.
29. Miscellaneous.

1. Abadi.

——Abadi—Nature of right.

Co-sharer parting with agricultural land and retaining only proprietary share in village does not forfeit his right to house site in *abadi,* however, long he may have been there and however palatial a residence he may have set upon it. A.I.R. 1939 Nag. 287=1939 N.L.J. 429=189 Ind. Cas. 273.

——Abadi—Persons recorded as co-sharers in village—Presumption.

There is no necessary legal presumption that at any moment, the co-sharers in a village which has been included within municipal limits are necessarily co-sharers in the *abadi* plot or plots merely for the reason that they are recorded as co-sharers in the village. A.I.R. 1934 All. 426=3 A.W.R. 326=149 Ind. Cas. 976 (2).

——Abadi—Nature of right.

Co-sharer long in possession of land in abadi can construct chabutara over it or build a house—Other co-sharers cannot interfere. 11 Lah.L.J. 481=A.I.R. 1930 Lah. 201=125 Ind. Cas. 57.

——Abadi—Nature and extent of right.

If some co-owners of the abadi under some arrangement remain in separate possession of a certain site, this does not give the other co-owners a right to sue. But if the co-owners in possession construct a building on the site, the other co-owners may sue for demolition of the building and for joint possession, provided that they do so within a reasonable time. 25 A.L.J. 983=106 Ind. Cas. 656=A.I.R. 1928 All. 59.

——Abadi—In the house purchased by one co-proprietor of an abadi from a stranger, the other co-proprietor has no right whatever.

A co-proprietor can occupy a portion of the abadi and build a house on it. If instead of building it himself he has purchased from a non-proprietor the superstructure built by him, his position is not made worse in any way. Therefore in a suit by a co-proprietor for possession of a house in the abadi purchased by another co-proprietor a decree directing to remove the materials of the house from the site cannot be passed. 29 P.L.R. 292=108 Ind. Cas. 183=A.I.R. 1928 Lah. 530.

——Abadi—Nature and extent of right.

A co-sharer in an abadi site cannot grant a licence to a third person to build on the site without the consent of the other co-sharers. 103 Ind. Cas. 43=A.I.R. 1927 All. 633.

——Abadi—Right.

A co-sharer cannot appropriate a vacant site in abadi to the prejudice of the other co-sharers. 1 Lah. 249=57 Ind. Cas. 207.

——Abadi — Shamilat—Encroachment—Special damage—Suit.

One of the village proprietors sued certain others for the removal of certain buildings which had lessened the area of the village *sath* or narrowed the entrance to it. The trespassers had not taken more than the share which would fall to them on partition. *Held,* the plaintiff cannot succeed in his action without proof of special damage. 114 P.R. 1918=176 P.W.R. 1918=129 P.L.R. 1918=48 Ind. Cas. 418.

——Abadi—Right to—Vests in all proprietors of village—Loss of right to share of Kuri Kamini.

Nothing that is not specifically mentioned in the wajib-ul-arz can be allowed to derogate from the common right of all the proprietors of a village to the *abadi.* The fact that a proprietor has lost the right to a share in the *Kuri Kamini* does not deprive him of the right to control the disposal of the *abadi* land. 19 P.W.R. 1918=43 Ind. Cas. 456.

2. Accounting.

——Co-sharer — Accounting — Hill—Quarrying to the extent of one's share—No liability to account.

A co-owner of joint property is not liable to account to the other co-owner for his use of the property in the ordinary modes of user of such property, so long as his use does not amount to ouster of his co-tenant or to the destruction, partial or entire, of the joint property. Quarrying is one of the legitimate uses of a hill, and a co-owner is not liable to account to the other owner for the stones quarried from the common hill when the portion quarried does not exceed his share of the joint property.

Per *Mookerjee, J.*—(1) A tenant in common cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenants; (2) When a tenant in possession has prevented his co-tenants from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and thereby made a profit, he must account either for the fair rental value of the profits or be liable for mesne profits; for one tenant is bound to account to another only as his bailiff under contract, express or implied. (3) Where one tenant-in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy. (1905) 1 C.L.J. 437=32 C. 837.

[As to costs in such cases. *See* 5 C.L.J. 642.]

——Co-sharers — Co-tenancy — Accounts — Expenses incurred in respect of a litigation for the purpose of propounding a will of the deceased.

A co-heir who has not authorized a litigation is not bound to bear his proportion of the expenses incurred in the litigation even though they were incurred for the preservation of the common property (as in this case) for the purpose of propounding a will of the deceased; and consequently, a mortgage executed for securing a loan incurred for such costs will not bind the said co-heir either on the basis of an implied contract or on grounds of equity. (1907) 17 M.L.J. 439=2 M.L.T. 468=30 Mad. 526.

——Co-sharer—Agreement to pay rent separately—Suit for whole rent brought by co-sharer, making others defendants — Maintainability—Bengal

Tenancy Act, Ss. 65, 159, 188—Contract, rescission of—Joint contractors—Avoidance of breach—Failure of consideration.

Where a whole body of co-sharer landlords and their tenants have come to an arrangement by which rent is made payable to the co-sharers separately in proportion to their shares in the estate, it is not competent for one of the co-sharers, so long as such arrangement subsists, to bring a suit for the full rents of the tenure by making his co-sharers parties defendants in the suit. If all the sharers agree, they might bring a joint suit for the entire rent. (1904) 9 C.W.N. 34.

——Co-sharer—Any one co-sharer without joining others, is entitled to complain of the action of another co-sharer which is prejudicial to his joint enjoyment without proving special damage or inconvenience. 119 Ind. Cas. 434=A.I.R. 1929 All. 393.

——Co-sharer — Accounting — Limitation—Cutting of wood on common land by one co-tenant—Misappropriation—Limitation Act, Art. 49.

The cutting of wood standing on common land by one co-tenant cannot by itself constitute a wrong, even though its appropriation by one alone would; and a suit by the other tenant or persons claiming through him will be governed by Art. 49. (1904) 28 M. 208.

3. Action against trespassers.

——Co-owners—Action against trespasser—One co-sharer can sue trespasser for possession of entire property.

Where property is held in co-parcenary, or in co-ownership, it is open to any one of the co-sharers to maintain a suit for possession of the entire property against a trespasser. The reason for the rule is that in the absence of a partition, the right of each co-owner extends to the whole property jointly with the other co-owners and that the attempt to re-claim the property is for the obvious advantage of all the co-sharers. 124 Ind. Cas. 558=A.I.R. 1930 All. 422.

——Co sharer—One of several co-sharers to eject a trespasser.

One of the co-owners is competent to sue a trespasser for ejectment and it is not necessary for the other co-owners to be parties to the action. It is, however, sometimes desirable that the other co-owners should be made parties to any final decree that may be passed. 119 Ind. Cas. 177=31 Bom.L.R. 448=A.I.R. 1929 Bom. 244.

See also A.I.R. 1930 Cal. 113=57 Cal. 170=123 Ind. Cas. 250=50 C.L.J. 208.

Also 113 Ind. Cas. 886 and A.I.R. 1927 Lah. 663=103 Ind. Cas. 767.

——A co-sharer can sue a trespasser without joining his other co-sharers in the suit. 116 Ind. Cas. 720=11 Lah.L.J. 202.

See also A.I.R. 1927 Nag. 390=10 N.L.J. 100 =102 Ind. Cas. 195.

——One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. 90 Ind. Cas. 804=A.I.R. 1926 Oudh 144.

——Co-sharer—Right to possession against trespasser.

Some of the owners of shamilat can sue for possession of a vacant site from a trespasser on behalf of all properties. 109 Ind. Cas. 694=A.I.R. 1929 Lah. 92.

——Suit by one co-owner against trespasser—Right of.

One co-owner can sue to eject a trespasser and the suit is not had for non-joinder provided the plaintiff does not deny the other co-owner's right. 75 Ind. Cas. 112=A.I.R. 1925 Mad. 63.

——Right of one co-owner to sue trespasser—Principle.

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable, where the defendant is not a tenant but a trespasser. 79 Ind. Cas. 182=A.I.R. 1923 Lah. 647.

——Suit by one co-sharer to eject trespasser from entire property—Effect of—Does not establish ouster or denial of other co-sharer's title.

One co-sharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere fact that a co-sharer brings such a suit can therefore be no evidence that he denied the title of the other co-sharers. It is a question arising out of his exclusive possession, but can be no evidence of a denial of the title of the other co-sharers. The suit brought by one co-sharer would in the eyes of law be considered for the benefit of the other co-sharers and the latter would be entitled to take advantage of such proceedings. 115 Ind. Cas. 440=6 O.W.N. 536=A.I.R. 1929 Oudh 337.

——Suit by one co-sharer against trespasser—Nature of decree.

One or several of many co-sharers can sue to prevent invasion of their common property by a mere trespasser and in such a case decree for sole possession, or for possession on behalf of other co-sharers should not generally be given. The proper form of decree should be for the restoration of the property to its condition prior to the trespasser's invasion and so preserve the invaded rights which the plaintiff and other co-sharers possessed in the property. 105 P.R. 1901, Foll. 108 Ind. Cas. 269 (Lah.).

——Common land—Right of one to eject trespasser—Decree for joint possession—Right to.

It is true that one of several co-sharers cannot, by himself, get against a trespasser a decree for ejectment from the whole of the common land, but he can of course get a decree for joint possession to the extent of his share, though he will have to work out his further rights by means of a suit for partition. 49 C.L.J. 83, foll. 31 P.L.T. 84.

——Suit by one co-owner for mesne profits against trespasser.

One co-owner can maintain a suit for mesne profits against the trespasser just as he could maintain an action in ejectment against him, without joining the other co-owner as a party to the action. 39 Mad. 501 and 13 C.P.L.R. 130, Foll. 97 Ind. Cas. 1028=A.I.R. 1927 Nag. 9.

——Co-sharers — Dispute between—Assertion of sole title—Nature of suit.

No individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers. If some co-sharers assert individual rights

to a piece of *abadi* land which they do not possess, they are liable to eviction at the instance of the other co-sharers, for an act of trespass could in no way be remedied at partition. 64 Ind. Cas. 2 (Lah.).

——Co-sharer—Criminal trespass by.

A co-owner is not justified in taking the law into his own hands and recovering joint possession; and if he does so be becomes liable to a criminal trespass. (1908) 10 Bom.L.R. 285.

4. Adverse possession.

See also TITLE—

(1) ADVERSE POSSESSION — CO-OWNERS.
(2) ADVERSE POSSESSION — LANDLORD AND TENANT.
(3) LANDLORD AND TENANT.
(4) LIMITATION ACT, ARTS. 142 AND 144.

(a) Burden of proof.
(b) Essentials of.
(c) Evidence of.
(d) Limitation.
(e) Nature of.
(f) Ouster.
(g) Starting point.
(h) Miscellaneous.

(a) Burden of proof.

——Co-sharer — Adverse possession — Burden of proof.

Possession of one co-owner is in law the possession all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession, and where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co-owner.

As against the person who has proved his title, the defendant who pleads adverse possession cannot succeed by merely proving that he has done acts of possession during the 12 years in controversy. He must further prove possession to be adequate in continuity, in publicity, and in extent, before he can plead adverse possession to the competitor. The *onus* is on the adverse possession to prove these. (1912) A.C. 230; A.I.R. 1922 P.C. 181; 37 All. 203, Foll. 117 Ind. Cas. 803=11 Lah. 29=A.I.R. 1929 Lah. 549.

——Co-sharer—Adverse possession — Onus of proof is on party asserting.

Where the evidence establishes that one of the parties was not only a joint owner, but that he undertook to look after the share of the other party at the express request, the burden lies upon the former to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. 67 Ind. Cas. 31=34 C.L.J. 432=26 C.W.N. 65=A.I.R. 1921 Cal. 647.

——Co-sharer—Possession of—Presumption as to.

Possession is never adverse if it can be traced to a lawful title. Possession of one co-sharer is presumed to be on behalf of other co-sharers, but if there is a denial of title of a co-sharer and there is an ouster, he must enforce his rights within limitation. A.I.R. 1946 Nag. 235=I.L.R. (1946) Nag. 312=1946 N.L.J. 381=227 Ind. Cas. 499.

——Absentee co-sharer—Possession of one co-sharer is possession of all.

The possession of one co-sharer must be deemed to be the possession of all other co-sharers, and in order to defeat the title of absentee co-sharers, it is for the co-sharers in possession to prove that by some overt act, he converted his possession into adverse possession to the knowledge of the other co-sharers. A.I.R. 1937 Lah. 578=I.L.R. (1937) Lah. 618 =40 P.L.R. 427=174 Ind. Cas. 942.

——Co-sharer—Ouster or exclusion—Burden of proof.

There can be no adverse possession by one co-sharer as against others until there is ouster or exclusion. Even the possession of a co-sharer can be adverse to the other co-sharer after there is an assertion of a hostile title by one co-sharer against the other and to the knowledge of the latter. The burden of proving adverse possession or ouster is undoubtedly on the party, who claims to defeat the title of the plaintiff by adverse possession. A.I.R. 1934 Cal. 644=61 Cal. 377=151 Ind. Cas. 464.

——Adverse possession—Nature of proof—Overt act.

Possession of one co-sharer is possession of the others and it is for the co-sharer in possession in order to defeat the title of the absentee co-sharer or his descendants to prove that by some overt act, he converted his possession into an adverse possession to the other co-sharer, an overt act of which such co-sharer had knowledge. A.I.R. 1934 Lah. 456=15 L. 907=37 P.L.R. 195=154 Ind. Cas. 983.

(b) Essentials of.

(i) Exclusive possession.
(ii) Ouster.
(iii) Transfer.

(i) Exclusive possession.

——Co-sharer — Adverse possession—What constitutes.

Where the land is *shamilat*, jointly owned by all the village proprietors, exclusive possession by one or two co-sharers, howsoever long, cannot confer any title on them. To acquire title by prescription, they must prove some overt act or acts amounting to the ouster of the rest of the proprietary body for a period of more than 12 years. A.I.R. 1941 Lah. 144=43 P.L.R. 41=195 Ind. Cas. 244.

——Co owner in sole possession of land for about forty years enjoying all its benefits and alone paying taxes —Presumption.

In order to establish adverse possession by one tenant-in-common against his co-tenants, there must be exclusion or ouster and the possession subsequent to that exclusion or ouster must be for the statutory period. What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to

all the circumstances, and a most important element is the length of time.

Where a co-owner is in sole possession of land for a period of over thirty years and approaching forty years and during that time, he enjoyed all the benefits arising from this property and he alone paid the taxes which were due on this land, the presumption arising from such long possession is the presumption that his possession was possession as sole owner and adverse to the other co-owners. A.I.R. 1940 Rang. 141 =189 Ind. Cas. 455.

——Ordinarily sole possession for thirty years by one co-sharer is not adverse to others.

Sole possession by one of two or more joint owners is not adverse to the others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right though where parties have not put forward a claim to their legal share for a period of some thirty years, it very often, if not usually, is the fact that they have all along intended to allow one co-sharer to take the whole. 71 Ind. Cas. 653=A.I.R. 1923 All. 447.

——Adverse possession—What is.

To constitute a title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent, to show that it is possession adverse to the competitor. A.I.R. 1939 Sind 315=I.L.R. (1939) Kar. 597=185 Ind. Cas. 11.

——Adverse possession — Mere exclusive possession is not sufficient.

In order to destroy a co-sharer's title, it must not only be shown that the other co-sharer was in exclusive possession of the joint property, but that there was a denial of title and an ouster of the former co-sharer or something equivalent to it. The mere fact that in a village one co-sharer is in exclusive possession of a joint property would not amount to a denial of title or an ouster so as to destroy his title. A.I.R. 1937 All. 124=1936 A.W.R. 1014=167 Ind. Cas. 371.

——Co-sharers — Exclusion from participation—Mere non-participation in or refusal to live on joint property for twelve years does not extinguish right to share.

It is only ouster of a tenant-in-common for twelve years that can extinguish his right. Mere non-participation in or refusal to live on joint property for the period does not extinguish it. (1901) 24 M. 441.

——Exclusive possession for 12 years by one of claimant-co-sharers from order under S. 145, Cr. P. Code, in his favour.

Exclusive possession for a period of 12 years by one of the co-sharers from the date of an order under S. 145, Criminal P. Code, declaring him to be in possession, followed by ouster of another co-sharer against whom the order was passed, amounts to adverse possession and the ouster coupled with the denial of the other's right to possession, extinguishes his right to property in dispute. A.I.R. 1937 All. 300=1937 A.W.R. 235=1937 A.L.J. 225=169 Ind. Cas. 125.

——Decree rejecting claim but directing other co-sharers could claim partition on payment of expenses incurred by plaintiff—No time limit fixed for payment—No overt act.

The plaintiff's father asserted that he had become exclusive owner by reason of the prior relinquishment by defendants of the rights in his favour and his having filled up the pond at his own expense; the alleged relinquishment was held to be unproved and it was ruled judicially that the fact that the plaintiff alone had spent money on filling the pond did not legally confer any exclusive title on him; it merely entitled him to contribution from the co-sharers. It was accordingly declared that his possession was that of a co-sharer, and that the other co-sharers could claim partition on payment of the proportionate share of the amount which was found to have been spent by him in filling up the pond. In the decree, no time limit was fixed for payment of money and there was no hostile overt act openly denying the title of the other co-sharers before the decree:

Held, his exclusive possession was not adverse and that his exclusive title was not established. A.I.R. 1937 Lha. 65=39 P.L.R. 331=171 Ind. Cas. 757.

——The exclusive possession of one co-sharer even though coupled with the non-payment of profits, cannot amount to a clear adverse possession unless there has been an ouster of the other co-parceners to their knowledge and openly.

In the absence of a clear demand and a clear refusal, the possession of one co-sharer cannot become adverse as against the other. 102 Ind. Cas. 66= 49 All. 763=25 A.L.J. 413=A.I.R. 1927 All. 454.

——In the absence of any partition, or of a hostile assertion of title to the knowledge of the other co-parceners or co-owners, the exclusive possession of one co-owner over a portion of a common property cannot set time running against others so as to give rise to a title by prescription in favour of the person in possession. A.I.R. 1927 Mad. 111, Rel. on. 102 Ind. Cas. 161=A.I.R. 1927 Nag. 395.

——Mere non-occupation is insufficient—Open assertion of hostile title is necessary.

The fact that one co-sharer did not live in the house or receive any profits in respect of his share in the same for more than 12 years cannot have the effect of destroying his admitted title. There must be an ouster or equivalent to an ouster. A.I.R. 1924 Oudh 266, Foll. 98 Ind. Cas. 80=3 O.W.N. 796=13 O.L.J. 824=A.I.R. 1927 Oudh 6.

(ii) Ouster.

——Possession by co-sharers—When adverse—Ouster—What amounts to.

If a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers. He must be deemed to be in possession on behalf of the other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other co-sharers. The ouster takes place when the title of the other co-sharers is denied. A.I.R. 1933 Oudh 560=10 O.W.N. 1326 =18 R.D. 21=149 Ind. Cas. 1172.

See also A.I.R. 1932 All. 666=54 All. 742=139 Ind. Cas. 176.

——**Co-sharers—Each attempting to exercise possession over whole joint property.**

Where two co-sharers of a joint property have been exercising or attempting to exercise possession over the whole property, without either of them ousting the other or either asserting the hostile title with notice thereof, either must be deemed to have been in actual possession to the extent of his share only. A.I.R. 1932 Cal. 634=36 C.W.N. 583=141 Ind. Cas. 320.

——Mere payment of revenue or entry of name in revenue papers is not sufficient to constitute adverse possession—Overt claim to exclusive ownership by himself and the repudiation of the rights of other co-owners for more than 12 years must be proved. 10 L.B.R. 45, Foll. 104 Ind. Cas. 383=6 Bur.L.J. 93 =A.I.R. 1928 Rang. 95.

——The communication by a post-card denying a co-sharer's right to his share sent by one co-sharer in reply to the other's post-card asking him to give him by partition his share in the property cannot make his possession adverse when he was already in possession as a co-sharer. 120 Ind. Cas. 273=30 P. L.R. 280=A.I.R. 1929 Lah. 519.

——**Ouster—Presumption as to.**

The sole possession by one tenant-in-common continuously for a long period without any claim or demand on the part of the other co-tenants is evidence from which an actual ouster might be presumed, but such exclusive possession by one co-sharer cannot amount to adverse possession unless the ouster has been open and to the knowledge of the other co-parceners. A.I.R. 1933 Nag. 340=29 N.L.R. 350 =149 Ind. Cas. 622.

See also 114 Ind. Cas. 497=A.I.R. 1930 Oudh 200.

——**Open assertion of hostile title is necessary.**

Where parties are co-sharers and no partition has taken place between them mere non-participation of profits by one and occupation and enjoyment of the joint property by the others is not *per se* adverse possession. There must be a disclaimer of other's right by an open assertion of a hostile title on the part of the other co-owner setting up adverse possession and such disclaimer to the others must be known to others. 94 Ind. Cas. 855 (Oudh).

——**Ouster of other tenant in common may be presumed from sole possession of one tenant for long time.**

To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. (29 Bom. 300, Rel. on.) Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. It does not follow, therefore, that as soon as a receipt of all the profits by one tenant-in-common commences, time is running adversely against the other tenant. 64 Ind. Cas. 552=23 Bom.L.R. 967=A.I.R. 1921 Bom. 77.

——Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. 31 Cal. 970 and 35 Cal. 961, Foll. 80 Ind. Cas. 118=16 S.L.R. 25=A.I.R. 1921 Sind. 177.

(iii) Transfer.

——**Transferee or heir of co-sharer—Rights of.**

In order to establish adverse possession as between co-sharers there must be an evidence of an open assertion of a hostile title by one of them to the knowledge of the others. Mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. The same principle applies to the case of a transferee from a co-owner. The heir of a co-owner also does not stand on a better footing than a transferee or assignee. 1946 P. W.N. 37=25 Pat. 412=229 Ind. Cas. 482=A.I. R. 1947 Pat. 99.

——**Adverse possession—Overt Act—Sale of joint property.**

The mere fact that a co-sharer sells a portion of the joint property would not amount to adverse possession; it would have to be shown that the title asserted was inconsistent with that of a co-sharer and it was brought to the knowledge of the co-sharer. A.I.R. 1935 Cal. 144=38 C.W.N. 1095=154 Ind. Cas. 760.

——**Sale of land belonging to co-sharers—Sale invalid as to some co-sharers.**

Where a person purchased properties belonging to some co-sharers and obtained possession of the same but it was found that the sale was invalid in respect of the shares of some of the co-sharers:

Held, that the possession of the purchaser was not adverse to the co-sharers whose title he had not acquired. A.I.R. 1935 Mad. 1059=42 M.L.W. 798= 1935 M.W.N. 1297=159 Ind. Cas. 1021.

[Overruled in A.I.R. 1942 Mad. 622=203 Ind. Cas. 195 (F.B.).]

——**One co-owner leasing share to other co-owner —Termination of lease—No possession.**

On the determination of a lease of a share of property, made by one co-owner to the other, former relations of co-owners are restored, and there can be no adverse possession even if the lessee remains in possession, unless there has been an adverse assertion of title. A.I.R. 1934 Bom. 219=36 Bom.L. R. 339=151 Ind. Cas. 1056.

——**Tenants under different leases by different co-owners—Adverse possession of one for 12 years to others' knowledge—Partition suit by latter—Whether can be resisted by former.**

While a co-owner has access to and control over every part of the property, and so may be said to have possession in the sense of detention of the whole, he exercises that control not on behalf of himself alone but partly on behalf of himself in respect of his own share and partly as representative of his co-owner. A co-owner in sole possession for a length of time can, therefore, maintain his exclusive possession even against his other co-owners till partition.

Persons deriving the interest of tenants in lands under superior holders who are co-owners of a *zamindari* in respect of different shares leased out to them separately are not co-owners. The fact that they were holders of separate and distinct interests as tenants in respect of two different shares of a joint property, prevents them from

claiming that they stand in the relation of co-owners. They cannot be considered to be persons who are in legal possession of the entire shares of the tenant's interest in the lands. The adverse possession asserted by one cannot therefore be adverse possession of a co-owner. The title gained by the tenant by his possession, must, therefore, have the same legal character and be tenure-holder's interest accordingly. He can defeat the other tenure-holder's claim to partition made on the footing of his possessing a fractional interest of a tenure-holder. A.I.R. 1934 Cal. 71=60 Cal. 1212=37 C.W.N. 835=149 Ind. Cas. 111.

——Alienation by co-sharer—Possession of alienee not adverse unless he takes open possession.

It is a settled doctrine that in order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the other; in other words, his possession must amount to what is described in law as an ouster of the other co-sharers. Even an alienee from a co-sharer cannot set up adverse possession against the other co-sharers unless he shows that he took open and public possession of the property. A.I.R. 1934 Mad. 183 =1933 M.W.N. 1322=39 M.L.W. 161=149 Ind. Cas. 455.

——Sole occupation by one, if sufficient—Suit as to a particular portion of property decided—Subsequent suit by addition of claim to other properties —If res judicata—C. P. Code (Act 5 of 1908), S. 11.

When the parties are co-sharers, co-owners or tenants-in-common and no partition has taken place between them, the sole occupation of one of them is not *prima facie* inconsistent with the rights of others. Therefore, mere non-participation in the profits by one and exclusive occupation and enjoyment of the joint property by the others is not *per se* adverse; in order that possession may be adverse, there must be (*a*) a disclaimer of the other's right by an open assertion of a hostile title on the part of the co-owner setting up adverse possession, and (*b*) notice thereof to the others either direct or to be inferred from notorious acts and circumstances.

If a suit which is brought with reference to a particular portion of the property, has been tried and dismissed or decreed, the position so far as that portion of the property is concerned cannot be got rid off by bring a fresh suit including in the claim other properties, which inclusion makes the whole value of the suit beyond the jurisdiction of the Court which decided that suit; otherwise there cannot be any finality. A.I.R. 1934 Pesh. 7=148 Ind. Cas. 926.

——Transferee from co-sharer — Possession of vendor, whether adverse to transferee.

In the case of co-sharers, the possession of one co-sharer is the possession of all the co-sharers and a co-sharer will not be permitted to claim the protection of the statute of limitation unless it clearly appears that he has repudiated the title of his co-sharer to his knowledge and is holding adversely to him. In other words, there must be an overt act showing adverse possession, and that act must be brought home to the co-sharer against whom adverse possession is claimed. The same principle applies to the case of a transferee from co-owners. Therefore, possession of the vendor is not adverse to the vendor's transferee where the vendor had sold only a share and continued to be a co-sharer in the holding. A.I.R. 1933 Lah. 763=34 P.L.R. 880= 148 Ind. Cas. 1112.

——Adverse possession—Constructive possession —Transfer of—Effect.

Constructive possession can be transferred from one co-heir to another and the possession of one co-heir is not adverse to the other co-heirs but is on behalf of all the co-heirs. A.I.R. 1932 All. 370= 138 Ind. Cas. 841.

——Sale of entire joint property in execution of decree against one co-owner—Open assertion of exclusive title by purchaser—Acquisition of title.

Where, in execution of a decree passed against one of four co-owners, a person purchased the entire joint property openly and to the knowledge of the other co-owners and after the purchase dealt with the property as exclusively belonging to himself and was in possession for more than 12 years:

Held, that his possession was adverse to the other co-owners, and he acquired a valid title by adverse possession. A.I.R. 1931 Mad. 22=1930 M.W.N. 246=33 M.L.W. 186=129 Ind. Cas. 454.

——Entry by co-sharer into possession of share of other co-sharer, not as co-tenant but in denial of such right—Possession, if enures for benefit of other co-sharer—Possession of tenant-in-common, if adverse to that of his co-tenant—Principle, if applies to person not recognised as co-tenant.

Where a co-sharer enters into possession of the share of the other co-sharer not in his right as a co-tenant but in denial of such right of the co-tenant, it cannot be said that his possession would enure for the benefit of the other co-sharers whom he his excluded from the enjoyment of the property. It is true that the principle of possession between the co-owners is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to that of his co-tenants, but a person cannot be a tenant-in-common with a person whom he never recognised as a co-tenant. A.I.R. 1935 Cal. 195=60 C.L.J. 232=39 C.W.N. 159=62 C. 305 =155 Ind. Cas. 987.

——Adverse possession—Source of title and possession, one lawful and other unlawful—It should be referred to lawful source.

Possession should always be referred to a lawful source rather than to an unlawful source, where two alternatives are open to the Court.

Where a co-sharer obtains an exclusive possession of the land belonging to the other co-sharer who is a widow and pays the land revenue for the same, but the widow's title is all along recognized, and in the revenue records, she is shown as a co-sharer and where after her death, her share is mutated among all the co-sharers including the one in possession, the possession of the latter, in the absence of any overt act on his part showing adverse possession cannot be held to have been adverse and all the reversioners of the widow are entitled to succeed to her share on her death. A.I.R. 1937 Lah. 430=39 P.L.R. 651=173 Ind. Cas. 327.

See also A.I.R. 1936 Cal. 34=61 C.L.J. 537=160 Ind. Cas. 870.

(c) Evidence of.

——Co-sharer—Mortgage by—Effect.

A co-sharer cannot claim adverse possession against another co-sharer by merely mortgaging the house in which he possessed a share. A.I.R. 1943 Pesh. 17=205 Ind. Cas. 603.

——Co-sharers—Name of some not entered in mutation register—Effect.

Where some of the co-sharers enter into possession under lawful title, namely, that of co-owners their possession cannot be adverse to other co-owners. The fact that names of such other co-sharers have not been entered in the register of proprietary mutation, does not necessarily show that the possession of the co-heirs was adverse to them. A.I.R. 1941 Nag. 141=I.L.R. (1941) Nag. 244=1941 N.L.J. 127=195 Ind. Cas. 44.

——Mere entry of that co-sharer's name and mere non-participation in profits by other co-sharers do not constitute adverse possession.

The lambardar of a mahal is in a fiduciary position in relation to the co-sharers in the matter of collections and disbursements. Mere entry of the name of the lambardar and non-participation of profits by other co-sharers would not be proof of adverse possession. 119 Ind. Cas. 866=6 O.W.N. 652=A.I.R. 1929 Oudh 402.

——Co-sharers—One co-sharer transferring property—Failure of transferee to establish that denial of title and ouster were brought to knowledge of the co-owners.

The principle of law based on the mere fact of co-ownership would apply with equal force to a transferee from a co-owner, who steps into the shoes of his vendor. A co-owner has no duty cast upon him to which the conduct of another co-owner and be on the look-out to find out the extent of the share purported to be transferred by him, and to intervene if more than the real share has been transferred. He is entitled to assume that the permissive nature of the possession has passed on to his co-owner's transferee who has now become the co-owner in place of the original co-owner. Of course, if the assertion of title to the whole is brought to his knowledge and it is accompanied by his ouster and exclusion, adverse possession would then commence as against him. The burden therefore would be on the transferee to establish that the denial of title and ouster was brought to the knowledge of the other co-owner and in the absence of such proof, he would not be able to perfect his adverse possession. A.I.R. 1940 All. 428=1940 A.W.R. 387=191 Ind. Cas. 602.

——Co-sharer—Adverse possession by—Ouster—Need for.

When a definite act of ouster is not pleaded, a co-tenant must be regarded as being in possession of his share of the property. In the absence of definite proof of ouster, one co-tenant cannot establish adverse possession against another. A.I.R. 1937 Pat. 56=164 Ind. Cas. 851.

See also 118 Ind. Cas. 785=31 Bom.L.R. 199=A.I.R. 1929 Bom. 141.

——Co-sharer—Ouster of—Absence of overt act.

When the parties to a suit are co-sharers, in the absence of any overt act on the part of the defendants amounting to ouster or express denial of the title of the other co-sharers, the plea of adverse possession cannot succeed. A.I.R. 1933 Lah. 258=146 Ind. Cas. 210.

——Co-sharer — Ex parte assertion of title—Effect.

An assertion by one of the co-sharers in actual possession of property as a witness in certain civil proceedings to which all other co-sharers are not parties is not tantamount to an assertion of hostile by all the co-sharers in actual possession. A.I.R. 1932 Lah. 143=32 P.L.R. 824=135 Ind. Cas. 686.

——Adverse possession enures in favour of co-sharer who refuses possession until payment of charge defrayed by him.

The rule that ordinarily one co-sharer cannot hold adversely against another proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers and this presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. A.I.R. 1923 Lah. 311, Foll. 92 Ind. Cas. 980=27 P.L.R. 65=A.I.R. 1926 Lah. 238.

See also A.I.R. 1923 Lah. 311=71 Ind. Cas. 847.

(d) Limitation.

——Adverse possession—Limitation.

An absentee co-sharer can recover possession on his return and the limitation period allowed to an immediate heir of an absentee is 12 years from the date of the absentee's death. 116 Ind. Cas. 310=A.I.R. 1929 Lah. 276.

——Where one co-sharer sues another co-sharer for possession and the defendant pleads adverse possession, the suit will fail only when defendant proves adverse possession for 12 years and Art. 144 will apply. 98 Ind. Cas. 80=3 O.W.N. 796=13 O.L.J. 824=A.I.R. 1927 Oudh 6.

——A suit instituted by transferee of a co-sharer for possession and partition, after 12 years from the date of transfer, is not barred by time, the possession of one co-sharer being on behalf of all the co-sharers or their transferees in the absence of express ouster. 120 Ind. Cas. 604=A.I.R. 1928 Lah. 957.

——In a declaratory suit by a co-sharer based on title, it is open to the defendant to set up and prove adverse possession. The limitation against a co-sharer does not begin to run until his title is openly denied. Nothing short of ouster can deprive him of his right. 111 Ind. Cas. 376 (Oudh).

——*Jh., H* and *Js,* were three co-owners of a certain land, being brothers. Possession was with the first. Plaintiffs, sons of *H,* sold their share in the holding to stranger, which was pre-empted by *G,* son of *Jh.,* and in whose favour the share of *Js.* was mutated on *Js's* death, no mention being made of the plaintiffs who then sued for possession of a half-share of *Js.,* 12 years after his death.

Held, that the suit was time-barred as *G* was in possession in his own right since *Js.,* death and not as his co-owner and so his possession became adverse to plaintiffs. 94 Ind. Cas. 486=A.I.R. 1926 Lah. 644.

(e) Nature of.

——Admission by one co-sharer by exclusive possession of another.

Mere admission by one co-sharer that another has been in exclusive occupation of a certain property would not alone create adverse possession against him and his title cannot be said to have been extinguished from the date of admission. 118 Ind. Cas. 574=A.I.R. 1929 Cal. 231.

——Joint possession should be presumed where no separation or overt act of ouster is proved.

The ordinary presumption of law is that the joint possession of co-sharers is continued until there is some overt act of ouster or separation. Where the overt act was the assertion made in the written statement in a previous litigation, and was evidenced only by a summary in the judgment which recited that the defendants asserted that the plaintiffs were out of possession of the lands and had not received the rent.

Held, that in the absence of the written statement itself it was impossible to say exactly what the assertion made by the defendants in the case was or precisely to what extent they denied the title of the plaintiffs and set up title in themselves and that there was no ouster proved. 85 Ind. Cas. 387=A.I.R. 1925 Oudh 510.

See also A.I.R. 1925 Rang. 40=82 Ind. Cas. 821.

Also 79 Ind. Cas. 279.

——Possession of one is possession of all—Overt act is necessary.

Possession of one co-sharer is the possession of all, provided always that there had been no overt act of adversity. 9 Lah.L.J. 484=29 P.L.R. 56 =A.I.R. 1927 Lah. 887.

——Undisturbed possession of one co-tenant may lead to the presumption of ouster of other co-tenants.

If one co-tenant is in possession of the property which belongs to him as well as to other tenant-in-common, his possession should not be considered to be adverse, unless there be circumstances from which the Court could come to the conclusion that the possession is adverse. (1912) A.C. 230 and 29 Ind. Cas. 275, Foll. But the question is not one of pure law but is a question of fact. An undisturbed and quiet possession for a long time is a sufficient ground to presume actual ouster. 98 Ind. Cas. 278=A.I.R. 1927 Mad. 170.

——In the cases of tenants-in-common the possession of one co-owner even though exclusive is possession of both and acts of ownership even though exclusive are not evidence of *de seisin*. A tenant in common cannot claim adverse possession unless it is clear that he has repudiated the co-tenant's rights by acts of ouster or disclaimer or by putting forward an adverse title. 35 Cal. 961; 33 C.L.J. 344 and 110 P.L.R. 1912, Foll. 107 Ind. Cas. 211 (Sind).

——Co-sharer's possession of non-transferable occupancy is adverse.

Where possession can be referred to a lawful title, it cannot be said that it was illegal and that it was adverse to a co-owner. In order to have the statute of limitation run against a co-owner, there must be actual ouster or some act equivalent to ouster. Where no one of the co-sharers had a right to take actual possession of the land and where he purchased the non-transferable occupancy right.

Held, such purchase did not confer any title on him, and when he went into possession, such possession was illegal as against his co-sharers, and so his possession of the entire land is equivalent to an ouster of the other co-sharers, and he can acquire limited interest by adverse possession. 17 C.W.N. 1088; 19 C.W.N. 136, Foll. 74 Ind. Cas. 193=50 Cal. 487=A.I.R. 1924 Cal. 45.

——All co-owners dispossessed by third party—One co-sharer recovering possession from third party—Effect.

When all the co-owners are dispossessed by a third party—One co-owner getting possession of that property under lease from that third party, extinguished the title of other co-owners. 35 C.L.J. 164 =64 Ind. Cas. 553=A.I.R. 1921 Cal. 616.

——When one co-sharer recovers property from trespasser on his own behalf—His possession is adverse to other co-sharers.

The plaintiffs sued for a share in ancestral property which the defendants had recovered from a trespasser as the sole reversioners and ignored any possible co-heirs and there was no understanding between present plaintiffs and defendants.

Held, that the plaintiffs have no subsisting right in the property, from which they had been excluded for more than 15 years before suit and any right they might have enforced at the proper time was barred. 3 Lah.L.J. 441=A.I.R. 1921 Lah. 163.

——Co-heirs.

The possession of the defendants over the undivided estate of the common ancestor of the parties, is the possession of all the co-sharers in that estate, and plaintiffs' failure to prove their possession within limitation is no defence to their suit for their share of the inheritance. 78 Ind. Cas. 282=A.I.R. 1925 Oudh 241.

——Co-sharer—Strangers—If could be.

The principle of possession between co-owners is that every co-owner is a tenant-in-common and that possession of a tenant-in-common is not adverse to his co-tenant. But a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant and probably had no knowledge of his existence. 107 Ind. Cas. 741=A.I.R. 1928 Cal. 396.

——Exclusive enjoyment of common property does not amount to adverse possession.

Defendant and plaintiff, the proprietors of a common zamindari, were descendants from a common ancestor. About 50, years prior to the institution of the suit, the ancestors of the defendants left their village and settled elsewhere. Though at times they paid visits to their ancestral village, they never claimed nor received any portion of the profits of the khewat in dispute.

Held, by the mere fact that defendant did not claim his profits defendant's title to the share recorded against his name in the khewat could not be extinguished and the plaintiff could not claim the defendant's share by adverse possession. (1912) A.C. 230, Foll. 114 Ind. Cas. 904=9 L.R.A. Rev. 175.

——The mere fact that one of the co-sharers was not in actual possession and resided elsewhere, would not make the possession of other co-sharers adverse.

(1912) A.C. 230; A.I.R. 1926 Oudh 141; 35 Cal. 961; A.I.R. 1926 Oudh 258, Foll. 118 Ind. Cas. 87 =6 O.W.N. 249=A.I.R. 1929 Oudh 257.

——Possession by a co-sharer cannot be adverse unless it is coupled with some act which is equivalent to ouster of the other co-sharer. 116 Ind. Cas. 195 =6 O.W.N. 213=4 Luck. 503=A.I.R. 1929 Oudh 284.

——One cannot alter the character of his possession, as a co-sharer, to that as the sole owner, by any secret intention in his mind. (1912) A.C. 230, Foll. 43 C.L.J. 387=95 Ind. Cas. 622=A.I.R. 1926 Cal. 883.

——Where no previous denial of title of other co-owners by a co-owner in possession of the whole property possession must be presumed on behalf of his co-owners also.

Possession is never considered adverse if it could be referred to a lawful title. Where a co-owner in possession does not deny the title of the other co-owners till shortly before the institution of the suit and never lays claim to more than his share, it is presumed that the co-owner in possession is in possession on his own behalf and on behalf of his co-owners. (1912) A.C. 230; (1855) 2 K. & J. 79; 37 All. 203; 35 Cal. 961; 21 C.L.J. 253; A.I.R. 1926 Oudh 141 and A.I.R. 1926 Oudh 258, Cons., and Rel. on. 112 Ind. Cas. 522=5 O.W.N. 847 =A.I.R. 1928 Oudh 449.

——Co-mortgagor redeeming the property does not have adverse possession.

A co-mortgagor, when he redeems the entire property, does not admittedly hold the property exclusively for himself. The presumption is that he retains the property for his own benefit as well as for the benefit of his co-sharers. The moment his co-sharer pays him up the share of the money due from him, he is duty bound to return to the co-sharer so paying up, his share of the property, and the position of such a co-mortgagor being that he has held the property of his co-mortgagor subject to a lien and has to hand over his-co-mortgagor's share on payment by him of the lien, he cannot be considered to be in adverse possession of the property. 104 Ind. Cas. 400=2 Luck. 618=4 O.W.N. 713=A.I.R. 1927 Oudh 347.

——Mere mutation of property in his name does not make one co-sharer's possession adverse to other co-sharers.

To set upon an adverse title it is not enough, if a co-mortgagor after redeeming the entire property gets the mutation of names in his favour on the basis of his possession. Unless the redeeming co-mortgagor proved that in the mutation proceedings he denied title of his other co-sharers to their knowledge and remained thereafter in exclusive possession of the property for 12 years his adverse possession cannot be considered to have been made out. 2 Luck. 618=4 O.W.N. 713=104 Ind. Cas. 400=A.I.R. 1927 Oudh 347.

(f) Ouster.

——Co-sharer—Adverse possession by one against others—Ouster—Need for.

In order to treat possession of one co-owner as adverse, ouster must be proved otherwise. In the case of co-ownership the possession of one co-owner is possession of all. 50 C.L.J. 382=A.I.R. 1930 Cal. 180.

——Ouster must be proved.

In order to bar the title of any of the co-sharers by reason of the exclusive possession of one of them it must be found that there was an ouster. The fact that the plaintiffs have not been able to prove their actual possession although they attempted to do so cannot operate to extinguish their title on the ground of adverse possession by their co-sharers. 91 Ind. Cas. 614 (Cal.).

——Ouster must be actual, open and exclusive.

In the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well. To enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants. 21 C.L.J. 253, Rel. on. 1 Luck. 62=13 O.L.J. 55=3 O.W.N. 186=92 Ind. Cas. 685=A.I.R. 1926 Oudh 258.

See also 86 Ind. Cas. 324=A.I.R. 1925 Oudh 494.

——Ouster is essential to constitute adverse possesion.

To constitute adverse possession as between tenants-in-common there must be an exclusion or an ouster. What is sufficient evidence of exclusion must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time. 47 Cal. 274; 16 C.W.N. 849, Foll. 80 Ind. Cas. 118=16 S.L.R. 25=A.I.R. 1921 Sind 177.

——Mere non-payment by a lambardar to any co-sharer of the said co-sharer's property, quota of the annual devisible profits of the mahal does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession. 79 Ind. Cas. 538=22 A.L.J. 518=5 L.R.A. Rev. 174=A.I.R. 1924 All. 719.

——Mere possession by some will not constitute ouster of others.

Three brothers Ghazi, Rawa and Maula Baksh obtained a decree in 1870, declaring their title to the house in dispute. Maula Baksh did not live in the house after the decree but allowed his two brothers to remain in possession. This they did until the year 1889 when they mortgaged the house to a third party and that third party remained in possession. This mortgage was redeemed and upon this being done, the plaintiffs who were the representatives of Maula Baksh, brought a suit for their one-third share of the house. There was nothing to show the plaintiffs had knowledge of the mortgage. *Held*, that the single fact that the brothers of Maula Baksh remained in possession and that a mortgagee from them was also in possession is not sufficient to constitute ouster. 71 Ind. Cas. 640=21 A.L.J. 204=4 L.R.A. Civ. 139=A.I.R. 1923 All. 291.

——Mere notice refusing possession is not ouster.

Mere notice by one co-sharer who redeemed mortgaged joint property to the other to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed is not sufficient

to constitute ouster. If since the date of the notice the defendant has not been in possession of the family property sufficiently long, it cannot be presumed that such long possession amounts by itself to an ouster. 77 Ind. Cas. 521=A.I.R. 1922 Bom. 156.

——Erection of building by itself is not ouster.

The erection of a substantial building on joint property by one co-owner or non-participation in profits cannot be regarded as conclusive evidence of ouster. 34 C.L.J. 432=26 C.W.N. 65=67 Ind. Cas. 31=A.I.R. 1921 Cal. 647.

(g) Starting point.

——Mortgage of entire property by co-sharer—Mortgagee not in possession—Transferee of mortgagee taking possession subsequently.

A co-sharer may mortgage his own share and if he is in possession of the property, may put a tenant or even his mortgagee in possession. These acts need not necessarily suggest to the other co-sharer that he is being ousted from his share. In order that time should run against a co-sharer, the acts of the other co-sharer who is claiming the whole property must be open and of such a kind that the ousted co-sharer, if he was vigilant, would be bound to know that his co-sharer was proceeding to oust him from his shares of the property:

Held, that the time against the co-sharer did not run from the date of the usufructuary mortgage of the entire property by the other co-sharer, since the possession of the mortgaging co-sharer could not be said to be so open that the other co-sharer could have discovered it with exercise of due vigilance; but that the time ran when the transferee from the mortgagee went into possession. A.I.R. 1937 All. 696=1937 A.L.J. 855=1937 A.W.R. 718=171 Ind. Cas. 910.

——Where a co-sharer commits any act showing that he claims a right to exercise proprietary rights over the whole of a joint holding, the general rule is that his possession becomes adverse from the date of that act. A.I.R. 1936 Pesh. 24=160 Ind. Cas. 952.

——Where a co-sharer takes an action with respect to a joint holding which transfers rights in the whole holding, he thereby by his very act proclaims that he is in adverse possession and where that transfer is also a transfer with possession, the possession of the transferee becomes adverse at once. A.I.R. 1936 Pesh. 24=160 Ind. Cas. 952.

——A co-owner who redeems a mortgage becomes a charge-holder and not a mortgagee and a suit by other co-owners against him for possession is governed by Art. 144 and not by Art. 148, Limitation Act. The possession of the redeemed co-owner does not become adverse to other co-owners from the date of redemption but becomes adverse only when he does any unequivocal overt act showing the intention to hold adversely to other co-owners. (1932) 136 Ind. Cas. 264=32 P.L.R. 649.

——Co-sharer — Adverse possession does not begin until ouster of other co-sharers is proved. A.I.R. 1925 Cal. 1176, Foll. 109 Ind. Cas. 658=10 Lah. 842=122 Ind. Cas. 81=A.I.R. 1929 Lah. 195.

——Adverse possession does not begin until ouster or notice of denial of right.

Co-heirs under the Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs unless some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. 85 Ind. Cas. 763=A.I.R. 1925 Cal. 1176.

——Adverse possession of strangers on behalf of one co-sharer begins only when he asserts his own exclusive right.

Where the plaintiff has been out of actual possession of the land in suit since a few years after the plaintiff's father's death which took place about 40 years ago and the second defendant has been in possession of the land for over 12 years. **Held,** that though defendant No. 1, the husband of defendant No. 2 is not a co-sharer with the plaintiff before he could be treated as a stranger, it must be shown that he was possessing the land asserting his own right. If this defendant possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not possessing it on behalf of the plaintiff's sister, then the plaintiff's suit would not be barred. 72 Ind. Cas. 33 =A.I.R. 1924 Cal. 356.

——Adverse possession by transferee from co-sharer with notice of nature of joint property begins only on exclusion but not where there is no notice.

For establishing title by prescription in one co-owner there should be evidence of exclusion of the other co-owners from possession or of assertion of exclusive title. The rule applies equally to a transferee from a co-sharer with actual or constructive notice of the fact that his alienor was only a co-sharer. However where such a transferee has neither actual nor constructive notice of the common character of the property he will be on the same footing as any ordinary transferee with an independent but invalid title or without none and need not prove exclusion or denial of title of the other co-sharers. 18 Cal. 10 (P.C.): 19 Cal. 253: 43 Mad. 244. Foll. 78 Ind. Cas. 37=20 M.L.W. 122=A.I.R. 1924 Mad. 741.

——Fresh cause of action from date of ouster.

Obiter.—Ouster by a co-sharer gives a fresh cause of action from the date of the ouster. A.I.R. 1935 Pesh. 163=159 Ind. Cas. 254.

(h) Miscellaneous.

——The acceptance by some co-sharers of a deed of release executed by another co-sharer setting forth an existing title in the subject-matter of the release takes away the adverseness of possession of the former, if any. 80 Ind. Cas. 619=11 O.L.J. 735=A.I.R. 1925 Oudh 208.

——Adverse possession—Co-heirs—Possession of one—Where adverse to others.

Where one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs. 34 Mad. 511, Foll. 16 M.L.T. 530=26 Ind. Cas. 346.

——Adverse possession—Muhammadan Law.

Without the assertion of an adverse title, a co-heir's possession in the absence of the others cannot become adverse to the others. 15 Ind. Cas. 292 (All.).

——Adverse possession—Title derived from other co-sharer.

A person who held no other position than that of a co-sharer cannot plead adverse possession, and the fact that he derives his title from one co-sharer does not enable him to assume a title adverse to other co-sharers. 170 P.W.R. 1911= 251 P.L.R. 1911=12 Ind. Cas. 140.

——Adverse possession.

There must be the clearest and most unequivocal conduct showing an assertion and a claim of exclusive ownership for 12 years before suit. 13 P. W. R. 1910=48 P.L.R. 1910=5 Ind. Cas. 840.

——Adverse possession—Tenants-in-common.

Members of a joint family of any sex hold property in British India as tenants-in-common and the possession of one is not necessarily adverse to others, unless there is ouster or denial of title or abandonment as to justify finding of ouster. 5 N.L.R. 41=2 Ind. Cas. 15.

——Adverse possession — Injunction — Ouster—Possession of portion of joint property.

The sole occupation by one co-sharer of a portion of joint property does not constitute an ouster of the other co-sharers. A co-sharer in possession of a portion of the common land with the tacit or express consent of his co-sharers cannot change the nature of that possession or use the property in a mode different from how it has been used. 41 Cal. 436=18 C.W.N. 176=19 C. L. J. 47=21 Ind. Cas. 861.

5 Building on common land.

——Building on common land—Erection of permanent building by co-sharer—Injunction should not be granted unless there is ouster or other substantial injury.

There is no such broad proposition that one co-owner is entitled to an injunction restraining other co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by one side or the other from the granting or withholding of the injunction. In the matter of injunctions there is a considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their right seek, by injunction, to prevent the erection of a permanent building and a case after a permanent building has been erected at a considerable expense, they seek to have it removed. Even though a case falls within the former category, unless there is ouster or other substantial injury, no restraint should be put and no injunction should be granted. Sole occupation by itself is not ouster unless it is attended by an assertion of a hostile title. 57 Cal. 92=A.I.R. 1930 Cal. 341.

——Building on common land—Suit for injunction.

If a co-owner does not use the joint property inconsistently with the joint possession, the other co-owner cannot get an injuction, restraining him from dealing with the joint property in a particular manner nor can he get a mandatory injunction to demolish the erected buildings. 11 C.L. J. 189=5 Ind. Cas. 171.

——Demolition would be ordered if building on joint land is not in keeping with method of enjoyment prior to it.

One of several joint owners is not entitled to construct a building on the joint property without the consent of other joint owners notwithstanding that the erection of such building might cause no direct loss to the other joint owners and in such a case a mandatory injunction ought to be granted even though it is found that the land built on has been in the exclusive possession of the person erecting the building and where the erection is of recent date and has been objected to from the beginning. The principle to be applied in such cases is whether the erection of the building is in keeping with the method of exclusive possession hitherto enjoyed by the co-owner. 104 Ind. Cas. 414=A. I.R. 1927 All. 709.

——In suit by one to remove permanent building built by another balance of convenience should be looked to.

Where a co-owner of joint land sues to have a permanent building erected on the land by another co-owner to be removed, the Court should weigh the amount of substantial mischief done to the plaintiff and compare it with that which would be inflicted upon the defendant, and if the balance of the convenience is in favour of the plaintiff it should insist upon the removal of the building. If, however, the balance of the convenience lies on the side of the defendant, the Court should leave the plaintiff to his remedy by partition. 95 Ind. Cas. 364=13 O.L.J. 611=3 O.W.N. 564=A. I.R. 1926 Oudh 412.

——Where one co-sharer has built structures on joint land, the other co-sharer's remedy, if any, is to obtain partition, but there may be circumstances in which the Court would permit the demolition of structures. A.I.R. 1924 P.C. 144, Foll. 98 Ind. Cas. 791=3 O.W.N. Sup. 230=8 L.R. A. Rev. 13.

——If a construction made by one co-sharer over joint property is calculated to make the joint property more exclusively his, other co-sharers can have the construction removed through Court. 101 Ind. Cas. 744=A.I.R. 1927 All. 518.

——Where a co-sharer finds that a lessee under another co-sharer is erecting buildings over the whole property, in spite of his objecting to do so, his only remedy is to sue for partition. 97 Ind. Cas. 441=A.I.R. 1927 Cal. 54.

——Even if some of the co-sharers are allowed to raise structures on a piece of joint land the exclusive use does not deprive the other co-sharers of a share in the properties when a general partition is effected. 91 Ind. Cas. 610=A.I.R. 1926 Cal. 524.

——Decree for demolition of structures built by another on common land should be passed if inconvenience cannot be remedied at partition.

Where the plaintiff sued some of his co-sharers for possession of a piece of shamilat land and for demolition of a chaupal erected thereon by them, and where it was found that by that construction the village road had been blocked to some extent and the inconvenience could not be remedied at the time of partition, the plaintiff was entitled to the relief claimed. 7 O.C. 362, Foll. 97 Ind. Cas. 569=3 O.W.N. 639.

——The mere circumstance of a building erected on common land without the consent of the co-

sharers and despite their protest even, is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected unless it could be shown that the erection of that building had actually caused such material and substantial injury as could not be remedied on a partition of joint land. 89 Ind. Cas. 831=A.I.R. 1926 Lah. 52. **See also** 44 Ind. Cas. 844=29 P.R. 1918.

——Right to sue—Suit.

Where no partition has taken place between several co-sharers, one co-sharer can maintain a suit for injunction not to build and to demolish buildings already built on land belonging to all co-sharers jointly and alienated by another co-sharer to the defendant. 71 Ind. Cas. 557=20 P.W.R. 1923=A.I.R. 1923 Lah. 205.

——If a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of the property. 34 C.L.J. 432=26 C.W.N. 65=67 Ind. Cas. 31=A.I.R. 1921 Cal. 647.

——Building on common land—Rights—Special damage—Limitation.

Proof of special damage is not necessary to restrain a co-sharer from appropriating a portion of the common land. The suit must however be brought at once and before the erection of substantial buildings. 1 Lah. 249=57 Ind. Cas. 207. **See also** 56 Ind. Cas. 454=2 Lah.L.J. 635.

——One co-owner has no right to build on common land.

One co-sharer out of many has no right to build on what is joint land without the consent of the others and if he does so, the others can sue for demolition of the building and for joint possession of the land. 85 Ind. Cas. 849=6 L.R.A. Civ. 274=A.I.R. 1925 All. 700. **See also** 25 Ind. Cas. 43 (All.).

——Co-sharer—Erection of building by one, when ouster—When demolition could be decreed.

One joint owner is not entitled as a matter of course to maintain an action in ejectment against a co-owner merely on the ground that the latter has taken exclusive possession of a portion of joint property. Such exclusive occupation, may, under certain circumstances, be perfectly legitimate and may not constitute an ouster. If there is no assertion of a hostile title, and no exclusion or ouster, an action in ejectment cannot lie. An exclusive appropriation by one co-owner of a part of the joint land to his own use by the erection of a permanent structure, is not necessarily evidence of an ouster. The plaintiff who complains of the act of his co-owner, cannot obtain a decree for demolition of buildings or for joint possession unless he can establish substantial injury by the act he complains against. He should further show that he took reasonable steps in time to prevent the erection. (1906) 4 C.L.J. 198.

——Building on common land—Party wall—Building.

Where one of the owners of a party wall, commences to build upon it without the consent of the other and the other interferes with his building, he is not entitled to an injunction to restrain the other co-owner from interfering. One of two tenants-in common is not entitled to build upon a party wall withont the consent of the other. 14 Ch. D. 192; 19 Mad. 88, Foll. 13 A.L.J. 473=30 Ind. Cas. 33.

——Building on common land — Constructing a pakka building.

If a co-sharer builds a **pakka** building on a common land of all co-sharers, the other co sharer can sue for demolition of the building and for injunction restraining from building on the site. 2 Ind. Cas. 854 (All.).

——Removal of building—Limitation.

A suit by one co-owner against another for the removal of the actual existing obstructions constructed by the other, on land, which by long usage and by agreement between the parties is reserved for use as a common passage is governed by Art. 144. Further the wrong is a continuing wrong within S. 23 of the Limitation Act. 76 Ind. Cas. 328=A.I.R. 1923 Cal. 356.

——Building on joint property—Rights of others.

Where there is no ouster of the plaintiff by the defendant co-sharer building upon joint property, the plaintiff is not entitled to a decree for joint possession of the portion built upon, but is entitled to a declaration of his title as co-sharer. 46 Ind. Cas. 496 (Cal.).

6. Contribution and compensation.

——Decretal debt—Payment of less than half by one of the joint lessees—Payment, held not as payment by surety but as by principal debtor—Suit for contribution dismissed.

The lessor of agricultural land obtained a decree against joint lessees for arrears of rent. As the result of execution proceedings, recoveries were made from **P** alone. Payment made by **P** represented less than half the decretal debt. In 1939, **P** applied for an order scaling down the amount due under the decree in accordance with the provisions of the Madras Agricultural Relief Act. The application was granted and decretal amount was reduced. Thereupon **P** filed a suit for a decree for contribution against the remaining joint lessees:

Held, that when **P** made the payment, he was not entitled to contribution because the total amount paid by him was less than half the share of the debt as it then stood. In other words, he made no payments as surety, but as principal debtor. As the Madras Agricultural Relief Act did not contain a provision entitling **P** to contribution in respect of the payment made before the Act in the event of a subsequent scaling down, his suit must be dismissed. A.I.R. 1945 Mad. 266=I.L.R. (1946) Mad. 167=58 M.L.W. 247=(1945) 1 M.L.J. 405=1945 M.W.N. 315.

——Right to be reimbursed, nature of.

The right of a co-sharer to be reimbursed by his other co-sharers in respect of money paid by the former in excess of his share does not arise out of any contract, express or implied, but is founded on principles of equity and justice. A.I.R. 1943 Cal. 330=I.L.R. (1943) 2 Cal. 180=47 C.W.N. 405=209 Ind. Cas. 15.

——Co-sharers jointly liable for rent to superior proprietor — Plaintiff co-sharer paying his share—Balance recovered from him by suit—Plaintiff filing suit against other co-Suit is one for contribution and not for re-imbursharers for recovery of their shares or rent—sement—Suit is not cognizable by Small Cause Court. A.I.R. 1941 Oudh 578=1941 O.W.N. 963=17 Luck. 67=195 Ind. Cas. 498.

——Contribution—Repair of well by one co-owner for benefit of himself and other co-owners—Repairer not doing it gratuitously—Contract Act (IX of 1872), S. 70.

Where a co-owner does repair works of a well, not only for himself but for the benefit of the other co-owners also, he is entitled to recover expenses from the other co-owners and so long as it is shown that the plaintiff did not intend to do the work gratuitously and that other persons enjoyed the benefit of the work, he is entitled to recover under S. 70 of the Contract Act. A.I.R. 1937 Pat. 103=18 P.L.T. 333=167 Ind. Cas. 42.

———One co-owner, if can give possession of joint property to agent for cultivation—Contribution of expenses of cultivation—Rights of joint possession.

A co-owner being entitled to a share of the produce, another co-owner is not entitled to place an agent in possession of the property against the former's wishes. The mere fact that the latter contributed to the cost of cultivation will not entitle him to exclude joint owner from exercising his undoubted right of joint possession. A.I.R. 1935 Sind 115=29 S.L.R. 121=36 Cr.L.J. 1310 =158 Ind. Cas. 282.

——A co-sharer who, to prevent arrest for a decree against himself and another co-sharer for arrears of rent due by both pays the whole rent and brings a suit for contribution, is not entitled to a first charge on the other co-sharer's portion of holding and he cannot claim priority, over encumbrances which existed on the property on the date of the payment. A.I.R. 1931 Lah. 727=33 P.L.R. 544=135 Ind. Cas. 509.

——Co sharer's liability—Exclusive possession of land—Share of rent—Dispossession—Damages.

Where one co-owner takes exclusive possession of all the co-sharers land which had been yielding profits in the shape of rent to all of them, such co sharer must compensate his other co-sharers for the loss of their share of the rents. (1809) 5 C.L.J. 267.

——Co-sharer in possession of excess land—Liability for profits—Calculation of profits—Principles—Criterion as to whether co-sharer holds as tenant or as khudkasht.

The criterion for determining whether land in respect of which a co-sharer is recorded as a tenant should be regarded as held by him as tenant or as khudkasht is whether he acquired the particular holding before he became co-sharer or after. In the case or those holdings which he acquired before he became co-sharer, he should be considered as tenant and in the case of those holdings which he acquired after he became co-sharer he must be recorded as owner in possession of khudkasht. A.I.R. 1932 All. 241=143 Ind. Cas. 105=16 R.D. 369.

——Absence of agreement to pay compensation on ouster—No liability to pay compensation.

A co-sharer in a village who is in possession of an area of bakasht land in excess of the share to which he is entitled, is not liable to pay compensation to the other co-sharers on account of his exclusive occupation if there is no agreement to pay compensation to the latter and there is nothing to indicate that he had at any time resisted any claim which the other co-sharers might have put forward to cultivate, the land. If the other co-sharers, instead of taking their share in the cultivation, choose to sit still, they cannot after the land has been cultivated by others, make what is practically a claim for an account. A.I.R. 1933 Pat. 616=150 Ind. Cas. 251.

——Other co-sharers, if entitled to money compensation.

Co-sharers owning certain land in common are entitled to money compensation from the co-sharer who is in exclusive possession of the land in respect of that exclusive use of the land by him. A.I.R. 1938 Lah. 302=40 P.L.R. 95=176 Ind. Cas. 726.

——Co-sharers kept out of possession—Their right to compensation.

Where the defendants had kept their co-sharers, the plaintiffs, out of possession, they are liable to pay compensation and a suit by the plaintiffs for claiming compensation is maintainable. A.I.R. 1940 Pat. 384=21 P.L.T. 1055=186 Ind. Cas. 397.

——Co-sharer in possession is liable to pay compensation in respect of profits earned by him by his cultivation.

A co-sharer who is in separate possession of the common land irrespective of what his share of such land would be on partition, to the exclusion of or in spite of objection from the other co-sharers, is under an obligation either to account or to pay compensation to them in respect of the profits earned by him by his own industry.

Compensation in such cases is a matter of justice, equity and good conscience, and is to be moulded according to the justice of the case. A.I.R. 1941 Pat. 90=21 P.I.T. 854=20 Pat. 162 =192 Ind. Cas. 456=7 B.R. 425.

7. Dispossession.

——Dispossession—What amounts to.

When co-owners are in joint possession to prove dispossession of a co-owner his ouster has to be proved very definitely and provided there is no break in social relations among the co-owners, the fact that the co-owner never enjoyed a definite benefit from the estate will not lead to the inference of ouster. 121 Ind. Cas. 785=7 Rang. 744 =A.I.R. 1930 Rang. 72.

——Meaning of.

Ouster means dispossession of one co-sharer by another where a hostile title is set up by the latter and where the occupation of the latter is not consistent wiih joint ownership. 18 C.W.N. 328, Foll. 47 C.L.J. 603=111 Ind. Cas. 19=A.I.R. 1928 Cal. 574.

——Mere excess of enjoyment does not in itself amount to an uster. 94 Ind. Cas. 255=A.I.R. 1926 Cal. 860.

——The possession of one co-sharer is in law the possession of the others. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. 95 Ind. Cas. 985=7 O.L.J. 8.

——Where property is held by a person through his co-sharer, the dispossession of his co-sharers in due course of law is such person's dispossession as well though he is not specifically made a party to proceedings of dispossession. 100 Ind. Cas. 507=A.I.R. 1927 Cal. 457.

——Physical possession is not necessary for proving an ouster.

To exclude is to "keep out"; to oust is to "put out", of possession. But it is not essential to prove physical dispossession in order to establish an ouster. For ouster and exclusion may be actual or constructive, and whenever a co-tenant remains in separate occupation in defiance of a claim to joint possession asserted by his co-sharers and thus prevents from obtaining possession, he is deemed to have excluded or ousted his co-sharers. Separate occupation by one co-sharer, therefore, is not necessarily exclusive occupation; it may or may not be according to the circumstances that are proved, and each case will turn upon its own facts. 55 Cal. 396=32 C.W.N. 291=109 Ind. Cas. 747=A.I.R. 1928 Cal. 216.

——Ouster is a question of fact in each case—Ouster can be presumed from non-participation in profits and other circumstances.

Generally speaking one tenant-in-common cannot maintain an ejectment suit against another tenant-in-common, because the possession of one tenant-in-cmmon is the possession of the other, and to enable the party complaining to maintain an ejectment there must be an ouster of the party complaining. But where the claimant, a tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Court can presume that there has been an ouster. However, no definite rule of law can be laid down as to what constitutes an ouster, every case must depend upon its own facts and the Court is entitled to find whether certain set of facts presented before it, does or does not amount to ouster. 43 Mad. 244, Foll. 87 Ind. Cas. 336=A.I.R. 1925 Cal. 1221. See also 79 Ind. Cas. 951=A.I.R. 1924 All. 920.

——Ouster is determined by facts of each case.

The facts that amount to ouster in each particular case may vary so that the question of ouster is one to be determined with reference to the facts and circumstances of each particular case. Where a **tappar** is put up by one co-owner on joint land without the consent of the other co-owner, the demolition of the **tappar** will not be ordered by the Court unless special damage is proved by the plaintiff. 14 C.P.L.R. 76 and 21 W.R. 373, foll. An ouster of co-owner is not necessarily implied by the sole occupation of a part of the joint estate by one co-owner. Even the erection of a substantial building by one co-owner upon a portion of joint property without the assent of the other co-owner may not necessarily amount to evidence of ouster. 82 Ind. Cas. 432=A.I.R. 1925 Nag. 145.

——Co-sharer—Ejectment suit — Execution — Ouster—Adverse possession.

One tenant in common cannot maintain an ejectment suit against another, unless there be an actual ouster. Circumstances under which a judge may presume ouster noted. To constitute an adverse possession as between tenants in common there must be an exclusion or an ouster. (1903) 5 Bom.L.R. 742.

——Ejectment suit—Suit by one to eject trespasser—Non-joinder of other sharers—If bar to suit.

A suit by one co-sharer to eject a trespasser from the common land is maintainable, even when the other co-sharer or co-sharers are not made parties to that suit. A co-sharer is entitled to a share in every inch of the joint property, and if a trespasser interferes with his possession he is certainly entitled to bring an action against him to eject him and to defend his right of possession. Non-joinder of the other joint owners is not a bar to the suit. 224 Ind. Cas. 50=1946 A.W.R. (C.C.) 94=A.I.R. 1946 Oudh 221.

——Co-sharer—Possession of one—Dispossession by another—Remedy.

A co-sharer can recover land which he has cultivated as his **khudkasht** for a number of years from the co-sharers who have dispossessed him without his consent and who have no better title to the land than he had in virtue of his possession as co-sharer. A.I.R. 1927 Oudh 467 and A.I.R. 1924 P.C. 144, Foll. 120 Ind. Cas. 385 (Oudh).

——Inference by Courts.

Even when there is no evidence of ouster at a particular time it is not unreasonable for Courts to infer an ouster as existing for a long time from facts found by them. 29 Bom. 300, Foll. 38 M. L.T. 283=102 Ind. Cas. 300=A.I.R. 1927 Mad. 595.

——When a co-sharer in a village has rightfully acquired land as his **khudkhast** and another co-sharer forcibly dispossesses him the Court can restore the man forcibly dispossessed to physical possession. 87 Ind. Cas. 679=6 L.R.A. (Civ.) 313=A.I.R. 1925 All. 593.

——Rights in property affected—Subsequent conduct of defaulter.

Where one of the shareholders of a property purported to mortgage the whole estate.

Held, that the other shareholders had a right to the declaration that the defendant could not alienate their share, and this notwithstanding that subsequently to the suit, the defaulter had paid off the mortgage debt. (1908) 8 C.L.J. 185.

——Co-sharer—Dispossession—Decree for joint possession—Illegal dispossession.

Where one of the joint-owners of immoveable property in execution of a decree obtained by him for exclusive possession in a suit to which the co-owner was not a party ousted the co-owner, there is a dispossession, and the latter is entitled to be restored to joint possession. 26 A. 588 (F.B.), foll. (1905) 2 A.L.J. 481.

8. Exclusive possession.

(a) Effect of.
(b) Ejectment.
(c) Mutual agreement.
(d) Suit for joint possession.
(e) Transfer.

(a) Effect of.

——Co sharer—Exclusive possession—If amounts to assertion of exclusive title.

Exclusive possession by a co-sharer is not an assertion of exclusive title and what amounts to ouster is a question of fact depending on the circumstances of each case. Where a co-sharer builds his residential house on the land, it amounts to an assertion of hostile and exclusive title to the knowledge of his co-sharers. A.I.R. 1934 Lah. 84=148 Ind. Cas. 983.

——Exclusive possession—Presumption in cases of —Burden of proof.

The general rule of law in the United Provinces is that a co-sharer in possession of a particular plot as his **khudkasht** or as his **sir** has a right to mortgage that plot. It is, therefore, for the party who alleges it, to show that a different rule prevails in Kumaun. A.I.R. 1935 All. 265=1935 A. L.J. 337=1935 A.W.R. 42=153 Ind. Cas. 898 =1935 R.D. 34.

——Where several persons become entitled on the death of the last owner to succeed to the estate of the last owner, the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. A.I. R. 1935 Cal. 273=60 C.L.J. 377=155 Ind. Cas. 815.

——No objection by others—Others, if entitled to realise income from land to the extent if their respective shares.

If one of the co-sharers takes exclusive possession over a piece of land in a village without the consent of the other co-sharers, it is open to them to take immediate steps for assertion of their rights. If, however, they allow a co-sharer to take possession exclusively over a plot and raise no objection whatsoever for a number of years, it is not open to them to ask that a decree should be given to them entitling them to make realization to the extent of their respective shares in the plot. When, however, accounts are taken between the co-sharers, the rent of the land held by a co-sharer exclusively will be taken into account. A co-sharer may take possession over a plot and if no objection is taken by the other co-sharers, then at the time of partition, the other co-sharers will be given other lands in the village by way of compensation. If the co-sharer is in possession with the consent of all the co-sharers, the case is much stronger. A.I.R. 1937 All. 321=1937 A.L.J. 501=1937 A. W.R. 372=169 Ind. Cas. 17=1937 R.D. 226.

——Co sharer in exclusive possession of joint land not exceeding his share.

In a case of a joint **khata**, where one co-sharer has been in exclusive possession of a portion of the joint land, which does not exceed his share in the entire holding, another co-sharer cannot dispossess him against his will from the portion of which he had been in possession. A.I.R. 1938 Lah. 465 =40 P.L.R. 653=177 Ind. Cas. 385.

——Cutting of grass for several years.

From the mere fact of cutting of grass by the plaintiff for several years, from an area of barren land, it cannot be said that the plaintiff was in exclusive possession of the land as against his co-sharers, so as to entitle him for a decree for possession on the basis of his necessary title. A.I. R. 1936 Lah. 669=165 Ind. Cas. 191.

——Other tenants in possession—Tenants not ousted.

The mere fact that the persons are tenants-in-common with others who are in possession of the property is sufficient to show that they were in possession even if they lived a great distance from the village where the property is situate and even if they had nothing whatever to do with the property unless it could be shown that the other co-tenants had ousted these persons from this property. A.I.R. 1936 Pat. 66=17 P.L.T. 170= 160 Ind. Cas. 1054.

——When adverse.

The exclusive possession of persons who are in fact co-owners with the plaintiff cannot be adverse to him unless they repudiate his title. A.I.R. 1938 Nag. 89=173 Ind. Cas. 103.

——Acquisition of title by adverse possession by one co-sharer for himself and as executor of his brother's estate with common fund.

Where a co-sharer has acquired title by adverse possession against the other lawful owners, both in his individual capacity and as executor to the estate of his brother by spending money which came from the estate of his brother and of his own estate, he cannot claim an exclusive title to the property so acquired. A.I.R. 1940 Cal. 33=70 C. L.J. 355=44 C.W.N. 114=188 Ind. Cas. 761.

——Exclusive possession—Ouster—Possession.

The sole possession and long enjoyment of profits by one co-owner exclusive of others continuously for a long period, evidences presumption of the ouster of the other co-owners. 58 Ind. Cas. 731 (Pat.).

——Exclusive possession — Ouster — Tenant-in-common in occupation of portion of joint property —Liability to account.

Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property, that he has to his sole property except to so far as it is limited by the equal rights of his co-sharers. But the owner out of possession cannot complain of the mere possession of the co-owner, so long as he refrains from setting any claim to share in that possession. Hence in order to give rise to a cause of auction against the co-sharer, it must be proved that his act had amounted to ouster or disseizin. Where there is an actual turning out or excluding out of the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. A tenant cannot be held liable to his co-tenant for damages for use and occupation of the joint property unless

there has been waste or ouster. Where one tenants-in-common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co-tenant to be admitted into possession, he is under no obligation even to account. 23 C.W.N. 900=29 C.L.J. 504=51 Ind. Cas. 976.

——Exclusive possession—Joint property — Rule of enjoyment—Effect.

The general rule as regards the enjoyment of joint property by the co-sharers is that one co-sharer has no right to appropriate himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for long time without any let or hindrance by the other co-sharers the latter have no right to eject him or his transferee or to distrub his possession or enjoyment or otherwise than by seeking partition and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what was in ther possession. 21 O.C. 214=5 O.L.J. 613=48 Ind. Cas. 91.

——Exclusive use of land by one co-sharer is not ouster.

Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers but he is liable to pay compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the lands. 80 Ind. Cas. 827=51 Cal. 631=51 I.A. 293=26 Bom.L.R. 651=35 M.L.T. 169=23 A.L.J. 76=5 L.R.P.C. 137=29 C.W.N. 34=20 M.L.W. 770=1924 M.W.N. 723=6 P.L.T. 750=3 Pat.L.R. (Civ.) 193=A.I.R. 1924 P.C. 144=47 M.L.J. 23 (P.C.).

(b) Ejectment.

——Other co-sharers can eject him without proving special damage.

Where a co-sharer brings a portion of the common property practically under his exclusive possession, another co-sharer is entitled to eject him without proving special damage. 163 Ind. Cas. 148=38 P.L.R. 679.

——Mahal—One of the co-sharers in actual possession—Others, if can eject him.

Where there are several co-sharers in the **mahal** and one of them happens to be in the actual occupation of the land, the other co-sharers are not entitled forcibly to eject him. Similarly, if there is a piece of land which is unoccupied by any co-sharer or tenant, any one of the co-sharers may go into possession and cultivate it. If he does so, the others cannot forcibly eject him. All the co-sharers have a right to use the fields, but if at any time any of them has sown a crop, he is entitled to reap it and the others cannot eject him. They can of course claim profits from him. A.I.R. 1935 All. 781=1935 A.L.J. 1072=1935 A.W.R. 759=156 Ind. Cas. 45=1935 R.D. 310.

——Injunction.

Although as a general rule one co-sharer has no right to take exclusive possession of a joint property, the question whether such exclusive possession amounts to ouster or not depends on the circumstances of each particular case, and in a case where it cannot be held that there has been ouster, the exclusive possession of a co-sharer should not be disturbed at the instance of another who is similarly in possession of another portion of the joint property.

An injunction restraining a co-sharer from building upon the site in his possession will not be issued in such a case if such construction is not likely to cause such material and substantial injury as could not be remedied on a partition of the joint land. A.I.R. 1931 Lah. 631=32 P.L.R. 653=135 Ind. Cas. 38.

——Exclusive possession—Injunction.

If one co-sharer be found in the act of occupying a portion of the lands which is not being actually used by another, the former should not be restrained in his occupation. Where the defendant, a co-sharer of the plaintiff has exclusive occupation of a small piece of land and by which the plaintiff has sustained no substantial injury and where the nature of the occupation is such that it may ultimately prove to be an improvement, the plaintiffs claim for an injunction on the defendant should be rejected. 15 C.W.N. 188=7 Ind. Cas. 124.

——Abandonment, what constitutes — Mere non-cultivation, effect of.

A co-sharer in an undivided **patti** who is in exclusive possession of certain plots of land is entitled to remain in possession of those plots without interference by other co-sharers.

Where after the plaintiff had cultivated a certain plot as his **khudkasht** for fifteen or sixteen years, he did not cultivate it for one year because it was impossible to cultivate it in that year owing to the land having been flooded and when he wished to cultivate it in the following year, he found that the defendants had taken possession of it:

Held, on these facts, it cannot be assumed that the plaintiff ever intended to give up his exclusive possession of the plot and the plaintiff was entitled to recover possession. A.I.R. 1932 Oudh 81=135 Ind. Cas. 399=15 R.D. 704.

——One sharer in possession of plot through tenant and realising rent at direction of another lambardar co-sharer—His transferee, whether can be ejected otherwise than by seeking partition.

Where a co-sharer has been in possession of a piece of joint land without let or hinderance by other co-sharers, the latter have no right to eject him or his transferee otherwise than by seeking partition. But the nature of exclusive possession must be the possession in assertion of a right of a co-sharer. Where the plot in dispute is in the possession of a tenant, his payment of rent at the direction of the co-sharer-**lambardar,** who is the only person entitled to realise rent, to another co-sharer, is not the possession of the co-sharer receiving the rent without any let or hindrance by the other co-sharers, and his transferee can be ejected otherwise than by seeking partition. A.I.R. 1940 Oudh 215=1940 O.W.N. 173=1940 A.

W.R. 89 (2)=15 Luck. 385=186 Ind. Cas. 141 =1940 R.D. 89.

——Exclusive possession—Common land—Remedy of excluded members.

Where land is in the exclusive possession of one co-sharer from a long time, the other co-sharer of the village have no right to disturb his possession except by means of a suit for partition. 6 O. L.J. 278=52 Ind. Cas. 7.

——Exclusive possession — Remedy —Ejectment —Partition.

The remedy for co-sharer against another in possession of the entire estate is by suit for partition and not by ejectment. 21 O.C. 276=5 O. L.J. 701=48 Ind. Cas. 767.

——Co-sharers whose rights may be invaded by exclusive possession of another co-sharer can maintain a suit without proving material and substantial injury.

Where a co-sharer perfectly knew that he had no right to take exclusive possession of any portion of the common land and that with his eyes open he commenced and completed the building.

Held, that an injunction can be granted to demolish without proving special damage. 1 Lah. 249 and 2 Lah. 73, Foll. 92 Ind. Cas. 297=A.I. R. 1926 Lah. 175.

——Whether mutation proceedings are evidence of exclusion from co-ownership property.

Mutation proceeding is not a judicial proceeding and does not decide title and is no evidence of exclusion from co-ownership property. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with greater confidence so that the revenue for it will be paid. 1 Luck. 389=29 O.C. 316=53 I. A. 220=48 All. 529=25 A.L.J. 25=28 Bom.L. R. 1409=44 C.L.J. 330=25 M.L.W. 1=98 Ind. Cas. 1013=3 O.W.N. 623=1926 M.W.N. 716= 38 M.L.T. 81=A.I.R. 1926 P.C. 100=51 M.L. J. 836 (P.C.).

——Encroachment on common land by one—Others are entitled to restrain him from so encroaching.

A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use. The rule that the plaintiff must prove special damage cannot be applied where the land on which defendant has built is part of the village pond, a partition of which is not at all likely to be allowed by the Revenue Authorities. Even one of many co-sharers is entitled as much as any other proprietor to prevent an encroachment on that common land. 71 Ind. Cas. 47=15 P.W.R. 1923=A.I.R. 1923 Lah. 289.

——Some co-sharers remaining in exclusive possession for a long time is not by itself enough to establish adverse possession by them.

The entry and possession of land by one co-owner, will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one owner is, in itself, rightful and does not imply hostility, as would the possession of a mere stranger. The law will never construe a possession tortious, unless from necessity; on the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful, acts of ownership are not, in tenancies in common, acts of disseisin; it depends upon the intent with which they are done and their notoriety. Where some of the co-sharers went away to another village and the others remained in possession of the property for 50 years enjoying all the profits any paying the rents and one of them executed a conveyance to another,

Held, that merely from these facts, ouster could not be presumed. 35 Cal. 961, foll. 60 Ind. Cas. 298=33 C.L.J. 344.

(c) Mutual agreement.

——Exclusive possession—Mutual arrangement—When can be disturbed.

A co-owner cannot set up a claim exclusively to any parcel of the joint property whereby mutual arrangements co-owners enjoy different parcels in exclusive possession without partition. Courts will not interfere with the arrangement at the instance of any one co-owner and will do so only on partition, so far as may be necessary to make an equitable division of the property. 18 Cal. 10 (P.C.); 28 Cal. 323; 27 All. 88; 11 C.W.N. 143, Foll. 14 N.L.R. 101=46 Ind. Cas. 272.

——Exclusive possession—Common land—Mutual arrangement.

Where one of the joint owners of an estate, who by mutual arrangement with the other co-sharers has been placed in exclusive occupation of some of the joint lands as representing his share, he cannot be equitably disturbed by the latter unless they seek a partition of all the lands comprised in the estate. 27 C.L.J. 441=45 Ind. Cas. 705.

——Exclusive possession or enjoyment—Mutual arrangement—Damages.

Where the plaintiff sues one of his co-sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right of fishing in it.

Held, the defendant was justly exercising his right in fishing in the tank and damages could not be claimed against him. 19 C.W.N. 872=29 Ind. Cas. 806.

——Exclusive enjoyment of building on a plot by one—Rights of other parties.

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the other co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. In making a partition the lands will be allotted to him. 37 All. 412=13 A.L.J. 555=29 Ind. Cas. 15 (F.B.).

——Exclusive possession—Joint ownership—Biggest adult shareholder—Presumption.

The biggest adult share holder of a property will be presumed to be the trustee for the others if he holds entire possession of the property during their minority. 23 Ind. Cas. 562 (Cal.).

7. (d) Suit for joint possession.

——Exclusive possession—Ouster—Suit for joint possession.

A portion of the joint land was a marsh and was jointly possessed by all the co-owners though they had other lands in separate posession. The marsh silted up and was occupied by one sharer to the exclusion of other. In a suit for joint possession, held, a co-owner is entitled to a decree without bringing a suit for partition. Where parties are contended with joint possession of a certain land and a separate possession of the rest, from the point of view of justice, equity and gold conscience, the dissatisfied party, may sue for partition. 18 C.W.N. 609=22 Ind. Cas. 683.

——Exclusive possession—Ouster of one co-sharer occupying portion of joint property—Whether other sharers entitled to joint possession.

The mere fact of sole occupation by one co-sharer of a portion of the common property does not constitute an ouster of the other co-sharers nor does it entitle them to a decree for joint possession especially where no hostile title is set up and even sole occupation of different parcels of land by different co-sharers according to convenience does not constitute ouster of other. Ouster means dispossession of one co-sharer by another where a hostile title is set up by the latter and where the occupation of the latter is inconsistent with joint ownership. 18 C.W.N. 328=21 Ind. Cas. 621.

——Exclusive possession—Separate plots in abadi —Right to continue.

If joint owners are in exclusive possession of separate plots in abadi they can continue such possession and enjoy it as they please so long as such user or possession does not interfere with the user of other owners of what is in their possession. 34 All. 113=9 A.L.J. 48=11 Ind. Cas. 768.

——Exclusive possession—Ouster.

Sole occupation by one co-owner of a part of the common estate does not necessarily mean an ouster of the other co-owners. Erection of a big building by one co-owner on the common estate without the consent of others is not conclusive evidence of ouster; the test is whether the complaining co-owner has sustained a substantial injury by the act of the other co-owner. If exclusion of co-tenant by another constitutes ouster, then the co-owner ousted can maintain an action against the co-owner in possession. 11 C.L.J. 189=5 Ind. Cas. 171.

———If a plaintiff comes into Court claiming to be exclusive owner of certain property, but he is found to be a joint owner with the defendant, the Court should proceed to decide the case on the basis of joint ownership. 112 Ind. Cas. 520= A.I.R. 1928 Lah. 429.

——Whether exclusive possession amounts to ouster depends upon the facts of each case.

As a general proposition one co-sharer has no right to take exclusive possession of joint property but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each particular case; and in a case where there is no ouster it is not right to refuse the defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers, nor does it entitle the latter to a decree for joint possession. 18 C.W.N. 328, Foll. 31 C.W.N. 496 =101 Ind. Cas. 27=A.I.R. 1927 Cal. 462. See also 107 Ind. Cas. 465=32 C.W.N. 449; also 82 Ind. Cas. 822=A.I.R. 1925 Cal. 469.

——One cannot recover mesne profits from others in absence of ouster.

A co-sharer is not entitled to get mesne profits from his co-sharers on account of their cultivating lands in excess of their shares when there is no proof of ouster and the mere taking up the exclusive occupancy of a portion of joint property by one co-owner after leaving sufficient margin for the other co-owner to take up similar exclusive occupancy of other plots, would not amount to an ouster so as to render the first occupant liable in mesne profits to the claimant or make him accountable for cultivating profits. 83 Ind. Cas. 86= A.I.R. 1925 Nag. 240.

———Very strong grounds are necessary for depriving a co-owner of the exclusive occupation which he has taken up of joint land. 82 Ind. Cas. 432=A.I.R. 1925 Nag. 145.

——Where a co-sharer is found to be wrongfully dispossessed of a certain land by another co-sharer, who has taken exclusive possession of it, the proper remedy is to give the dispossessed co-sharer a decree for exclusive possession. 71 Ind. Cas. 299=A.I.R. 1923 All. 363.

——When two plots held exclusively by two co-sharers severally, the holder of one plot cannot claim easement over the other plot.

Although exclusive possession by co-sharers of portions of undivided estates is a common thing, such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. Therefore one co-sharer in exclusive possession of a plot cannot acquire a right of easement over another plot held exclusively by another co-sharer. 87 Ind. Cas. 736=3 Pat.L.R. 81= A.I.R. 1925 Pat. 492.

——Because a co-sharer has built a platform some time ago and thereby has to a certain extent secured exclusive use of the ground under the platform, he is not entitled to raise a further structure on the platform which may still further deprive other co-sharers of the use of the joint property. 28 Punj.L.R. 590=104 Ind. Cas. 563=A.I.R. 1927 Lah. 718.

——Co-sharer making default in Government dues and bringing about the sale of the estate cannot be permitted to have exclusive possession after purchase.

A co-sharer, who has defaulted to pay the Government dues and has thereby brought about the sale of the estate cannot be permitted if he purchases the estate at the sale, to hold it for his own benefit to the exclusion of his co-owner. The essence of the matter is that the co-owner or the lessee who thus acts in breach of his obligation, contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the

person whose interest it was his duty to protect. 43 Cal. 660; 44 Cal. 573, Foll. 72 Ind. Cas. 698 =36 C.L.J. 208=A.I.R. 1923 Cal. 13.

——Form of decree—Exclusive dealing with joint property by one of the co-owners — Remedy of others.

Upon the death of the tenant of land which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself. The remaining co-sharers brought a suit to recover possession—apparently actual physical possession—of three quarters of the tenant's holding thus occupied by the defendants. **Held**, that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in dispute, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. 1904 A.W.N. 194= 1 A.L.J. 488=27 A. 88. See also (1905) A.W. N. 233=28 All. 161.

——Form of decree—Joint possession—Illegal ouster of joint owner—Suit for recovery of joint possession.

If a plaintiff has been in joint possession of property and has been illegally ousted from joint possession of any portion of that property by a co-owner, he is entitled to be restored to such joint possession. 1901 A. W. N. 48 distinguished. 1904 A.W.N. 106=26 A. 588=1 A.L.J. 183= 1904 A.W.N. 199=27 A. 153 (F.B.).

——Form of decree—Joint proptrty—Trees planted on joint land by one co-owner with the consent of the others — Assertion of adverse title by co-owner who had planted the trees.

One of several co-owners planted a grove upon joint land. The other co-owners (plaintiffs) were found to have consented. **Held**, that plaintiffs are entitled to a decree declaring that they were joint owners of the land in dispute, and as such joint owners entitled to an account of the profits of the land, but not that they should be restored to joint possession. 1905 A.W.N. 160.

——Form of decree — Share in undivided mahal taken possession of by some of the co-sharers to the exclusion of others—Relief to which the excluded co-sharers are entitled.

Where co-sharers in an undivided mahal come into Court complaining that other co-sharers having a like interest with themselves have excluded them from possession of the joint property, the only relief which a civil Court can give is a decree declaring the plaintiffs to be entitled to possession jointly with the other co-sharers. It cannot go on to partially eject the co-sharers in possession for the benefit of the dispossessed plaintiffs. (1901) A.W.N. 48.

8. (e) Transfer.

——Co-sharer in exclusive possession—If can transfer by way of gift.

As a result of private partition between P and D, certain plots were assigned to D. D continued to remain in exclusive possession of the same for considerable time and afterwards gifted them away by a deed of gift. P filed a suit for cancellation of deed on the ground that plots were situate in joint khata and D alone was not competent to transfer them by way of gift:

Held, that exclusive possession armed D with the right to make a gift but it did not deprive P of his title to plots in dispute; he could be given a declaration that his title to plots remained unaffected. A.I.R. 1945 All. 153=1945 A.L.J. 106 =1945 O.W.N. (H.C.) 59=1945 A.W.R. (H. C.) 42=I.L.R. (1945) All. 159=222 Ind. Cas. 133.

——One co-sharer in exclusive possession of portion of undivided holding—If can transfer it subject to adjustment of rights of other co-sharers at time of partition.

If a co-sharer is in possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition. Hence, a co-sharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of partition. Other co-sharers' rights will be sufficiently safeguarded if he is granted a decree declaring that the possession of the transferees in the lands in dispute will be that of co-sharers, subject to adjustment at the time of partition. A.I.R. 1940 Lah. 473=43 P.L.R. 626=I.L.R. (1941) Lah. 583=192 Ind. Cas. 266.

——It is not permissible for any co-sharer to alienate to a third person as his exclusive property the property which he has been occupying by agreement with his co-sharers. 1940 A.W.R. (H.C.) 199=1940 R.D. 132.

——One co-sharer in exclusive possession—Whether can transfer plot—Remedy of co-sharers not in possession.

A co-sharer, who has been in exclusive possession of a certain plot of land without let or hindrance by other co-sharers, can transfer the plot to a third person subject to the right of other co-sharers to obtain a partition of the village. The co-sharer not in actual possession has no right to eject the transferee in possession. His remedy is to obtain a partition. A.I.R. 1939 Oudh 243= 1939 O.W.N. 773=1939 A.W.R. 132=15 Luck. 15=183 Ind. Cas. 593=1939 R.D. 477.

——Co-sharer in undivided property—Whether can alienate any defined portion even if he is in exclusive possession—Subsequent partition—Portion mortgaged falling to others—Right of such co-sharers, if affected by sale.

A co-sharer in an undivided property cannot alienate any defined portion of such property even though he might have been in exclusive possession of the same by an agreement amongst the various co-sharers. It follows that if such a mortgage is made, the mortgage is subject to the right of other co-sharers to enforce a partition. If the mortgage is followed by a partition and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share.

Where a co-sharer in exclusive possession of portion of undivided property mortgaged it and decree for sale was obtained on it but on subsequent partition, the portion mortgaged was given to some

other co-sharer, and on the mortgagee purchasing the property in sale and mutation being effected in his name, the co-sharer to whom it was allotted in partition sued for possession:

Held, that the mutation in itself did not injure the plaintiff inasmuch as the purchaser's title had not been perfected by adverse possession and he took nothing by this purchase. A.I.R. 1936 All. 456=1936 A.L.J. 630=1936 A. W. R. 543=162 Ind. Cas. 762=1936 R.D. 250.

——Occupancy holding — Surrender by tenant in favour of one of co-sharer-landlords—Whether co-sharer holds it as khudkasht or occupancy tenant —Test.

In the case of a surrender of an occupancy holding by the tenant in favour of one of the co-sharer-landlords, the question whether the holding becomes the exclusive **khudkasht** of the co-sharer when he obtained surrender of it, or that the co-sharer became an occupancy tenant of the land depends upon whether the other co-sharer acting conjointly accepted him as a tenant of the propriety body or allowed him to hold the acquired land exclusively as a co-owner. A.I.R. 1943 Nag. 325=1943 N. L. J. 486=I. L. R. (1943) Nag. 757=213 Ind. Cas. 378.

——Stranger's adverse possession—Co-sharer purchasing—Possession, whether of the co-sharer.

Where a stranger having possessed the property for more than 12 years has acquired an indefeasible right to it by adverse possession, and subsequently one of the co-sharers purchases back the property with his own money, his possession cannot be said to be the possession of the co-sharer. A.I.R. 1934 Cal. 356=149 Ind. Cas. 410=60 Cal. 1406.

9. Fraud.

——Co-owners—Fraud—What is.

The mere fact that in respect of an alleged disbursement of the amounts collected, the co-owner made fraudulent entries, cannot be held to be fraud. A.I.R. 1940 Mad. 339=1939 M.W.N. 927.

10. Injunction.

——Co-sharer—Injunction — Construction on joint land — Mandatory injunction — Special damage, proof of, not necessary.

Where a co-sharer makes construction upon common land, it is not necessary for a co-sharer, who has not acquiesced in such construction to prove special damage. 1905 A.W.N. 158=2 A. L.J. 455=27 A. 688 (F.B.).

——Injunction—Co-sharer building on joint land without the permission of the other co-sharers.

One of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners. 12 A. 436; 18 A. 115, Foll. 1908 A.W.N. 19 =5 A.L.J. 93.

——Injunction mandatory, when to be given—Erection of wall.

When one of several co-owners builds a permanent wall on the common land, the Court has a discretion to interfere and direct its removal. Such discretion can only be exercised in cases where injury has accrued to the other co-owner by reason of the building and on proof that they took reasonable steps in time to prevent its erection. (1903) 30 C. 901.

——Injunction—One of the tenants laying drain pipes under the property held in common—Right of the co-tenant to restrain him.

The plaintiff sued to restrain the defendant who had commenced to lay a drain pipe, for the purpose of carrying off the drainage from his premises, under the surface of a piece of land which was held by the defendant in common with the plaintiff. **Held,** that the act of the defendant was not an infringement of the rights of the co-tenant giving rise to a cause of action, because the laying of the drain and the incidental temporary interference with the soil could not be regarded either as an ouster or destruction or even an act of waste. One tenant-in-common cannot maintain an action against another for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having at the same time an intention of making a prompt restitution. 2 Bom. L.R. 898=25 B. 248.

——Joint land—Building by one—If ouster—Right of others to mandatory injunction for demolition—Conditions of.

It cannot be held that an exclusive appropriation by one co-owner of a part of the joint land to his own use, by the erection of a permanent structure, is nessarily evidence of an ouster. The co-sharer who complains of the acts of his co-sharer cannot claim a decree for demolition of the building or joint possession unless he can establish that he has sustained some substantial injury by reason of the act of which he complains. The Court will not order demolition by way of a mandatory injunction unless it be shown that injury would otherwise accrue to the plaintiff co-sharer and that before the building was started objection was taken to the erection. It is only when the co-sharer cannot be adequately compensated otherwise than by the demolition of the building that a Court of equity should order such demolition. 31 P.L.T. 7=A.I.R. 1950 Pat. 511.

11. Joint possession.

(a) Decree for.
(b) Nature and presumption of right.
(c) Laches and Limitation.
(d) Suit to enforce right.

11. (a) Decree for.

——Joint possession—Decree — Other co-sharers can claim joint benefit in a decree obtained without their consent by one co-sharer.

Where a co-sharer obtains a decree for ejectment from a revenue Court without the consent of the other co-sharers and obtains possession in execution of the decree a decree for joint possession cannot be denied to the other co-sharers although their title was never denied and although

there might be apprehension of a breach of the peace if such joint decree were granted. 117 Ind. Cas. 339=11 L.R.A. Rev. 35=A.I.R. 1929 All. 609.

——Where one co-sharer is in sole occupation of a portion of a joint property but his possession is not hostile or inconsistent with the joint ownership of the other co-sharers, the latter are not entitled to get a decree for khas possession of such property. 47 C.L.J. 603=111 Ind. Cas. 19=A.I.R. 1928 Cal. 574.

——A person who is entitled to possession jointly with others can be granted a decree for joint possession not only if he was originally in joint possession and has been subsequently ousted but even if he had never been in possession at all. 4 Luck. 206=10 L.R.A. (Rev.) 177=114 Ind. Cas. 767=6 O.W.N. 1308=A.I.R. 1929 Oudh 414.

——Where a co-sharer has been in peaceful possession of the joint land as a co-sharer and has not denied the title of another co-sharer, nor did he oust him from possession, a decree for joint possession against the former should not be granted to the latter. 48 All. 684=24 A.L.J. 892=96 Ind. Cas. 666=A.I.R. 1926 All. 669.

——Joint possession—Purchaser from co-tenant.

A decree for joint possession ought not to be passed in favour of purchaser of property from a co-tenant who never had actual possession. 25 M.L.J. 352=14 M.L.T. 346=21 Ind. Cas. 314.

——Joint possession—Ejectment suit.

A co-tenant of joint property cannot sue for ejectment or joint possession with his other co-tenant, solely on the ground that the latter is in sole occupation of the property. 11 C.L.J. 189=5 Ind. Cas. 171.

——Where defendants in peaceful possession of lands as khudkasht—Joint possession need not be decreed.

Where a party is entitled to joint possession, he should be granted the relief, and, to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. (34 All. 150, Foll.) But in certain cases a Court would be entitled to refuse a decree for joint possession. 18 Cal. 10 and (1894) A.W.N. 127, Foll. Where the defendants had been in peaceful possession of the lands as their khudkasht for well nigh twelve years before the suit for joint possession was instituted,

Held, that a decree for joint possession need not be granted.

Held, further that having regard to the peculiar nature of the District concerned, a decree for joint possession would be inexpedient. It is no doubht the case that the Code of Civil Procedure as it was enacted in 1882 did not provide for the execution of a decree for joint possession and the Code of 1908 does provide a mode as to how a decree for joint possession is to be executed. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession. 87 Ind. Cas. 59=A.I.R. 1925 All. 668.

——It is a matter entirely within the discretion of the Court whether or not to grant a decree for joint possession. 82 Ind. Cas. 432=A.I.R. 1925 Nag. 145.

——Decree for joint possession may be refused in proper cases.

A person who was entitled to joint possession but had not obtained such possession might get a decree for joint possession but there may indeed be cases in which the Court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession. Where the plaintiffs have an equally satisfactory remedy and where the plots in dispute have for many years past been cultivated by the defendant alone. **Held**, plaintiffs should not be granted a decree. 34 All. 150, Foll. 84 Ind. Cas. 2=5 L.R.A. (Rev.) 185=A.I.R. 1924 All. 923.

——Where the plaintiff as a co-sharer claims a declaration of his right to the lands in dispute and also joint possession with the defendants,

Held, that a decree for joint possession ought to be granted. 71 Ind. Cas. 455=45 All. 157=A.I.R. 1923 All. 445.

——If one co-sharer wrongfully cultivates parti land and gets it recorded in his name and another co-sharer sues for declaration of title and joint possession,

Held, that a decree for joint possession can be passed. 19 A.L.J. 780 and 19 A.L.J. 783, Foll. 71 Ind. Cas. 559=5 L.R.A. (Rev.) 23=A.I.R. 1923 All. 416.

——C. P. Code, O. 21, R. 35 — Suit by a co-sharer for damages and possession—Joint possession should be decreed but not damages.

Where the plaintiffs and defendant were joint owners of a Zamindari and the defendant by taking over possession of the whole excluded the plaintiffs from possession and the plaintiffs sued him for joint possession with mesne profits,

Held, the plaintiff was entitled to a decree for joint possession, but not to a decree for profits by way of damages, for the profits could be taken into account when the accounts of the village income are adjusted at the end of the year. 63 Ind. Cas. 806=44 All. 5=19 A. L. J. 783=A.I.R. 1922 All. 162 (F.B.).

——Co-sharer landlord is entitled to decree for joint possession against tenant settled by other co-sharer—Acquiescence in tenant's possession does not take away his right.

Where the Tahsildar has not authority from the landlord, his act in granting a receipt cannot amount to recognition. Where the tenants took settlement only from the twelve annas landlords and the twelve annas landlords did not settle the land with them as sixteen annas landlords.

Held, the four annas landlord who made no settlement with tenants is entitled to a decree for joint possession with the tenants. The co-sharer landlord is not debarred from claiming joint possession with the tenants only because the defendant's occupation of the land was acquiesced in without remonstrance for nine years. 66 Ind. Cas. 55=1922 Pat.H.C.C. 142=3 Pat.L.T. 409=1 Pat. 394=A.I.R. 1922 Pat. 279.

——Where a co-sharer claims the re-formation in situ as an accretion to his tenure on payment of rent, that amounts to denying the full proprietary title of the co-sharer to whom such land belongs

and he is entitled to a decree for joint possession without instituting a partition suit. 104 Ind. Cas. 547=31 C.W.N. 750=A.I.R. 1927 Cal. 565.

——**Joint possesion of land when proved to be the property of all co-sharers, can be obtained.**

When one co-sharer occupies a portion of the vacant land, which in many villages has already been reduced to a comparatively small area, hardly sufficient for the common purposes of the inhabitants of the village, it is hardly fair to the other co-sharers to tell them, that their action for the joint possession of the common land so occupied cannot be sustained, because they have remedy by partition, and that the co-sharer occupying the land must, until partition, remain in exclusive possession of the land occupied by him.

Where plaintiffs have not succeeded in establishing the exclusive title of the co-sharers who are proprietors in the patti, they cannot get a decree for ejectment, but there is nothing to prevent them from obtaining a decree for joint possession of the land which is proved to be the property of all the co-sharers including the plaintiffs and the defendants. 61 Ind. Cas. 415=2 Lah. 73=3 L.L.J. 75=68 P.L.R. 1921=A.I.R. 1921 Lah. 157.

——**One cultivating more than his share—Other's remedy is to sue for partition.**

Joint co-owners of a field cannot enjoy possession of the field except by cultivating each separate portion of the field. If they have once agreed to cultivate definite portions, neither can be allowed to bring a suit for joint possession of the portion of the other. If one party is cultivating more than his share, the remedy of the other is to bring a suit for partition. 64 Ind. Cas. 427=A.I.R. 1921 Nag. 101.

——**When a co-sharer is dispossessed by another, suit for joint possession will lie in Civil Court.**

Where upon abandonment of a holding by a tenant it has been jointly cultivated by the co-sharers, subsequent dispossession of the plaintiff by the defendant would entitle the plaintiff to maintain a suit for recovery of joint possession in the Civil Court. It is not at all incumbent on the plaintiff to have recourse to the Revenue Court. There is no law which restricts his right to a claim for a share in the profits only. He is entitled to obtain joint possession of the land which is the joint property of the parties. The case would be different if by some sort of arrangement between the co-sharers each had been in separate possession of a plot of land for a length of time, which separate possession could not be disturbed until an actual partition took place. 84 Ind. Cas. 1000=5 L.R.A. (Rev.) 113=A.I.R. 1924 All. 865.

——Where the plaintiff sues as a member of a joint family to recover joint family property from the defendant, another member of the joint family, who claims to hold it adversely, no decree for mesne profits should be passed but a decree for joint possession of an undivided share in the property, should be passed. 65 Ind. Cas. 345=8 O.L.J. 596=A.I.R. 1922 Oudh 55.

——**Co-sharer—Joint property—Exclusive dealing with joint property by one of the co-owners—Remedy of the other co-owners—Form of decree.**

On the death of a tenant of land which belonged to several joint-owners, one of the co-owners obtained exclusive possession of the tenant's holding and his name recorded as owner in the mutation department. The other co-owners sued for joint possession to the extent of their interest in the land, as they asked also for interest **pendente lite** and future interest and costs of suit and for no further relief. **Held,** that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint-owners of the land, and that the plaintiffs were, as such joint-owners, entitled to an account of the profits of the land. But the plaintiffs were not entitled to an injunction restraining the defendant from dealing with the land without the plaintiff's consent. 1905 A.W.N. 233=28 A. 161.

11. (b) Nature and presumption of right.

——**Joint possession—Nature of—Legitimate use of property does not constitute invasion of co-sharer's right.**

Where a property is jointly owned, each one of the co-owners has a right as co-owners to use the property in a way not inconsistent with similar rights of other co-owners. Each co-owner has the right, irrespective of the quantity of his interests, to be in possession of any part and parcel of the property jointly with the others and he is not liable to an action if the use is legitimate and does not constitute an invasion of rights of other co-sharers, **i.e.**, if there is no exclusion or ouster. 32 Cal. 837, Foll. 120 Ind. Cas. 497=A.I.R. 1930 Sind 34.

——**Joint possession—Presumption.**

Co-sharer is entitled to repair the whole property and his repairing is not so hostile as to make it a denial by him of the title of others. 92 Ind. Cas. 685=1 Luck. 62=13 O.L.J. 55=3 O.W.N. 186=A.I.R. 1926 Oudh 258.

——Co-tenant out of possession starts with the presumption in his favour that the possession of the other co-tenant is not adverse to him. 78 Ind. Cas. 895=10 O.L.J. 646=27 O.C. 77=A.I.R. 1924 Oudh 266.

——**Co-owner in possession is not a trustee for other co-owners.**

The position of a co-tenant or a co-partner holding the property in his own name, is not that of a trustee for the other co-owners or co-partners; and if he has certain obligation in respect of the property so held by him towards the co-owners or co-partners the co-owners or co-partners would have the right to enforce in a proper manner their right of ownership to that property. 73 Ind. Cas. 718=47 Bom. 321=25 Bom.L.R. 112=A.I.R. 1923 Bom. 237 (F.B.).

——**Possession of one—Whether should be considered to be constructive possession of others.**

In the case of co-sharers, possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his co-sharers in denial of their rights. A.I.R. 1935 All. 774=1935 A.L.J. 828=1935 A.W.R. 728=155 Ind. Cas. 824=1935 R.D. 267. **See also** A.I.R. 1935 Lah. 441 and A.I.R. 1933 Oudh 70=141 Ind. Cas. 246.

——**Obiter.**—The possession of a co-sharer would be deemed to be the possession of all the co-sharers

for the purposes of limitation. A.I.R. 1939 Lah. 288=41 P.L.R. 109.

——When the lambardar gets possession of tenancy land on surrender by the tenant, the co-sharer is entitled to a joint possession, even if the surrender is not effected by a registered instrument. 1942 N.L.J. 207.

——Tenancy-in-common and several tenancy.

There is no half-way house between estates in severalty and estate held in tenancy-in-common. A.I.R. 1943 Pat. 194=24 P.L.T. 175=22 Pat. 382=207 Ind. Cas. 353=9 B.R. 401 (F.B.).

——Joint possession—Nature of rights.

One co-owner cannot exclusively be saddled with the loss due to negligence in the repairing joint property in proper time where the other co-owner could arrange himself for the repairs. 80 Ind. Cas. 920=A.I.R. 1925 Nag. 68.

——Co-sharer—Lands formed by accretion — Exclusive possession.

Whenever new lands are formed by accretion to an old estate it is not open to any co-sharer of the estate who appears first on the field to grab possession of the land and hold it either as his tenant or by settling tenants thereon to the permanent exclusion of all the other co-sharers. (1906) 33 C. 1201.

——Joint possession—Mahomedan family—Possession of one member—If possession of all.

In the case of a Mahomedan family it cannot be assumed either as a matter of law or as a matter of fact that possession of one is possession of all. 16 Cut.L.T. 147=A.I.R. 1950 Orissa 250.

——Co-heirs under Mahomedan law are in the position of tenants in common and entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. A.I.R. 1924 All. 384, Foll. 109 Ind. Cas. 658=10 Lah. 842=122 Ind. Cas. 81=A.I.R. 1929 Lah. 195.

11. (c) Laches and Limitation.

——Joint possession—Exclusive possession—Suit for joint possession must be brought without delay.

Where a suit for joint possession of four fields was brought by a village co-sharer on the ground that it was common property of the village co-sharers and had been brought under cultivation by the defendant cosharers, and the suit was dismissed by the lower appellate Court on the ground that as the defendants had taken peaceful possession of the common land without denying the title of the plaintiff and had been openly engaging themselves in cultivating the land in a proper course of cultivation for at least three years without objection by the plaintiff, it would be inequitable to disturb the defendants' possession of the land.

Held, that the suit was rightly dismissed as the claim for joint possession should have been made promptly and that the plaintiff could not be allowed to wait and see if the defendants' efforts and expenditure had achieved their object and the land was regularly bearing valuable crops. 4 N.L.R. 120, Foll. 128 Ind. Cas. 415=26 N.L.R. 345.

——Joint possession—Suit for—Delay.

A claim for joint possession of common property by one co-sharer against other co-sharers ought to be put forward without delay. Where the defendant co-sharers took possession of uncultivated common land peacefully and openly to the knowledge of the plaintiff-co-sharer, and at their expense cultivated it for at least three years the plaintiff who stood by during that period, cannot be allowed to urge his claim for joint possession after finding the land has become fruitful. 4 N.L.R. 120, Foll. 26 N.L.R. 345=128 Ind. Cas. 415.

——Joint possession—Limitation.

Possession by some of the co-sharers of different portions in a joint mahal prevent limitation from running against them in regard to the remainder. 3 O.L.J. 279=35 Ind. Cas. 743.

——Joint possession.

A suit by a co-owner for joint-khas possession is maintainable even without locating the quantity of land resumed as ckakran land, where the land has been leased out by the co-owners within three years of the suit and there had been no improvement. 10 C.L.J. 103=3 Ind. Cas. 399.

——The possession of the defendants over the undivided estate of the common ancestor of the parties is the possession of all the co-sharers in that estate, and plaintiffs' failure to prove their possession within limitation is no defence to their suit for their share of the inheritance. 78 Ind. Cas. 282 =A.I.R. 1925 Oudh 241.

11. (d) Suit to enforce right.

——Joint possession—Exclusion—Suit for joint possession will lie when there is ouster.

If one co-sharer separately occupies a portion of the common land without objection from his co-sharers, and with their express or implied consent, he is not to be subjected to a suit in which the plaintiffs claim joint possession of the plot of which the defendant is in sole occupation. If the separate occupation of the defendant is with the tacit or express assent of his co-sharers, and the co-sharers are dissatisfied with the manner in which the joint land is being held in possession by tenants in-common, their proper remedy is to bring a suit for partition. On the other hand, if the separate occupation of a co-sharer is continued after objection from any of his co-sharers and in defiance of their claim to be in joint possession of the land, then the co-sharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the property. Whether there is exclusion or ouster depends upon the circumstances prevailing in the particular case under consideration. 111 Ind. Cas. 74=55 Cal. 653 =A.I.R. 1928 Cal. 535.

——Joint possession—Right to obtain—When some co-sharers plant trees on joint plot—Others need not file a suit for portion of such plot but can get joint possession.

Where a partition has already been effected and all that the parties wish to do is to subdivide a small portion of land left for the joint use of the co-sharers and on which some co-sharers have planted trees-in an attempt to incorporate it in their own grove, the other co-sharers are fully entitled to get joint possession of the plot without a suit for partition and the trees along with the land remain in the joint possession of the parties and all rights formerly exercised by the co-parcenary body

of the land, such as the rights to irrigation shall remain intact. 106 Ind. Cas. 26=4 O. W. N. 1058=9 L.R.A. (Rev.) 347=A.I.R. 1928 Oudh 46.

——**Joint possession—Ouster—Repairing joint property is not ouster.**

It is a settled rule of law that where a particular property is owned by several co-sharers the possession of one co-sharer is, in law, the possession of the other co-sharers as well, and that it is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about the result. The act of repairing a joint property by one co-sharer cannot be considered as tantamount to the ouster of other co-sharers. Every co-sharer has a right to keep joint property in repairs and in doing so he cannot be considered to be doing an act which would in any way indicate an intention on his part to deny the title of other co-sharers and to set up an exclusive title to himself. A.I.R. 1926 Oudh 258, Foll. 96 Ind. Cas. 453=6 O.W.N. 1227=2 Luck. 172=13 O. L. J. 61=A.I.R. 1926 Oudh 464.

——**Lease of a portion of the land—Erection of building—Right of others to possession.**

The lessee of a piece of land had a valid lease in respect of a six-annas undivided share in the land, but the lease with respect to the remaining ten-annas share was not binding on the real owners of that share.

Held, that the mere fact that one of the owners of the 10 annas share did not object to the erection by the lessee of a hut on a small portion of the land, could not preclude the owners from asserting their right to joint khas possession of the land, although they would not be entitled to disturb the possession of the lessee so far as the hut was concerned. 63 Ind. Cas. 863 (Cal.).

——**Joint possession—Suit for—Suit for joint possession in a mahal lies in a Revenue Court.**

Where a person is a co-sharer in an undivided mahal and actually in possession of the property in the sense that he was making collection of rent for the co-parcenary body it is not open to one of the co-sharers to institute a suit in the Civil Court for joint possession of property or for the mesne profits and his remedy is by a suit in the revenue Court. 120 Ind. Cas. 558=A.I.R. 1929 All. 810.

———On the abandonment of a holding by a tenant a co-sharer landlord is entitled to joint possession without seeking for partition of the joint property as against another co-sharer landlord who takes possession of the holding. 26 Cal. 553, Foll. 102 Ind. Cas. 148=A.I.R. 1927 Cal. 936.

——**Mode of enjoyment—Duty of Court.**

A well was reserved in common between three brothers who divided the rest of their common properties. There were two **picottas** on the eastern side of the well and all the co-sharers were using those **picottas** or bailing stands for bailing out water from the well. **P** found some trouble in bailing out water at the then existing bailing stands and therefore, wanted to construct a bailing stand on the southern portion of the common well. The land situated to the south of well belonged wholly to **P**. The Court gave a decree allowing **P** to put up a new **picottas** subject to the condition that in execution the turns should be fixed by having a Commissioner appointed:

Held, that the Court ought to have enquired into the best method of enjoyment by the parties and what exactly the terms were. This matter should not have been left for the execution Court. **P** was entitled to ask the Court to interfere with the method of enjoying the property and the Court of law was entitled to alter the method of enjoyment if it came to the conclusion that the existing mode of enjoyment was bound to lead to friction and that a better and more convenient method of enjoyment was feasible without any detriment to the parties. A.I.R. 1945 Mad. 244=(1945) 1 M.L.J. 347=1945 M.W.N. 337=58 L.W. 292 (2).

——**Exclusive circumstances must be proved to justify exclusive occupation of joint property by one co-sharer.**

Mere setting up of rival claim does not give right to a decree for joint possession. If one of the tenants-in-common be in actual occupation of a portion of the estate and cultivating that part in a proper course of cultivation as if it belonged to him separately and another tenant-in-common attempts to come upon the said portion for carrying on operations inconsistent with the course of cultivation in which the first tenant-in-common is engaged, and the profitable use of the said portion by him and the first tenant resists and prevents such entry by the other tenant not in denial of his title but simply to protect himself in the profitable enjoyment of the land, his conduct would not give the other tenant right to a decree for joint possession. **Prima facie** co-owners have a right to hold joint possession of joint property and therefore if one co-sharer tries to defeat the claims of another co-sharer to such joint possession of the property, then special circumstances have to be alleged and established to justify exclusive occupation by one of the co-sharers of the joint property. Where only some of the co-sharers set up an exclusive or adverse right in land jointly held, the above principles apply. 82 Ind. Cas. 235=A.I.R. 1925 Cal. 235.

———Every co-sharer is entitled in conjunction with other co-sharers to join possession of the **parti** land in the village, unless and until some co-sharer is in a position to establish his exclusive and peaceful possession over that **parti** land for an appreciable length of time. 101 Ind. Cas. 821=8 L. R.A. Rev. 117=A.I.R. 1927 All. 490.

——**Joint possession—Right to co-sharer in exclusive possession.**

A co-sharer can claim joint possession with another co-sharer where the latter has not only exclusive possessions of the lands but asserts in his written statement exclusive possession in denial of the title of the plaintiff. 44 Ind. Cas. 689 (Cal.)

——**Transfer by one of land held in several—Other co-sharers, if can have transfer set aside and take joint possession with transferor.**

One of several co-sharers in an undivided **mahal** cannot transfer to a stranger lands held by him in severalty and if he does so, the other co-sharers

are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors. A.I.R. 1935 All. 771=1935 A.W.R. 717=155 Ind. Cas. 829=1935 R. D. 259.

——Stranger purchasing non-transferable occupancy holding—Other co-sharer's right to joint possession—Subsequent purchaser of landlord's interest.

The defendants who were complete strangers purchased a non-transferable occupancy holding from the previous tenant and thereafter, though within a short time of the purchase, acquired a small share in the superior interest, thus becoming co-sharer landlords. The other landlords then instituted a suit to recover joint possession with the defendants to the extent of their shares:

Held, that when the defendants took possession of the land, they came in as trespassers with no right which could avail against the plaintiffs who had at that time the right to evict them and in the absence of acquiescence on their part, they were entitled to joint possession to the extent they owned. A.I.R. 1933 Cal. 687=37 C.W.N. 256 =149 Ind. Cas. 1014.

——Mode of enjoyment — Excluded co-owner's rights.

If there be two or more tenants-in-common, and one **(A)** be in actual occupation of part of the estate, and is engaged in cultivating that part on proper course of cultivation as if it were his separate property, and another tenant-in-common **(B)** attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which **A** is engaged and the profitable use by him of the said part, and **A** resists and prevents such entry, not in denial of **B's title**, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of **A** would not entitle **B** to a decree for joint possession.

In such a case, **B** may make definite proposals for joint cultivation and if **A** does not agree to reasonable proposals, B may be allowed to cultivate the whole land. A.I.R. 1933 Nag. 367= 144 Ind. Cas. 382 (2).

——Permanent lease by co-sharer in exclusive possession—Suit by other co-sharers for joint possession.

It is not open to a co-sharer who has brought waste land under cultivation and occupied it as his exclusive property with the consent of his co-sharers, to alienate that property by way of a permanent lease.

A co-sharer who had brought waste land under cultivation made a permanent lease of it. The other co-sharers brought a suit for joint possession within twelve years. The lessee denied title of the plaintiffs, by alleging that the land belonged exclusively to his lessor:

Held, that the lessee was a trespasser so far as the plaintiffs were concerned and the plaintiffs were entitled to a decree for joint possession. A.I.R. 1932 All. 81=16 R.D. 188=132 Ind. Cas. 561.

——One co-sharer in possession of zerat land—Suit by others for ejectment.

One co-sharer landlord cannot institute a suit for ejectment against another co-sharer landlord who is in possession of a portion of the zerat land. His proper remedy is to institute a suit for partition. A.I.R. 1931 Pat. 389=10 Pat. 572=13 P.L.T. 129=133 Ind. Cas. 673.

——Joint possession.

The plaintiff claiming an undivided share in a Taluk was entitled to a declaration that the settlement in favour of the defendant claiming through the owner of the remainder was invalid and inoperative but joint possession of the plaintiff with the defendant would not be decreed in absence of proof of possession of remaining lands. 52 Ind. Cas. 171 (Cal.).

——Joint possession among co-owners.

In the absence of a superior title by custom to hold exclusive possession in the case of shamilat land, a plaintiff co-owner is entitled to only joint possession of it with another co-owner. 160 P. W.R. 1915=31 Ind. Cas. 862.

——Joint possession—Right to—Hotchpot.

One co-sharer who had joint property in his possession cannot seek a decree for joint possession of other property in the possession of a co-sharer defendant unless and until he brings the property in his own possession into a hotchpot. 28 All. 161; 18 Cal. 10 P.C.; A.W.N. (1901) 48 Foll. 94 P.R. 1915=210 P.W.R. 1915=31 Ind. Cas. 489.

——Joint possession—Right to.

A tenant in common is entitled to joint possession of every part of the common property and if he claims exclusive possession of a portion he must prove special circumstances (e.g.), having built on it with the acquiescence of other co-tenants. 33 C.P.L.R. 153; 14 P.L.R. 76, Foll. 5 N.L. R. 105=3 Ind. Cas. 54.

——Joint possession—Right to.

Each joint owner is entitled to joint possession of every part of the property equally with every other member. 7 N.L.R. 82=11 Ind. Cas. 687.

——Joint possession—Decree for—When given—Tenant—Encroachment by—Tenant subsequently becoming co-owner.

If the tenant who afterwards became a co-sharer landlord had taken possession of land peacefully after he had become a co-sharer, the principle of the case of 18 Cal. 10 would apply where the plaintiffs were entitled to joint possession. 16 C.W. N. 251=11 Ind. Cas. 637.

12. Lambardar.

(a) Collections by—Account for.
(b) Cost of collections.
(c) Custom as to.
(d) Nature of office.
(e) Powers and privileges.

12. (a) Lambardar—Collections by—Account for.

——Lambardar—Collections—It is incumbent on the lambardar to prove his exact collections.

After the partition it is open to a co-sharer to bring a suit against the lambardar claiming his share of profits from arrears collected by the lat-

ter for years prior to the partition. In such a suit the **lambardar** would naturally be required to produce all the evidence in his possession in regard to his collections, and if he does not do so it will be open to the Court to draw the presumption that he had collected those arrears in full. 119 Ind. Cas. 93=1929 A.L.J. 869=A.I.R. 1929 All. 689.

——Merely because a **lambardar** has been unable to produce accounts, he cannot be held to be liable on the basis of demands rather than on realizations. A.I.R. 1926 Oudh 593, Foll. 102 Ind. Cas. 478 =A.I.R. 1927 Oudh 547.

——In the absence of any accounts by the **lambardar** it is unsatisfactory to accept the patwari's register as the conclusive evidence of the total collections made by him. 94 Ind. Cas. 389=A.I.R. 1926 All. 436.

——When a co-sharer wishes to charge the lambardar beyond what is admitted on the ground that he has collected more than what is admitted it lies on the co-sharer to prove how much more the lambardar has collected or might have collected but for the gross negligence or misconduct, than is admitted. 80 Ind. Cas. 469=A. I. R. 1925 Oudh 317.

——A lambardar can be charged with interest on arrears of profits when it is established that he had been negligent in his fiduciary position towards his co-sharers. A.I.R. 1924 Oudh 319, Foll. 1 L.C. 498=105 Ind. Cas. 565=A.I.R. 1927 Oudh 478.

——A lambardar cannot be held liable for rents realised by an unauthorised person. He should in a suit for profits be given credit for sums spent by him in ejecting certain tenants. 77 Ind. Cas. 1032=A.I.R. 1924 All. 613.

——Liability of Lambardar arises on the date of ascertaining the amount due except in case of any legal provision—He is also liable for negligence or wilful mischief.

For the purpose of collection and distribution, a **lambardar** is undoubtedly the agent of the co-sharer and that legal relationship, when a question arises with regard to the accounting by the lambardar for the rents and profits for which he is responsible on behalf of his principal, sets in motion two recognised principles of contract law. The first is this:—An agent who collects money for his principal subject to a proper deduction for commission, expenses, outgoings and so forth, is a debtor to his principal for the balance in his hands. The liability to pay arises when the amount is ascertained, subject to this, that if there is a customary period or a period fixed by some notification having the force of law, it becomes payable in the eyes of the law on that date. The delay in such a case is neither the fault of the **lambardar** nor the fault of the co-sharer. It is the fault of the tenant and cannot affect the contractual rights of the parties. The second principle is this:—An agent who neglects his duty, that is say, who is guilty of a breach of contract, is ordinarily liable to pay compensation or what is called damages, which directly follow from his breach. If a lambardar does not collect from solvent and willing tenants, if he squanders the cash, and generally fritters away profits which might be realised if he were ordinarily diligent, he is, in the eyes of the law apart from anything in the Tenancy Act, liable for breach of contract. To these two just claims recognised by the Contract Act, there can be only two defences. The first is satisfaction either by cash payment or contract account. The second is limitation, by which the law prohibits the co-sharer from enforcing his claim. 84 Ind. Cas. 158=22 A.L.J. 610=5 L.R.A. Rev. 189=46 All. 791=A.I.R. 1924 All. 481 (F.B.).

——Fiduciary position of the **lambardar** towards the co-sharers justifies award of interest on the refusal of the **lambardar** to give accounts. 78 Ind. Cas. 85=11 O.L.J. 206=5 L.R. Oudh 99 =A.I.R. 1924 Oudh 319.

——Where a duty is imposed upon a **lambardar** to take reasonable care in collecting the rents, the liability incurred by his failure to perform that duty survives after his death and can be enforced against the assets of the **lambardar** in the hands of his sons. 65 Ind. Cas. 739=25 O.C. 49=8 O. L.J. 485=A.I.R. 1922 Oudh 149.

——**Prima facie** when the collection of profits by **lambardar** is grossly inadequate, there is a presumption of negligence. 94 Ind. Cas. 389=A.I.R. 1926 All. 436.

——Collection below 75 per cent.—Prima facie case of negligence—Allowance.

Where the collections by **lambardar** are below 75 per cent. there is a **prima facie** case of negligence, and it might well be said in such a case that the onus is upon the **lambardar** to show that he had not been negligent.

Ten per cent. is a reasonable allowance for collection expenses of the **lambardar** in ordinary cases. A.I.R. 1937 All. 661=1937 A.L.J. 769 =1937 A.W.R. 650=171 Ind. Cas. 686=1937 R.D. 387.

——Lambardar—Liability of—Limits.

A **lambardar** may be liable for his acts of negligence but he cannot be made liable in cases where the question of interpretation of a provision of law is involved. 122 Ind. Cas. 609=7 O.W.N. 388 =11 L.R.A. Rev. 146=A.I.R. 1930 Oudh 319.

——Lambardar — Profits — Interest — Liability to account—Ouns.

The burden of proving by **prima facie** evidence the actual receipts of profits, lies on the co-sharer suing the **lambardar** for his share of the profits. Interest ought not to be allowed except in special circumstances on the profits claimed by the co-sharer, since the relation between the parties is not of debtor and creditor. The co-sharer must prove a demand and refusal before claiming interest. 15 N.L.R. 85=50 Ind. Cas. 930.

12. (b) Lambardar—Costs of Collections by.

——Lambardar—Remuneration.

Lambardar is entitled to reasonable remuneration for collecting revenue if actual charges are unascertainable. **Lambardari** dues have no reference to costs incurred by a **lambardari** in course of village management. 116 Ind. Cas. 742=10 L.R.A. Rev. 159=A.I.R. 1929 All. 155.

——Lambardar — Cost of collection —Reasonable allowance—Haq lambardari.

10 per cent. is a reasonable allowance for costs

of collection. The 5 per cent. by way of haq lambardari paid to him is quite independant of the charges for collection. 1 O.L.J. 156=24 Ind. Cas. 673.

——Co-sharers can agree that no remuneration should be paid to lambardar for collection.

The right to receive lambardari dues at five per cent. upon the land revenue is conferred by statutory rules made by the Board of Revenue, but this rate of five per cent. is only to be given to the lambardar in the absence of any agreement to the contrary. It is always open to the co-sharers to agree what amount is to be paid by way of remuneration to the lambardar. No minimum amount is fixed by law. 2 Luck. 274=3 O.W.N. 900=98 Ind. Cas. 677=8 L.R.A. Rev. 42=A. I.R. 1927 Oudh 18.

——Lambardar sending profits to co-sharers by money-order, when entitled to money-order charges.

If the co-sharers live neither in the village itself nor in the same place as the lambardar, it is reasonable that the lambardar should send them their share of the profits by money-order and that the money-order charges should be paid by the co-sharers, but where there is no evidence to show that it was necessary to send money by money-order, the lambardar is not entitled to money-order charges. A. I. R. 1939 Nag. 121=1939 N.L.J. 140=I.L.R. (1941) Nag. 345=181 Ind. Cas. 915.

——Suit against lambardar for village profits—Decree—Claim for allowance of lambardari haq and collection charges at stage of second appeal—Whether should be entertained—Allowance for claims made, if can be granted.

Where a co-sharer obtained a decree against the lambardar for village profits but in second appeal, the lambardar claimed allowance for lambardari haq and collection charges:

Held, that the right of the lambardar to receive 5 per cent. as lambardari haq was a statutory one and should be entertained even at the stage of second appeal, and that in making collections, the lambardar should be deemed to have incurred expenses and allowance should be made for both. A.I.R. 1935 All. 976=1935 A.W.R. 1358=159 Ind. Cas. 411=1935 R.D. 396.

12. (c) Lambardar—Custom as to.

——Lambardar—Chanda District—Custom of taking land.

In Chanda District there is an old established village custom allowing a lambardar to take lands out of the possession of any tenant for cultivation of sugar-cane and deducting the rent therefor. 27 Ind. Cas. 502 (Nag.).

——Lambardar—Agent—Custom.

The practice of appointing a lambardar is so universal that a presumption arises that a lambardar is the agent of the proprietary body in every village unless the contrary is shown. But the presumption does not extend to the case of a minor lambardar nor to that of his guardian. 10 N.L. R. 93=26 Ind. Cas. 608.

——Lambardar—Customary agent—Whether can sue alone.

A lambardar as the customary agent of the proprietary body can sue alone to set aside a voidable transaction. 10 N.L.R. 5=23 Ind. Cas. 20.

——Lambardar, powers—Perpetual lease.

The grant of a perpetual and heritable lease is not beneficial to the general body of co-sharers and is beyond the competence of a lambardar unless justified by custom or by the special circumstances of the particular case. 20 Ind. Cas. 147 (Oudh).

——Lambardar—Lease perpetual—Acquiscence—Effect of.

The granting of a perpetual lease is beyond the competence of a Lambardar acting on behalf of the entire body of co-sharers, in the absence of a special custom to the contrary. A co-sharer in an undivided mahal may acquiesce in an arrangement by the lambardar or other co-sharers for the cultivation of the lands of the mahal without thereby binding himself to accept all the terms of any contract of lease which the other co-sharers may have entered into. 20 Ind. Cas. 57 (Oudh).

——The rights of Lambardar cannot be transferred. 78 Ind. Cas. 278=A.I.R. 1924 Nag. 284.

——A lambardar has a right to give a lease of Zemindari property having regard to a particular season. 29 A. 554, Foll. 74 Ind. Cas. 177=4 L.R.A. Rev. 298=A.I.R. 1924 All. 459.

——A lambardar may, by established usage, or with the consent of the whole body of co-sharers, have the power to grant leases. The practice is so convenient and in U. P. so prevalent that it may be presumed to exist unless the contrary is proved. If one or both the lambardars are entitled to give lease, the fact of other co-sharers also signing would not invalidate the lease. 94 Ind. Cas. 3=A.I.R. 1926 Oudh 422.

12. (d) Lambardar—Nature of office.

——Lambardar—Position of.

A lambardar is really a representative of the co-sharers and is in the position of a manager in respect of the joint estate. He is entitled to do acts which are necessary for the proper management of the estate or conducive to the benefit of the co-sharers. He cannot be considered to be as agent of the co-sharers under S. 190, Contract Act. 111 Ind. Cas. 834=5 O.W.N. 693=10 L. R. A. Rev. 98=10 L.R.A. Rev. 208=A. I. R. 1928 Oudh 406.

——Lambardar—Position of.

As between a *lambardar* and a person jointly interested with others in a *patti*, there is no such privity of contract as would entitle the latter to treat the former as his agent in respect of the item in his hands. 56 Ind. Cas. 761 (Nag.).

——A lambardar ceases to be so after the division of the mahal.

Where the village has been divided into pattis after the plaintiff was appointed lambardar for the whole mahal, and no further appointments have been made the plaintiff cannot be deemed to be the lambardar of any of the patties, and cannot claim the remuneration of a lambardar in respect of them. On partition the plaintiff should be held to have ceased to be the nominal lambardar even of his own patti, though for that patti only he remained so, for all practical purposes. A.I. R. 1923 Nag. 153, Foll. 94 Ind. Cas. 647=21 N.L.R. 16=A.I.R. 1925 Nag. 451.

——Lambardar—Dismissal for failure to assist in recruiting—Family claims—Appointing successor.

The failure of a particular *lambardar* to assist in recruiting is not a matter which should exclude the claims of the family unless he is a member of a tribe or family which for specific reasons is permanently unlikely to be successful in the work. 4 P.R. 1919 Rev.=54 Ind. Cas. 861.

——Lambardar—Imperfect partition—Lambardar's authority.

In an imperfect partition, the *lambardar's* representative authority is at an end except in relation with the Government. A lease of *lac patera* by a *lambardar* is not binding on the co-sharers. 57 Ind. Cas. 318 (Nag.).

——Lambardar—Appointed after rent had accrued due—Liability.

A *lambardar*, though appointed after the rents for a particular period have fallen due, would be liable to account for it in a suit by a co-sharer for profits if the *lambardar* after his appointment, realised the same or if he merely recovered decrees for the same, he would be liable for the amount realised under the decrees or for the ascertained value of the decree. 41 All 316=17 A. L. J. 167=52 Ind. Cas. 836.

——Lambardar—Rent—Liability—Co-sharer not a lambardar.

A co-sharer who is not a *lambardar* of the village is not bound to the other co-sharers to collect the village rent and cannot be made to surrender any portion of his collections if the collections do not exceed his own share of the profits. 19 O.C. 326=38 Ind. Cas. 89.

——Lambardar starting cattle market in common land—Other co-sharers, if have right to share in profits.

A co-sharer is perfectly entitled to invest money in a piece of land in a village, and would be entitled to all the profits derived from that source, subject to this limitation that he would be liable for payment of the rent of the land used by him like any other co-sharer or tenant in that village. But there can be no law under which the co-sharers in the village can become entitled to share in the income, which a co-sharer may get by investing his money or through his own labour and exertion. They are not warranted in making a presumption, that as the market was started by the *lambardar* so he must have started it for the benefit of all the co-sharers. Consequently, where a co-sharer who is a *lambardar* starts a cattle market in the common land and derives profits, the other co-sharers have no right to share in the profits. A.I.R. 1936 All. 324= 57 All. 707=162 Ind. Cas. 763.

——Lambardar — Acquiring derelict holding — Benefit of, when can belong to co-sharers.

All co-sharers have a right to share in the benefit acquired by a lambardar co-sharer by way of recovering possession of a derelict holding if they contribute their share of the expenses incurred by the lambardar for such acquisition. A lambardar though he gets an extra share of the profits ought not to be made liable for an extra share of the expenses. The *Mukaddam* remuneration should be deemed part of the expenses of the acquisition of the holding. 19 C.L.J. 202=20 Ind. Cas. 872.

——Co-sharers should claim proportionate share of land surrendered in favour of one of them within reasonable time.

Where a tenant surrenders his holding to a co-sharer Lambardar, the claim of other co-sharers to partake of the holding on payment of their quota of the expenses of acquisition is one in equity which the Court in its discretion may grant or not; which discretion will not be interfered with in appeal unless there has been something wrong in the manner of its exercise. Undue delay in the assertion of the claim negatives the right.

Where more than three years had elapsed since the plaintiff knew of the surrender and the defendant had spent money and leased the land to another:

Held, that there was unreasonable delay and that the plaintiff had no right to disturb the lessee. 78 Ind. Cas. 532=A.I.R. 1925 Nag. 51.

——Lambardar woman — Appointment of — Land Revenue Rules 17 and 27.

Neither sole ownership nor any other feature in the position of the individual concerned, gives to a woman a right to the appointment of headman. There are however features among which sole ownership is one, which may justify an appointing officer in selecting a woman in spite of her sex if there are no sufficient counteracting considerations of another order. 2 Lah. L. J. 172.

——Lambardar—Qualifications of candidate—Acquisition of lambardari by special arrangements—Orders of Deputy Commissioner—Appeal—Zaildari.

In appeals in *Zaildari* cases the Deputy Commissioner's Orders therein should in all cases, if possible, be upheld. In making an appointment in *Zaildari cases* previous good public service satisfactorily discharged deserves special consideration. 1 P. W. R. 1913 Rev.=1 P.R. 1913 Rev.=148 P.L.R. 1913=18 Ind. Cas. 594.

——Lambardar and co-sharer—Suit for profits—Nature of liability of two lambardars for the same village.

Where there are two lambardars for the same village they may, as a matter of convenience elect to divide the village between them for purposes of collection; but such division will be purely a matter of convenience and will not affect the joint liability of the lambardars to the co-sharers. 1907 A.W.N. 487=4 A.L.J. 173=29 A. 287.

12. (e). Lambardar—Powers and privileges.

——Lambardar—Power to lease vacant lands—Consent.

A provision in a *wajib-ul-arz* of a village that the lambardar should consult the wishes of co-sharers of the village does not mean that the consent of the co-sharers should be obtained to a lease. The general rule in the Central Provinces is that the *lambardar* leases the vacant lands in the ordinary course of management. The mere fact that the co-sharers are not consulted does not entitle them to avoid *bona fide* lease. 54 Ind. Cas. 634 (Nag.).

——Lambardar—Power to lease joint property—Sub-lease out-living the original lease.

A *lambardar* cannot grant lease of joint property except for the partcicular year in which the lease

is granted or for reasonable period. No sub-lease can be granted as to outlive the original lease. 3 O.L.J. 728=38 Ind. Cas. 399.

——Lambardar can, with the consent of majority of propriety body, give out waste land of a village to a tenant and allow him to have a building over it, *i.e.*, give it for non-agricultural use. The consent of each individual co-sharer is not necessary. 9 N. L.J. 53=95 Ind. Cas. 906=A.I.R. 1926 Nag. 361.

——Lambardar—Grant of lease by.

A lambardar cannot grant a lease of co-parcenary land beyond a necessary period. But where it is beneficial to the general body of the co-sharers it is not open to them to have it declared invalid. 25 Ind. Cas. 61 (All.).

——Lambardar—Powers—Institution of partition proceedings.

The mere institution of partition proceedings does not terminate the powers of the lambardar to consent to the transfer of an absolute occupancy holding. 10 N.L.R. 896=26 Ind. Cas. 606.

——Lambardar—Powers of—Lease of Banjar—Right of co-sharers—Fraud of lambardar.

As a rule, the lambardar cannot lease Banjar land without the consent of the whole proprietary body. But if the lease does not injuriously affect the interests of the body or villagers and is on the contrary beneficial to both it will not be set aside at the request of a co-sharer who stood by and allowed the lessee to spend money in reclaiming the land. It would be unfair to view a new tenancy of this nature in the same light as one which seriously curtails the villager's rights of grazing and *nistar* and is prejudical to them. The lambardar's power to act on behalf of the whole body of landlords in relation to an act done in their interests must be treated differently from a fraudulent one. 12 N.L.R. 136=36 Ind. Cas. 544.

——When a Lambardar pays the arrears of land revenue for the co-sharer his right to recover is by suit.

There can be no analogy between the power of the Crown to sell the property of the defaulting co-sharer free from incumbrance and the right of the lambardar to enforce his decree by attachment and sale of the defaulter's property. The difference between the two is founded upon principles of public expediency. A co-sharer or a lambardar, paying the arrears of revenue for a defaulting co-sharer, who has a limited interest in the property, cannot in enforcement of his decree proceed against his rights and interests except by a properly framed suit, which is not confined to a personal remedy. The extent of property sold in execution would depend upon the nature of the suit in which the execution issues. 11 Moore's I.A. 241 (P.C.); 1 Cal. 133 (P.C.); 10 Cal. 985 (P.C.); 30 Cal. 550 (P.C.); 16 C.W.N. 1070; 17 C.W. N. 337; 19 C.W.N. 313; and 17 Mad. 208, Foll. 26 A.L.J. 825=114 Ind. Cas. 33=A.I.R. 1928 All. 651.

——Revenue and profits collected on behalf of other co-sharers—Preferential treatment.

In the matter of profits, a *lambardar* cannot give himself preferential treatment. Out of the sums collected by him on his and other co-sharers' behalf, he is bound to pay the revenue and the balance must be distributed among all the persons who are entitled to shares, *i.e.*, the *lambardar* himself and the co-sharers of the *mahal*. A.I.R. 1935 All. 912=1935 A.W.R. 1202=1935 R.D. 421=157 Ind. Cas. 177.

——Lambardar—Wajib-ul-arz.

A co-sharer cannot avoid a lease created by a *lambardar* he being generally empowered to create lease with the consultation of his co-sharer by an entry in the *wajib-ul-arz*. His remedy is to sue for damages against the *lambardar*, or his removal from office or for partition. 48 Ind. Cas. 72 (Nag.).

——Lambardar and co-sharer—Right of lambardar—Lease of timber-bearing common land—Wajib-ul-arz—Construction.

A lambardar has no authority to ordinarily grant leases of timber-bearing common land of the village to lessees for the purpose of having the timber cut and converted into charcoal. Where a wajib-ul-arz provided that each co-sharer managed the patti land in his patti and the lambardar the hamlet, held that the lambardar had no power to lease the timber-bearing common land and authorise the lessees to cut the timber. (1910) 7 A.L.J. 827=33 A. 17 =7 Ind. Cas. 98.

——Lambardar and co-sharer—Occupancy tenant executing a lease in favour of co-sharer—Death of tenant without heirs—Right to possession.

Where an occupancy tenant executed a Zarpeshgi lease in favour of one of the co-sharers and died without leaving any heir:

Held, that the co-sharer in possession could not be ousted by the lambardar inasmuch as he in his position as co-sharer, was entitled to possession of the land in suit. 1906 A.W.N. 289=3 A.L.J. 669.

——Co-sharer—Lambardar—Power of, to grant a long lease—Lease for 7 years.

A lambardar has no power to grant a lease of co-parcenary land beyond such term as the circumstances of the particular case require. A.W.N. 1897, p. 207 and 20 A. 438, Foll. In this case the lambardar had granted a lease for 7 years which was set aside. 1906 A.W.N. 257=3 A.L.J. 639=29 A. 20. *See also* 1908 A.W.N. 56=5 A.L.J. 173=30 A. 163.

——Co-sharer—Lambardar—Lease by.

In the case of a lease of co-parcenary land granted by a lambardar where there is any suspicion established that the lambardar has granted a long lease to the detriment of co-sharers, a heavy burden would be placed on the lessee to show that by custom or for some other cause the lambardar is authorised in granting the lease. On the other hand, where the granting of the lease is shown to be for the benefit of the co-sharers and when the co-sharers presumably have been shown to have derived benefit under the lease, the lease should not be set aside. (1907) 4 A.L.J. 538=29 A. 554=1907 A.W.N. 165.

——Co-sharer—Long leases—Circumstances under which lambardar may give.

A lambardar is competent to execute a lease of land for 10 years without reference to the other co-sharers where the land would not otherwise be let and where it is for the benefit of co-sharers that he so let the land. 17 A.W.N. 1897, p. 207, Foll. 1906 A.W.N. 277=3 A.L.J. 655.

——Lambardar—Right to lease timber bearing 'patri' land for cutting timber and converting it into charcoal.

The power given to lambardars by the *wajib-ul-arz* to manage *shamilat* lands does not contemplate the granting of leases authorizing the lessees to cut

down at will timber existing on the *shamilat* lands and converting into charcoal. 33 All. 17=7 A.L.L.J. 827=7 Ind. Cas. 98.

——Lambardar—Profits—Liability for—Farzi rent entered for the sir in revenue papers—Farzi rent not to be considered in calculating profits—Admission of Revenue agent binds his client although retracted afterwards—Co-sharer holding sir status.

In a suit for profits against a *lambardar*, plaintiff was found to hold certain *sir* in respect of which a *Farzi* rent was entered in the Revenue Papers. Before the first Court, the plaintiff's Revenue agent stated that the proper rate of rent for *sir* was Rs. 5 per *bigha*:

Held, that the plaintiff was bound by that statement though the agent afterwards resiled from it.

Held, further, that a co-sharer who holds *sir* lands is not a tenant of the co-parcenary body in respect of that land. The *Farzi* rent entered in the Revenue Papers should not be considered in determining the share of profits of the plaintiff. 7 A.L.J. 90=1 Ind. Cas. 975.

——Lambardar—Suit against, by co-sharer—Interest pendente lite—Burden of proof.

In a suit by a co-sharer against a *lambardar* for profits, the plaintiff would ordinarily be entitled to interest and the burden is on the lambardar to prove exemption from liability to pay interest. 13 Ind. Cas. 116 (All.).

——Lambardar—Suit against co-sharer for his share of revenue paid — Contribution, Decree—Interest.

A suit by a lambardar against his co-sharers for revenue paid by the former on the latter's default does not differ from an ordinary suit for contribution and the decree in such a suit should, therefore specify the liability of each co-sharer separately and should not be joint as against all co-sharers. A lambardar can also recover interest from the defaulting co-sharers. 14 O.C. 164=11 Ind. Cas. 674.

Where tenants surrender their respective occupancy fields to the village *lambardar*, until partition of the village, co-sharers are not entitled to actual joint possession with the *lambardar*. A.I.R. 1934 Nag. 244=17 N.L.J. 115=153 Ind. Cas. 125.

——Default of one co-sharer to pay rent—Payment by lambardar—Suit by lambardar for money paid by him—Decree — Assignment of profits by co-sharer to stranger—Suit by stranger for profits against lambardar—Suit, if maintainable in Revenue Court—Agra Tenancy Act (3 of 1926), S. 229—Lambardar's right to set-off his decree—Transfer of Property Act (4 of 1882), Ss. 3, 132—Claim for profits, if an actionable claim—Lambardar, if entitled to show that assignment was a sham transaction.

A was the owner of certain shares in a village and as such was entitled to certain profits for a year as against *B*, the *lambardar* of the *Mahal*. The profits for 1334 *Fasli* fell due on August 1, 1927, and on August 3, 1927, *A* assigned her right to recover the profits to *C*. *B* had paid *A's* share of the land revenue and he filed a suit for recovery of the amount for which he obtained a decree. *C* filed a suit for the recovery of the profits under the assignment. *B* pleaded *inter alia* that the transfer made in favour of *C* was a fictitious one, having been made to defeat *B's* claim for reimbursement out of the profits ostensibly sold:

Held, (*i*) that since the passing of the Agra Tenancy Act of 1901, the policy of the Legislature has been that a suit by an assignee of a co-sharer for profits should be maintained in the Revenue Court as if it were a suit by the co-sharer himself. A person who purchases the share of a co-sharer will be the co-sharer's assign, but so will be the person, who purchases not the share of the co-sharer but only the co-sharer's right to recover profits in any particular year or years. The assignee need not be the assignee of the entire interests of a co-sharer, but may be an assignee of only a portion of those interests. Consequently the suit was properly instituted in the revenue Court;

(*ii*) that although it was open to *B*, the *lambardar*, to get credit for all payments made by him in the year for which profits were claimed, yet *B* was not entitled to claim by way of settlement of the account a right to be reimbursed out of the profits for 1334 *Fasli* anything that he paid in the years 1332 and 1333 *Fasli*. Any payment that may have been made in the year 1332 or 1333 *Fasli* can be taken into account only in adjusting the accounts of those years and those years alone. The mere fact that *B* held a decree against *A* would not enable him to ask for an adjustment on account of that decree, unless he can show that he actually made the payments for which he obtained the decree in the year 1334 *Fasli*. If he paid any portion of the land revenue for 1332 or 1333 *Fasli*, in the year 1334 *Fasli*, he would be entitled to have that amount set off against anything that may be due to the co-sharer or her assign;

(*iii*) that *B* could not be allowed a set off on the ground that *C* was the purchaser of an actionable claim and under S. 132, T. P. Act, had purchased it subject to equities against his transferor;

(*iv*) that *B* was entitled to establish the true nature of the transfer in favour of *C*, and that if *C* was not a *bona fide* purchaser for value and had lent his name only to be used as a cloak by *A*, the suit could be regarded only as a suit filed by *A* herself through her *benamidar* and in that case, there would be nothing to prevent the Court from allowing *B* to claim a set off of his decree against *A's* claim although the claim is made in the name of *C*. A.I.R. 1934 All. 155=1934 A.L.J. 1=3 A.W.R. 39=56 All. 624=147 Ind. Cas. 937=18 R.D. 32.

——Lambardar—Authority of — Suit for partition instituted—Effect of.

The mere institution of partition proceedings by a co-sharer against a *lambardar* does not of itself put an end to the authority of the *lambardar* to lease out waste land. The absence of consultation by the *lambardar* with his co-sharers in the matter of leasing out waste land does not affect the position of a stranger taking the lease in good faith. 14 N.L.R. 18=43 Ind. Cas. 934.

13. Lease.

——Land uncultivated and lying vacant—One co-sharer leasing it to tenant—Other co-sharers, if can object—Burden of proof of invalidity of lease.

Where land is uncultivated and is lying vacant, it is open to a co-sharer to cultivate it in which case it will become his *khudkasht* and there will be nothing illegal in his action. When such co-sharer *B* has put a tenant in possession of this land, the burden of proof lies on the co-sharer

objecting it to show that it was not open to *B* to put a tenant in possession of the vacant land and let that tenant cultivate the land. A.I.R. 1935 All. 943=1935 A.W.R. 1366=159 Ind. Cas. 647.

——One co-sharer executing lease in favour of tenant.

If one co-sharer executes a lease in favour of a certain person as a tenant, the lease is not necessarily invalid and ineffectual merely because it has not been executed by every one of the co-sharers jointly. A.I.R. 1935 Oudh 229=1935 O. W.N. 257=10 Luck. 682=154 Ind. Cas. 87.

——Lessee of a Co-sharer need not be ejected.

Where a co-sharer has leased out a portion of joint land for a factory and the lessee has constructed it, then in suit for ejectment by other co-sharers from their shares, if the Court finds that on partition between the co-sharers adequate relief be granted to all without disturbing the possession of the lesseee, a decree for ejectment should not be granted. 116 Ind. Cas. 223=A.I.R. 1929 Lah. 168.

——All landlords must sue for ejectment unless jointly created tenancy has been determined.

Plaintiffs being maliks of one of the two tauzis to which the lands in suit appertained and the other malik, *viz.*, the *pro forma* defendant 6, not having joined as a co-plaintiff in the case the suit brought by the plaintiffs against the defendants to resume the said lands to the extent of their shares in the village on the allegation that the defendants, who held them on condition of rendering services as gorajts, had refused to render the services any longer was held to be not maintainable. A.I.R. 1929 Pat. 433.

——A right of permanent tenancy created by some tenants in the joint lands without the consent of all co-sharers is void. 98 Ind. Cas. 284=8 L.R. A. Rev. 144=A.I.R. 1927 Oudh 39.

——Lease granted by one co-sharer only is void as against other co-sharers — Lessee cannot be ejected.

Where a perpetual lease of a plot of land was granted by one co-sharer and later on in a private partition that plot was allotted to another co-sharer:

Held, that the lease was null and void as against that co-sharer who had become owner of that plot but a declaration to the effect that the lessee had no right whatsoever in respect of the leasehold could not be granted to the plaintiff. The lessee may have more than one remedy arising out of the lease as against the lessor. For instance, he may have a claim for compensation or for substitution in place of the leasehold property in the event of his ever being ejected therefrom by the plaintiff or any other co-sharer of the village than the lessor. 76 Ind. Cas. 534=26 O.C. 239=A. I. R. 1924 Oudh 60.

——Where one of the co-sharers has granted a permanent lease of the joint holding without the consent of the other co-sharers, such co sharers are entitled to joint possession without setting aside the lease. 9 L.R.A. Rev. 223=114 Ind. Cas. 891=A.I.R. 1928 All. 525.

——One of the co-owners can maintain a suit to eject a tenant on sufferance, when the period of the tenancy has expired, and where after the expiry of the tenancy there has been no fresh privity between him and the original landlords. (Case-law considered.) 51 Bom. 149=29 Bom. L.R. 222=101 Ind. Cas. 35=A.I.R. 1927 Bom. 192.

——Death of a joint tenant does not benefit the zamindar, but the surviving joint tenant.

In case of joint tenancies, if a joint tenant dies without any heir-at-law, his interest survives to the surviving joint tenant. The surviving joint tenant does not lose his right in half the tenancy, joint holdings cannot be divided in that way. The death of a joint tenant without heirs does not in any way benefit the zamindar, but the surviving tenant still remains a tenant of the whole holdings. 88 Ind. Cas. 539=A.I.R. 1925 All. 758.

——In the case of a joint tenancy of two lessees where one of the lessees dies, the lessor does not get a right of re-entry as to half the property demised because the lease does not come to an end until the death of the survivor of the two lessees and hence the landlord's right of re-entry does not come into being until the death of both the lessees. 82 Ind. Cas. 204=A.I.R. 1925 Pat. 228.

——A lease executed by one of two co-owners can take effect only with respect to the lessor's half interest and is voidable as against the other co-owner. 82 Ind. Cas. 1041=A.I.R. 1925 Nag. 175.

——In suit by one co-sharer for ejectment of a lessee from entire premises he must prove that on date of suit he had authority to sue for ejectment.

When a lease is granted by one co-owner the other cannot maintain a suit for the ejectment of the lessee from the whole of the premises. In a suit by one co-owner for ejectment of a trespasser from the whole of the premises the burden of proof lies on him to show that he had unrestricted authority to eject him on the date of the suit. The mere fact that at some point of time in the past he had such authority is not sufficient to show that he continued to be clothed with that authority at the date of the suit so as to be entitled by himself to require the defendant to clear out of the entire premises notwithstanding the fact that the other co-owner has manifested his intention to the contrary by granting him a fresh lease of the entire properties. 82 Ind. Cas. 1041=A.I.R. 1925 Nag 175.

If two persons had once obtained a lease of property, and on the termination of the period of that lease, one of them alone takes a lease for a further period in his own name, the other having refused to pay his share of the cost of renewal, the second lease does not enure for the benefit of the latter. 63 Ind. Cas. 3=13 M.L.W. 441=A. I.R. 1921 Mad. 620.

——A tenant is not entitled to make a surrender of the holding to the part proprietors. 2 P.L.T. 163=A.I.R. 1921 Pat. 341.

14. Liability to account.

——Co-sharer in management—Co-sharer suing for accounts giving prima facie evidence as to amount of realizations—Burden.

Where a co-sharer who is in management of the joint properties has given leases of joint property but has kept no proper accounts and the co-sharer suing for accounts gives *prima facie* evidence to show what the realizations of rent are likely to be by referring to documents actually

signed by the former wherein the rents are fixed, the onus is shifted on to the defendant to show that those sums were not actually realized, for a landlord who leases out property to a tenant ordinarily recovers his rent. There is consequently a presumption under S. 144, Evidence Act, that in the ordinary course of business, the money would be realized. Also the fact whether the defendant actually realized the moneys or not was within his knowledge as compared to the knowledge of the plaintiff (S. 106, Evidence Act). A.I.R. 1944 Nag. 7=1942 N.L.J. 355=I.L.R. (1944) Nag. 63=217 Ind. Cas. 39.

——Two persons in actual management gathering profits.

If out of several co-sharers owning joint properties, two in actual management gather in the profits, each is liable to account for the sum taken by himself. The mere fact that the other is also liable to account does not relieve him from his own liability to account. A.I.R. 1944 Nag. 7=1942 N.L.J. 355=I.L.R. (1944) Nag. 63=217 Ind. Cas. 39.

——One receiving rents and profits in excess of his share.

One co-sharer can sue another for accounts if the latter co-sharer realizes rents and profits of the joint property in excess of his share, without instituting a suit for partition. A.I.R. 1940 Cal. 363=I.L.R. (1940) 1 Cal. 110=189 Ind. Cas. 642.

——Co-owner in possession to exclusion of others—Liability of, to render accounts of rents and profits of other's share.

It is true that one co-owner is not accountable to another merely because he has had "excess of enjoyment" of the joint property. If however his possession or user of joint property is inconsistent with the title of the others, or it amounts to their exclusion or dispossession, such possession or user clearly becomes 'unlawful' and he is liable to render account of the profits of the share of the other. A.I.R. 1940 Lah. 350=I.L.R. (1941) Lah. 246=43 P.L.R. 612=190 Ind. Cas. 699.

——One co-sharer making all collections—No account submitted—Liability to surrender shares of others—Oudh Rent Act (22 of 1886), S. 108 (15).

Though a co-sharer who has collected less than his own share cannot always be made liable to render accounts and to surrender a portion of the amount collected by him to the other co-sharers, but where he has collected whatever could be collected, he should be so made liable in cases in which, on account of special reasons, justice and enquity require it and in the absence of their accounts, the calculations can only be made on the basis of the gross rental. A.I.R. 1937 Oudh 152=1936 O.W.N. 810=1936 R.D. 433=164 Ind. Cas. 975.

——Co-pawnees—Tort between them.

Co-pawnees—One wrongfully withholding property from the other—Suit by such co-pawnee for share of price is not maintainable—Mere willingness of the pledgor to pay and refusal of the pawnee in possession to return the goods does not amount to injury, in the absence of destruction of the goods, giving rise to an action in tort against the co-pawnee—Proper remedy is an action for accounts.. A.I.R. 1932 Lah. 185=33 P.L.R. 93=13 Lah. 555=135 Ind. Cas. 682.

——Liability of co-sharer in possession for mesne profits.

The possession of one co-sharer is not wrongful and where one of the co-sharers is in possession of the property and the others make no attempt to obtain possession of it, the co-sharer in possession cannot be said to be wrongfully in possession of it and as such would not be liable for mesne profits during the period of his possession. 22 Luck. 84=228 Ind. Cas. 476=1946 A. W. R. (C.C.) 246=1946 O.W.N. 366=A.I.R. 1947 Oudh 129=1947 R.D. 6.

——Mortgage of Sir land by one co-sharer—Mortgagor ejected for non-payment of rent as ex-proprietary tenant—Rights of other co-sharers.

M took a mortgage of certain *Sir* land from *S*. Ex-proprietary rent was fixed but as *S* did not pay, *M* obtained a decree for arrears of rent against him and ejected him.

The other co-sharers took no action to prevent *S* from mortgaging his *Sir* and took no action when *M* sued *S* and ejected him but as soon as the land was vacant they grabbed it. *Held*, that even if the land was joint they had no right to seize it for themselves, their utmost right being to join in its disposal. 14 R.D. 643.

15. Mutual relations.

——Co-heirs — Minor living with brother—Brother acquiring property out of joint income—Rights of minor—Trusts Act, Ss. 96, 63 and 64.

Defendant No. 1, the brother of the plaintiff, took possession of the entire estate left by the father including a prosperous business which he was carrying on. The plaintiff was, at the time of her father's death, an infant and she was living with the brother who was managing the properties. The properties in question were purchased by the brother, defendant No. 1, out of the profits of the business which he was carrying on:

Held, that the plaintiff was entitled to a share in the properties so acquired by defendant No. 1, who was only in a fiduciary position towards the plaintiff.

Held also, that in view of Ss. 96, 63 and 64 of Tructs Act, the transferee from defendant No. 1 could escape only if he was a purchaser in good faith for consideration without notice of the trust. A.I.R. 1945 Mad. 303=(1945) 1 M.L.J. 338=1945 M.W.N. 333.

——One of co-sharer landlords in sole possession of land for convenience or by mutual arrangement—When can be presumed to have implied authority to settle tenants upon land.

Where a co-sharer landlord has been in sole possession of a portion of the joint lands for convenience or by mutual arrangement amongst the co-sharer-landlords, then from the manner in which the co-sharer deals with the land, a Court may presume that he has been authorised by the other co-sharers to represent them for ordinary details of management in dealing with the portion of the estate in his separate possession including the settling of *raiyats* upon the lands of that portion for convenience of cultivation. If it appears, for example, that the co-sharer has been settling tenants upon the land in his possession to the knowledge of the other co-sharers and without any objection or protest by them, the authority may be readily presumed. Similarly, the authority may be presumed in certain special cases if the settlement is evidently for the benefit of the entire estate and is one which the other

co-sharers would have readily assented to, if they had been in direct possession of the land settled. But at the same time, the right of being in *khas* possession of lands appertaining to the estates is one of the cherished rights of the landlord and the induction of occupancy *raiyats* on them or leasing them out to persons who will by operation of law automatically acquire occupancy rights therein may amount to a serious curtailment of that right. Where, therefore, there is no express authority given by the co-sharers for settlement of land to persons who may acquire occupancy rights therein, the Court will require very strong and cogent circumstances to enable it to presume that the co-sharer who had inducted such a person upon the lasd had authority on behalf of the other co-sharers to do so.

Both on general principles, as also on a proper construction of the provisions of the Bihar Tenancy Act, the mere fact that a co-sharer landlord has been in sole possession of certain joint land for convenience or by mutual arrangement amongst the co-sharer-landlords is not sufficient to raise an inference that he has implied authority to settle tenants upon the land for convenience of cultivation.

Held, that in the circumstances of the case, the co-sharer-landlord in possession of a portion of joint lands could not be presumed to have implied authority from the other co-sharers to settle tenants in the land. A.I.R. 1943 Pat. 194=24 P.L.T. 175 =22 Pat. 382=207 Ind. Cas. 353=9 B. R. 401 (F.B.).

——**(Obiter)** The relationship between co-owners of whom one is in possession of common funds is not that of creditor and debtor. A.I.R. 1940 Mad. 95 =1939 M.W.N. 1077=50 L.W. 636=(1939) 2 M. L.J. 745.

——There is no fiduciary relation between co-owners of a property as such and if one co-sharer realizes profits in excess he does so in his capacity as an owner, for which no agency from the other proprietor is necessary. A.I.R. 1940 Cal. 363=I.L. R. (1940) 1 Cal. 110=189 Ind. Cas. 642.

——Mutual relation—Cultivation by one—Effect of.

Cultivation by one co-tenant is *prima facie* on behalf of himself and his co-tenants. 57 Ind. Cas 495 (Nag.).

——Mutual relation.

Co-sharing in cultivation of a portion of a holding is co-sharing in cultivation of the holding. 2 U. P.L.R. (B.R.) 61=57 Ind. Cas. 51.

——Mutual relation—Relationship of, when comes to an end.

The relationship of the sharers of a village *inter se* continues for all legal purposes till a partition by the Revenue Court takes effect. 5 O.L.J. 215=46 Ind. Cas. 339.

——Mutual relation—Position of—Good faith in dealings—Intentional default in payment of revenue.

The relative position of co-sharers in respect of the payment of revenue, demands from each, such measure of candid dealing and good faith, as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. 16 Cal. 194, Disappr. 44 Cal. 573=15 A.L.J. 154=32 M.L.J. 206=21 C.W.N. 473=1 P. L. W. 294=(1917) M.W.N. 254=25 C.L.J. 259=21 M. L.T. 240=5 L.W. 526=19 Bom.L.R. 410=44 I. A. 30=39 Ind. Cas. 346 (P.C.).

——Mutual relation—Possession.

Possession of one co-owner is possession for another unless he asserts hostile title and acquires title. Actual and exclusive possession of co-sharers cannot be on behalf of one who abandons the land. 35 Ind. Cas. 72 (Cal.).

——Mutual relation—Suit between, for use, and occupation.

A suit by one co-owner against another will not lie simply for use and occupation. 9 Bur. L. T. 69=32 Ind. Cas. 630.

——In a mahal—Mutual relation—If can put an end to undivided character of, by private arrangement.

Co-sharers in a mahal cannot put an end to the undivided character of the mahal by a private arrangement. 9 A.L.J. 244=13 Ind. Cas. 535.

——Mutual relation.

It is common to find one or more co-heirs acting on behalf of the general body of co-heirs. 4 Bur. L.T. 163=11 Ind. Cas. 781.

——Mutual relation — Ownership — Government revenue.

It is doubtful whether between co-sharers any mutual confidence exists as regards the payment of Government revenue. 9 Ind. Cas. 507 (Cal.).

——Mutual relation—Suit for his share only.

One co-sharer can maintain a suit to recover his share only when the suit is not really for setting aside alienations but for recovery of property on the ground that the life-tenant could not confer any title that would subsist after her death and that the plaintiff is entitled to possession since her death. 7 Ind. Cas. 218 (Cal.).

——Mutual relation—Constructive possession.

Possession by one co-sharer, holding share of another who is not in actual possession means constructive possession of another. 17 P.W.R. 1910=29 P. R. 1910=61 P.L.R. 1910=5 Ind. Cas. 888.

——Mutual relation.

Co-sharer zemindar, who mortgages his share to another co-sharer, continues to be co-sharer and can obtain peaceful possession of holding which has fallen unless shown to have lost this particular right by virtue of mortgage. 115 Ind. Cas. 635=10 L.R. A. Rev. 163=A.I.R. 1929 All. 167.

——Enjoying joint property by exclusive possession by arrangement tacit or express would not be disturbed during joint tenure.

Where joint owners have agreed to a mode of enjoyment it is not open to one of them to disturb that arrangement without the consent of the others. This is not inconsistent with the fundamental principle that in law each joint owner of an estate is regarded as having a joint proprietary right in the whole estate. That, however, is merely a right, a co-owner cannot set up a claim to any parcel as his exclusive property during the continuance of the joint ownership. But where co-owners by arrangement, either tacit or express, take up exclusive possession and enjoyment of different parcels of the joint property without such definition or severance of interest as would amount to partition the Court need not interfere with the arrangement at the instance of one co-owner during the tenure in common and will do so only on partition so far as may be necessary to make an equitable division of the property. 28 Cal. 223, Foll. 83 Ind. Cas. 229=39 C. L. J. 414 =A.I.R. 1924 Cal. 792.

——No partition of village among co-sharers by metes and bounds but co sharers in possession of specific plots of bakasht land—Exchange of plots between plaintiffs and defendants—Under deed plaintiffs entitled to be in possession of house standing on part of land given by defendants—Defendants remaining in possession—Suit by plaintiff alleging that they rented out house to defendants, for arrears of rent, ejectment and mesne profits.

There had been no partition of the village among the co-sharer landlords by metes and bounds, but the co-sharers were in possession of specific plots of *bakasht* lands. Out of the lands in possession of the plaintiffs, they had given 14 decimals to the defendants for building a *zanana* house, and the defendants gave in exchange certain lands to them in lieu of the land which they had got. The deed of exchange clearly stated that the plaintiffs were entitled to be in possession of the house standing on 3½ decimals of land. The plaintiffs brought a suit alleging that they had after the exchange, let out the house standing on 3½ decimals of land to the defendants and that the defendants had not paid the rent for the house and asked for the following reliefs: (1) a decree for the arrears of rent, and (2) a decree for ejectment and mesne profits:

Held, that the transaction was nothing but a mutual arrangement between two landlords who were in possession of specific plots of *bakasht* land in the village. This arrangement might not be binding on the other co-sharer landlords who were not parties to it and might be disregarded when there would be a partition of the village by metes and bounds; but so long as the village was not partitioned, it must bind the plaintiffs as well as the defendants.

Held, further that their suit was rightly dismissed in so far as their claim for the rent of the house was concerned as this story was found to be untrue.

Held, also, that as the plaintiffs' case was that the defendants were lawfully in possession of the house as tenants, their claim for mesne profits must be disallowed. A.I.R. 1941 Pat. 451=193 Ind. Cas. 345=7 B.R. 593.

——One co sharer, if can grant easement of right of way affecting entire land possessed by him jointly with other co-sharers.

A co-sharer is entitled to use the land in a normal, natural and businesslike manner. If in the exercise of and in accordance with this user of the land, he grants a lease, that lease will be a valid one and the lessee cannot be interfered with by the other co-sharers. But a co-owner cannot use the land to the detriment of his co-sharers. He cannot burden the land with incumbrances which will affect the rights of the other co-sharers where the imposition of such a burden is not made in the course of the ordinary and businesslike user of the land. The imposition of a servitude upon a land is not necessary for the ordinary enjoyment of the land. Hence, a co-sharer has no right to burden the joint estate with a right of way. The grant of such a right does not constitute a natural businesslike and normal use of the land. It amounts to an imposition of a burden upon the land made entirely for the benefit of the grantor and to the detriment of his co-sharers. In such a case the co-sharers can refuse to be bound by the grant and the grantee can have no remedy against them inasmuch as they are not parties to the grant. A.I.R. 1940 Cal. 447=71 C.L.J. 248=190 Ind. Cas. 483.

——Transaction assented to by some co-sharers, whether binding on others.

Any transaction which is assented to only by some of the co-sharers cannot be binding on the entire body of landlords and cannot alter the character of the land. Consequently tenants of *bakasht* lands cannot be converted to *fazidars* on behalf of proprietors. A.I.R. 1940 Pat. 617=21 P. L. T. 320 =192 Ind. Cas. 502=7 B.R. 472.

——Mortgage by one co heir of his own share as well as that of others without their consent—Suit by mortgagee.

The possession of one co-heir is possession not only for himself but also for other co-heirs. The fact that he had without their consent purported to mortgage not only his own share but also theirs is not in itself an indication that his possession had become adverse to theirs. The mere fact that a Receiver was appointed in the mortgage suit brought by the mortgagee against the mortgagor co-heir would not prejudice them in the enjoyment of their right, they being persons with paramount rights, not parties to the action and actually in possession of those rights. A.I.R. 1940 Rang. 83=187 Ind. Cas. 460.

——Alienation—Transfer by exchange deed by one on behalf of other co-sharer of specific property to stranger—No objection for many years.

A co-sharer in an undivided property cannot alienate any defined portion of such property even though he might have been in exclusive possession of the same by an agreement amongst the various co-sharers. It follows that if such an alienation is made, the alienation is subject to the right of the other co-sharers to set it aside But where a co-sharer on behalf of the other co-sharers has executed the deed of exchange in favour of a stranger and no objection was made by any of the joint owners to the transfer and the transferee continued in possession without any objection for 24 years, under the circumstances, it is not open to the transferee to raise a point which might have been available to the co-sharers at the time of the transfer, *i.e.*, that the transferor was not competent to transfer. The transferee cannot be allowed to resile from the agreement after a lapse of so many years. and the deed of exchange cannot be held to be invalid because some of the co-sharers were no parties to it. A.I.R. 1939 All. 504=1939 A.L.J. 384=1939 A. W.R. 373=184 Ind. Cas. 233.

——Right to alienate—Some co-sharers executing mortgage entering into compromise with mortgagee to deliver some property to mortgagee for reducing mortgage charge.

Even before partition a co-sharer in possession may mortgage any portion of the joint property not in excess of his share subject to adjustment of the right of all the co-sharers at the time of partition.

Hence where some of the co-sharers who have executed a mortgage enter into a compromise with the mortgagee agreeing to deliver some land to the mortgagee in consideration of his reducing the mortgage charge and releasing the rest of the property from the mortgage, the co-sharers entering into the compromise are bound by it to the extent of their share and the compromise is not illegal merely because one of the mortgagors is not a party

to it. A.I.R. 1938 Lah. 737=182 Ind. Cas. 353.

——Co- sharers deprived of use of profits due to appropriation by other co-sharers — Former, whether entitled to compensation for loss.

Where some of the co-sharers have been deprived of the use and occupation of the land and of the use of profits which they might have derived from the land by the other co-sharers appropriating the profits, there is no reason why the former should not be compensated for the loss which they have suffered by their having been deprived of the use of the money which they would have made if the latter had not deprived them of the same. A. I. R. 1936 All. 706=1936 A.L.J. 984=1936 A. W. R. 700=165 Ind. Cas. 266=1936 R.D. 298.

——Sale of entire property by one co-tenant with consent of the other—Authority to effect sale for discharging a particular debt—Discharge of different debt—Ratification by conduct.

Though one tenant-in-common cannot sell more than his share of the common property and any conveyance in excess thereof will not be binding on his co-tenants, it is open to a tenant-in common to authorise his co-tenant to sell his share of the common property and such authority may be express or implied.

A, a co-tenant, authorised *B* another co-tenant, to sell *A's* share also for the purpose of discharging a particular mortgage but the property was sold by *B* for discharging a different debt. Subsequently, *B* discharged the entire mortgage debt out of other money on the request of *A* and *A* did not take any steps to impeach the sale for five years:

Held, that as *A* had authorised *B* to effect the sale and he had also elected to confirm the transaction and to obtain a benefit therefrom, it was not open to his representatives to turn round and repudiate the sale.

Where a co-tenant authorises another to effect a sale and to discharge a particular debt out of the sale proceeds, a sale effected by the latter will not be invalid merely because the sale proceeds were not applied to discharge that particular debt. A.I.R. 1936 Mad. 696=44 L.W. 205=71 M.L.J. 223=1936 M.W.N. 907=164 Ind. Cas. 1078.

——Joint Hindu family—Two members claiming as co-owners with independent titles—Valid discharge, if can be given by one.

The principle that, in the case of members forming a joint family, if the elder brother acts as a manager, he would be deemed to be in a position to give a valid discharge has no bearing in a case in which the two plaintiffs are related as uncle and nephew and claim as co-owners under independent titles and not as members of the joint family. A.I.R. 1936 Nag. 80=31 N.L.R. 191 (Sup.)=162 Ind. Cas. 577.

——Suit for title and ejectment—Alternative claim for declaration of right to receive rent on the foot of the arrangement between the parties—Arrangement not established in the former suit—In present suit, trial Court holding that defendants were *raiyats* under the arrangement but protected from eviction—Lower Appellate Court holding plaintiff entitled to possession:

Held, that the question of under-*raiyati* could not be allowed to be re-opened in the present case. A.I.R. 1935 Cal. 256=60 C.L.J. 324.

——Widow co-sharer unable to realise her share of rent from joint property—Other co-sharers realising her share—Tort—Ss. 69 and 70, Contract Act.

Where the widow could not be expected to realise her share of rents, her co-sharers when realising them could not possibly be said to be committing a tort though the widow had to bring a suit for her share of the rents. The case is really governed by Ss. 69 and 70, Contract Act. A.I.R. 1935 Lah. 981.

——Succession.

A joint tenant has a right to succeed to a joint tenancy in the absence of any nearer reversioner, even though the shares have been specified. A.I.R. 1935 Lah. 99.

——Arrangement between proprietors regarding co-shares in parganas—Collector, if bound by it.

Proprietors frequently, for their convenience, come to an arrangement by which one set of proprietors have a larger share in one *pargana* and a lesser one in another. Of course, such an arrangement would not bind the Collector or affect an auction-purchaser at a revenue sale unless it was made with the consent of the Collector. A.I.R. 1934 Cal. 619=154 Ind. Cas. 444.

——Mortgage of his share by one co-sharer—Subsequent mortgage by all co-sharers of their shares—Suit on first mortgage—Mortgagee purchasing share in execution—Subsequent suit on second mortgage.

Where one of the co-sharers executes a mortgage of his share and subsequently all the co-sharers execute a mortgage of their shares to the same mortgagee and he obtains a decree on the first mortgage and purchases the share, it is open to him to bring a suit on the second mortgage as the claims are different. A.I.R. 1934 Cal. 421=38 C.W.N. 124=151 Ind. Cas. 454.

——Right of co-tenant in property.

A co-tenant has an interest in the whole property and is entitled to claim his right and interest in every bit of the property. A.I.R. 1934 Lah. 1=154 Ind. Cas. 375.

——Widow of one of co-sharers leaving land uncultivated—Other co-sharers cultivating land and paying portion of usufruct to her—Title of widow not denied—Suit for damages by widow.

Where the widow of a co-sharer had to go to her father's house as she could not get on with her deceased husband's family and was unable to cultivate the land herself, and the other co-sharers cultivated the land but did not deny the widow's title and paid her a portion of the usufruct of the land:

Held, that a suit for damages by the widow would not lie, although she could have relief by a suit for partition. A.I.R. 1933 Cal. 397=60 Cal. 292=144 Ind. Cas. 193.

——A co-sharer merely as a co-sharer does not hold any fiduciary position as regards the other co-sharers nor is he an agent for them. The mere fact that he has made collections of rent will not make him an agent for the other co-sharers. A.I.R. 1932 All. 98=1932 A.L.J. 129=54 All. 240=138 Ind. Cas, 4b5.

——A joint gift cannot be assumed merely by the circumstances that it is made in favour of two or more persons without defining their shares and in cases of donees who are incapable of forming a joint Hindu family, the presumption is that they

were tenants-in-common without benefit of survivorship. 39 P.R. 1909, Foll. 69 Ind. Cas. 538 =A.I.R. 1924 Lah. 289.

Where a party acquires certain property with the help of a fund which belongs to him jointly with others the co-owners in equity are entitled to their proportionate interest in the newly acquired property. 25 C.W.N. 406 (P.C.); L.R. 42 I.A. 177, Foll. 10 O.L.J. 481=78 Ind. Cas. 393=A.I.R. 1924 Oudh 218.

In an undivided patti co-sharers by mutual arrangement are allowed to take possession of and cultivate separate plots. Such separate possession cannot be interfered with by other co-sharers. 105 Ind. Cas. 270=8 O.L.J. 231=A.I.R. 1921 Oudh 146.

——One co-sharer in exclusive possession of joint land in excess of his share—Liability to pay compensation to the other co-sharers—Extent.

A co-sharer in exclusive possession of joint land in excess of his share is liable to pay compensation to the other co-sharers for his exclusive use and benefit of the common land, although the other co-sharers are not entitled in the absence of an ouster to an account of the profits or to a share therein from the co-sharer in occupation of the common land.

Such compensation must be for the entire period from the date of the exclusive occupation by the co-sharer and not merely for the period subsequent to the date of the suit by the other co-sharers. I.L.R. (1949) Mad. 770=A.I.R. 1949 Mad. 503= (1948) 2 M.L.J. 618=1948 M.W.N. 845.

16. Notice.

——Co-sharers—Notice to quit—Service on one of joint tenants.

In the case of joint tenants service of notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. 33 C.W.N. 559=49 C.L.J. 555=120 Ind. Cas. 455=57 Cal. 10=A.I.R. 1929 Cal. 651.

——Where a notice to quit is proved to have reached some of the joint-tenants, all the tenants must be presumed to have got it. 164 Ind. Cas. 446=39 C.W.N. 1041.

——One of co-sharer-landlords issuing notice to terminate lease on behalf of himself and others who admitted it.

Where one of the co-sharer-landlords sent a notice to the terminate the lease on behalf of himself and the other co-sharers and the others admitted that he was acting for them by joining in the suit:

Held, that the notice was valid and binding. A.I.R. 1935 Bom. 219=37 Bom.L.R. 220.

17. Ouster.

(a) Essentials of.
(b) Proof of.
(c) Specific acts and Remedies.

17. (a) Essentials.

——Knowledge of other co-sharers.

Where upon the death of a Muhammadan, leaving a son and two daughters, the son enters upon possession of the whole estate, the law presumes that he has entered upon possession for and on behalf of all. It is then necessary for him to prove ouster before he can succeed in depriving the others of their interests in the estate. The proof of ouster in these circumstances has to be extremely strong and ordinarily can only be sustained by actual exclusion of rights to the knowledge of the person excluded. It may well be that circumstances may exist in which an inference of knowledge can be drawn, or in which the laches or negligence of the co-owner is so great that knowledge will be presumed, but a case of that type would have to be very exceptional. The law does not penalise a co-owner who relies on the honesty of his co-sharer and, therefore, ordinarily the mere fact that he does not take the trouble to assert as many of his rights as he may be entitled to would not justify an inference of ouster. But in the ordinary case of adverse possession against a person who is not a co-owner, it is not necessary to show that adverse possession was brought home to the knowledge of the true owner. It is enough to show that possession was overt and without any attempt at concealment.

[On a consideration of the evidence, his Lordship was not satisfied that ouster had been established.] A.I.R. 1941 Nag. 343=1941 N.L.J. 467=I.L.R. (1942) Nag. 608=198 Ind. Cas. 653.

——Knowledge on part of person ousted.

Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter, therefore, is essential. A.I.R. 1936 Pat. 136=17 P.L.T. 366=161 Ind. Cas. 331 (2)=2 B.R. 324.

——Mere possession of the entire property by a co-sharer unaccompanied by any other circumstances is not sufficient to create a presumption of ouster. 71 C.L.J. 200.

17. (b) Proof of.

——Co-sharers—Ouster—Proof of.

In the case of co-owners, the question whether on given facts and circumstances, a case of ouster can legitimately be raised, depends entirely upon the circumstances of the case and it is not possible to lay down any inflexible rule of law that an ouster must be presumed where a co-owner has been in sole enjoyment of the property for a long time. A.I.R. 1943 Oudh 54=1942 O.W.N. 522=1942 A.W.R. 324=203 Ind. Cas. 391=1942 R.D. 766.

——Proof.

The mere fact that a co-sharer has mortgaged the joint property is not sufficient to show that he was repudiating the title of the other co-sharers. The mortgage in such a case may be held to be subject to the adjustment of the shares of the parties at the time of partition. In order to prove ouster of the other co-sharers, a co-sharer has not only to prove that he was treating the property as though it belonged exclusively to him but also that this fact was known to the other co-sharers. A.I.R. 1942 Lah. 135=44 P.L.R. 133=201 Ind. Cas. 159.

——Transfer by one co-sharer of joint land.

A transferee from a co-sharer occupies, in the eye of the law, the same position as his transferor and by the mere fact of obtaining a transfer in his favour and appropriating to his own use some of the joint land, he does not acquire title by adverse possession as against his co-owners. There must be some clear assertion of hostile title on his behalf accompanied by distinct acts of ouster of his co-sharers for a period of more than twelve years before the suit, before he can acquire title by adverse possession. A.I.R. 1935 Lah. 651=159 Ind. Cas. 230.

——Enjoyment of profits by co-sharers in possession only—Assertion of hostile title by one of occupant co-sharers.

In the case of co-owners, in the absence of an open assertion of a hostile title by one to the knowledge of the others, there can be no ouster and non-participation in the profits by one and exclusive occupation by the other do not establish adverse possession. A.I.R. 1932 Lah. 143=32 P.L.R. 824=135 Ind. Cas. 686.

——'If possession might be either lawful or unlawful, in the absence of evidence it must be assumed to be the former'.

The possession of a co-heir, even if he enters into possession as the sole and exclusive heir is not adverse to the other co-heirs, as such an assertion cannot by itself amount to an overt act of ouster. A.I.R. 1931 Lah. 439=131 Ind. Cas. 105.

——Muhammadan families—Sisters willing to be maintained in lieu of taking shares.

In the case of Muhammadan families, it is unusual for Muhammadan ladies to insist on their unquestioned rights and that they often prefer being maintained by their brothers to taking a separate share for themselves and the mere fact of partition among the makes without reference to them does not mean much in the shape of ousting them from their rights. A.I.R. 1941 Nag. 343=1941 N.L.J. 467=I.L.R. (1942) Nag. 608=198 Ind. Cas. 653.

——Mere mutation in itself does not constitute ouster. A.I.R. 1941 Nag. 343=1941 N.L.J. 467=I.L.R. (1942) Nag. 608=198 Ind. Cas. 653.

——Abandonment—If can be presumed—S. 114, Evidence Act (1 of 1872), effect of.

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events in the conduct of public and private business in their relation to the facts of the particular case.

Brothers lived together and held the property belonging to their parents as co-owners. One of them used the property as his own. After a time, the rest of the brothers went away and took no interest in the property for a long period of 25 years:

Held, that the mere fact of leaving the house was not sufficient to show that they were ousted from this property, but in considering this matter, the Courts must always bear in mind that the Evidence Act requires rules of common sense to be applied to the consideration of cases and that the abandonment on the part of the departing brothers of any claim that they might have had to the property might be presumed under S. 114, Evidence Act. A.I.R. 1941 Rang. 111=195 Ind. Cas. 234.

——Non-receipt of rent, whether proof of ouster.

The mere fact of non-receipt of rents is not conclusive evidence of ouster by the co-sharer who is in possession.

The onus of proving ouster is upon those who set up adverse title. A.I.R. 1936 Pat. 136=17 P.L.T. 366=161 Ind. Cas. 331 (2)=2 B.R. 324.

17. (c) Specific acts and Remedies.

——Uninterrupted sole possession of one co-sharer of part of joint property—Co-sharer, in assertion of hostile title doing hostile overt act.

In law, uninterrupted sole possession of one co-sharer of a part of the joint property cannot, by itself and without more, amount to ouster of the others. In such circumstances, the possession of one co-owner is presumed to be the possession of all and it is only when a co-sharer in assertion of a hostile title does a hostile overt act that the statute begins to run against the other co-sharer.

If the transferring co-sharer, claiming to be the exclusive owner purports to transfer the property as belonging to him alone, this will certainly be an overt act hostile to the other co-sharers and if the transferee continues in sole possession for more than the statutory period, without admitting the joint character of the property, he will, of course, acquire a prescriptive title. But if the transfer purports to be of a part of the joint property and there is denial of the title of other co-sharers the transferee steps into the shoes of the transferring co-sharer and his sole possession for whatever length of time will not be adverse against the other co-sharers:

Held, on facts, that there was not a title of evidence to show that the plaintiffs had either denied the joint character of the property or did any other act amounting to an ouster of the other co-proprietors and, therefore, their exclusive possession for 12 years could not by itself, invest them with a title by prescription. A.I.R. 1941 Lah. 307=43 P.L.R. 337 =197 Ind. Cas. 609.

———Participation of profits of jalkar by one co-sharer.

Mere participation of the rents and profits of *jalkar* without more by one of the co-sharers even for a long period of time is not sufficient to constitute ouster. A.I.R. 1933 Cal. 222=56 C.L.J. 369 =143 Ind. Cas. 179.

——One co-sharer building exclusively on joint land during minority of other co-sharer.

The act of a co-sharer in building exclusively on a portion of the joint land cannot by itself amount to an ouster of the other co-sharer who was a minor at that time. A.I.R. 1941 Pesh. 65=42 Cr.L.J. 872=196 Ind. Cas. 444.

——Refusal of managing co-owner to render accounts—Remedy of dispossessed co-owners.

To show ouster, it must be found that there was an exclusive possession by one co-owner connected with some act amounting to a total denial of the rights of the co-owner who is out of possession. The remedy of the co-sharer who is dispossessed must be to sue the other for joint possession and he can claim along with it compensation or mesne profits. A pure action of account would not be an apropriate remedy under such circumstances. A.I.R. 1940 Cal. 363=I.L.R. (1940) 1 Cal. 110=189 Ind. Cas. 642.

——Person opening doorway in his house abutting on common courtyard—Each house abutting thereon having similar doorway—Opening, if amounts to ouster of other co-owners.

Where one of the joint owners of a courtyard opens a doorway in the wall of his own house abutting on the courtyard and each one of the co-owners has a similar doorway in his house opening likewise, the opening of the doorway does not amount to an ouster of other co-owners from the courtyard and they have no cause of action to maintain a suit for injunctions to restrain him from opening the door unless an excessive user or a user inconsistent with that to which it has been put before, is proved. A.I.R. 1938 Lah. 487=40 P.L.R. 746 =178 Ind. Cas. 289.

——On partition house allotted to plaintiff and defendant—Occupation of house by both—Subsequent conduct.

There were three brothers, *N*, *R* and *S*. After *N's* death, plaintiff who was the natural-born son of

S, was adopted by the widow of *N*. About two months after the adoption, there was a partial partition and the suit house was allotted to the plaintiff and *S* who was the defendant in the suit. There were proceedings about the custody of the minor plaintiff and eventually the adoptive mother was appointed the minor's guardian. Both the branches of the family, *i.e.*, the plaintiff's branch and the defendant's branch, were in occupation of the suit house till the adoptive mother, finding it irksome to live under the same roof as her brother-in-law, the defendant, left the house. Subsequently she wishing to return to the suit house, applied to the Court, that she should be permitted to open a new gateway, so that her portion might be quite distinct from the defendant's portion of the house. The defendant opposed the application, and in doing so, averred that in the house two families could not conveniently reside and went on to say that the adoptive mother ought not to be allowed to live in the suit house:

Held, that plaintiff and defendant were co-owners and the defendant's conduct afforded clearest possible evidence of exclusion of the plaintiff, amounting to ouster in law. Defendant was, therefore, liable to pay rent for plaintiff's half share in the house from the date of ouster to the date on which the ouster ceased. A.I.R. 1938 Mad. 827=1938 M.W.N. 399 =180 Ind. Cas. 677.

——Suit for possession—Defendant co-sharer claiming his share only—Ouster.

Where in a suit for possession of his share by a co-sharer, the defendant co-sharer claiming adverse possession has never asserted any exclusive title in himself to the knowledge of the plaintiff and has only claimed title to his own share, the plea of the adverse possession cannot prevail as there is no ouster of the plaintiff. A.I.R. 1938 Mad. 133=(1937) 2 M.L. J. 511=46 M.L.W. 910=1937 M.W.N. 1285=176 Ind. Cas. 639.

——Removal of absentee co-sharer's name from Record of Rights at instance of co-sharers in possession—In such case adverse possession of co-sharers in possession, if commences from such date without notice to absentee co-sharer —Non-participation in rents and profits by absentee co-sharer for long time.

The removal of the name of the absentee co-sharer from the Record of Rights at the instance of the co-sharers in possession of the land is an overt act amounting to ouster, as it is done openly, and if the absentee co-sharer takes interest at all in the land, he would not fail to learn about it, for, the Record of Rights is attested every four years. Such an act of removal of the name commences an adverse possession of the co-sharers in possession even without notice of removal of name to the absentee co-sharer as he would have known about it had he taken any interest in the land and so his knowledge of the adverse claim may be presumed.

Even non-participation in rents and profits for a very long time may justify an inference of ouster. Absentee co-sharer's remaining out of possession of the land for a very long time and his not taking any interest in land during the period and also not receiving any share of its rents and profits, justifies an inference of ouster and is also good evidence of "abandonment" *i.e.*, an intentional quitting of possession by a proprietor coupled with an intention not to resume it. A.I.R. 1937 Lah. 890=39 P.L.R. 95=I.L.R. (1938) Lah. 367=175 Ind. Cas. 605.

——Possession of co-sharer, when adverse—Ouster or assertion of hostile title, necessity of —Mere non-payment of rent or profits.

In order to succeed on the ground of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of twelve years. There can be no adverse possession by one co-sharer as against other until there is ouster or exclusion and the possession of a co-sharer becomes adverse to another co-sharer from the moment when there is an ouster, *i.e.*, after there is an assertion of a hostile title by one co-sharer against the other and to the knowledge of the latter.

It is somewhat dangerous doctrine to propose that mere non-participation of rents and profits of joint property by a co-sharer for a very long period would be sufficient to give rise to the inference of ouster.

Obiter.—In order to infer adverse possession or exclusion the Court must be satisfied that the taking of profits is an indication of a denial of rights in the other co-tenants to receive them and long and uninterrupted possession without more by one co-sharer is not sufficient to constitute adverse possession. A.I.R. 1936 Cal. 106=40 C.W.N. 777=161 Ind. Cas. 450.

——Ouster, if can be inferred from conduct—Length of ouster—Question of fact.

Long course of enjoyment without protest by co-owners coupled with the non-participation in profits and non-enjoyment of the property by the others, is enough to establish ouster. The length of ouster can make no difference to the principle, provided it is longer than the statutory period of twelve years. It is for a Judge of fact to determine whether the length of exclusive possession in the case before him was enough to establish ouster. A.I.R. 1936 Nag. 282 =I.L.R. (1937) Nag. 242=165 Ind. Cas. 934.

——Some co-sharers allowed others to remain in possession of common land for some time.

Where lands are held in common, each co-sharer is entitled, subject to paying compensation to the other co-sharers, to cultivate any part of it not being cultivated by them. This being so, the other co-sharers are not thereby ousted and their remedy, if they object, is merely to obtain a partition. The mere fact, therefore, that some of the co-sharers allowed others to remain in possession of common lands for some time will not necessarily amount to ouster, nor can it defeat their right to claim partition. A.I.R. 1940 Pat. 617=21 P.L.T. 320=192 Ind. Cas. 502.

——Co-tenant demanding rent from lessee—Demand whether means ouster.

A demand of rent by a co-tenant from lessee of property cannot be evidence of ouster in any circumstances. Demand of rent is an equivocal act; whether such demand is made on his behalf or on behalf of others, it is not evidence of any ouster by him of the other co-tenants. A.I.R. 1936 Pat. 66=17 P.L.T. 170=160 Ind. Cas. 1054=2 B.R. 274.

——Sole possession by one tenant-in-common continuously for a long period—Ouster—Presumption.

Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. A.I.R. 1935 Cal. 195=60 C.L.J. 232=39 C.W.N. 159=62 Cal. 305=155 Ind. Cas. 987.

——Ouster—Ejectment—Possession, joint—Injunction—Demolition of buildings—Justice, equity and good conscience.

It cannot be laid down as an inflexible rule of law that the sole occupation of a part of the joint estate by one co-owner inevitably implies an ouster of the other co-owner. It cannot also be laid down as a universal proposition of law, that the erection of a substantial building by one co-owner upon a portion of the joint property without the assent of the other co-owner is conclusive evidence of ouster. What constitutes ouster in a particular case must depend upon its special facts. Whether a co-owner seeks a decree for ejectment and joint possession against his co-sharers on the ground of ouster or asks for an injunction, perpetual or mandatory, to prevent the change of condition of the joint property or to restore it to its original condition, the Court is bound to decided the question on equitable grounds. The artificial distinction between a common law action of ejectment and an equity suit for an injunction recognised in England should not be introduced in this country, where the Courts are bound, in all matters for which no special rule may exist, to act according to justice, equity and good conscience. The authorities on the subject of the right of joint owners reviewed. 11 C.L.J. 189=5 Ind. Cas. 171.

——Ouster—Damages.

An assignee of the interest of one of several co-sharers is entitled to all the rights of the assignor, but if the assignee be ousted from exclusive possession of any part of the undivided share, the assignee cannot recover damages for the same. (1908) 18 M. L.J. 258=3 M.L.T. 277.

——Mesne profits.

The rule that there can be no suit for mesne profits in respect of lands which were enjoyed by the parties as tenant-in-common can apply only if there had been no ouster or exclusion by the defendant co-sharer. A.I.R. 1933 Nag. 316=30 Nag. L. R. 71=147 Ind. Cas. 445.

18. Partition.

(a) Effect of partition.
(b) Evidence of partition.
(c) Mode of division.
(d) Partial partition.
(e) Private partition.
(f) Right to partition.
(g) Suit for partition.

18. (a) Partition—Effect of.

———For determining whether a joint tenancy has been converted into a tenancy-in-common the principle is as follows: A joint tenancy may be severed in three ways. In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. Secondly, a joint tenancy may be severed by mutual agreement and thirdly, there may be a severance by any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy-in-common. When the severance depends on an inference on this kind without any express act of severance it will not suffice to rely on an intention with respect to the particular share declared only behind the back of the other parties interested. In this class of cases there must be a course of dealing by which the shares of all the parties to the contest have been effected. 116 Ind. Cas. 385=29 M.L.W. 434 =56 I.A. 112=A.I.R. 1929 P.C. 72=56 M.L.J. 643 (P.C.).

——Permanent lease by one without other's consent—Does not bind others.

A person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers but for the practical application of the principle there must be a finding as to whether the lands covered by the lease are homestead lands and as to the character of the lease. Besides there may be equitable considerations which may in certain circumstances protect a lessee of this sort. 104 Ind. Cas. 366=A.I.R. 1927 Cal. 882.

——The special rights of a co-sharer must be protected at partition.

If there is a grove land belonging to a co-sharer standing in the joint land and the said land either wholly or partially falls at the time of the partition into the share of another co-sharer, the latter becomes entitled to both the land and the trees, unless the former's title to the trees and his status as a grove-holder is secured to him by the partition proceedings. In absence of such evidence of the partition proceedings it cannot be held that the rights as grove-holder were preserved to the co-sharer claiming them. 118 Ind. Cas. 431=A.I.R. 1929 Oudh 489.

——Co-sharers—Partition—Effect of.

Partition puts an end to the incidents of a joint tenancy. When the interest of a joint tenant is severed by partition, on his death, succession to his interests will not be by survivorship but the separated tenant's heirs would inherent his interest in the tenancy. 82 Ind. Cas. 204=A.I.R. 1925 Pat. 228.

——Co-sharers—Partition—Effect of.

When a partition is proved to have been effected between the co-owners of a holding the presumption is that the house also has been partitioned along with the land. 107 Ind. Cas. 275 (Lah.).

——Effect of the partition decree.

A person to whom a parcel of land has been allotted by a decree for partition of a Civil Court, does not take it subject to a settlement of a tenancy granted by his former co-sharers without his concurrence when the land was the joint property of all the co-sharers.

The tenancy itself is transferred by operation of law to other lands which have been allotted to the former co-owners on partition. And where the person with whom the lands were settled by the former co-owners had acquired occupancy rights, such rights could attach only to the lands to which the tenancy is transferred. A.I.R. 1942 Cal. 513= I.L.R. (1942) 1 Cal. 408=46 C.W.N. 904=202 Ind. Cas. 635.

——Partition—Effect on prior tenancy.

Possession delivered in partition proceedings among proprietors, is subject to the tenancy, if any, which any of the proprietors themselves might have created. 2 P.L.T. 266=A.I.R. 1921 Pat. 295.

——Partition—Co-owners, lease by—Determination of lease.

Three different share-holders of a joint estate granted leases of a certain plot to the same person in respect of their different shares. On the determination of one of the leases the lessor sued for partition and for khas possession of the lands in her share. *Held*, she was entitled to the relief claimed. 1 C.L.J. 40, foll.; (1906) 5 C.L.J. 307=11 C.W. N. 397.

——Mortgage by one co-sharer of his undivided share—Partition—Mortgagee, if party to partition.

The property being joint at the time of the execution of the mortgage, one co-sharer can only mortgage his undivided share in the property. Such a right is always subject to the right of the other co-sharers to effect a partition and when such partition is carried out the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor, unless he can show that the partition was fraudulent. It is not necessary that the mortgagee must be a party to the partition proceedings. He has only a charge on the undivided share of the mortgagor and he has no right to prevent the co-sharers from partitioning property. A.I.R. 1934 Lah. 809=36 P.L.R. 185=16 Lah. 392=155 Ind. Cas. 938.

——Mortgage by one co-sharer — Mortgagee losing possession in consequence of partition—Right of mortgagee to obtain possession—Option given to mortgagee to select particular piece of land—Whether affects his right.

A mortgage deed stipulated that if the mortgagee was subsequently ousted from any portion of the land mortgaged which holding was owned jointly by mortgagor and himself he would be entitled to make good the deficiency by appropriating an equal area to be chosen by him out of other land belonging to the mortgagor. In consequence of partition proceedings the mortgagee lost possession of the area mortgaged and he instituted a suit for possession of a particular piece of land which had fallen to the mortgagor's share. This land had been mortgaged by the mortgagor to another who was person joined as defendant:

Held, that if the subsequent matter of a mortgage was an undivided share and the joint sharers effected a partition, the mortgagee must pursue his remedy against the share allotted in severalty to his mortgagor and that the fact that the mortgagee had the option of selecting a particular piece of land and chose a portion mortgaged to others, did not affect the applicability of the general principle. A.I.R. 1934 Lah. 660=35 P.L.R. 452=149 Ind. Cas. 1195.

——Mortgage of undivided share by co-sharer—Subsequent partition under award made on reference without intervention of Court—Mortgagee's rights—Substitution of security—Mortgagee can proceed against properties allotted to mortgagor's share in substitution of undivided share.

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share.

This principle applies equally to a partition by arbitration. A.I.R. 1932 P.C. 235=9 O.W.N. 829=36 C.W.N. 1129=36 M.L.W. 456=1932 M.W.N. 1063=63 M.L.J. 664=1932 A.L.J. 909=56 C.L.J. 324=13 Lah. 702=35 Bom.L.R. 1=34 P.L.R. 63=59 I.A. 405=139 Ind. Cas. 85 (P.C.).

——Rule that status quo ante should be maintained pending suit.

Where there is dispute between co-sharers, it is of the utmost importance that the *status quo ante* should be maintained pending the decision of the suit, and that none of the co-sharers should be allowed to deal with joint property in a manner which is likely to render the suit infructuous or create other complications. A.I.R. 1937 Lah. 288=173 Ind. Cas. 731.

——Right of compensation on exclusive possession—Absence of resistance to exclusive possession.

The right to claim compensation is confined to cases where one co-sharer appropriated the common land by excluding and ousting the other co-sharer from the enjoyment of his proper share in it; or in other words, where he brought into his own use the entire land in defiance of the claim of his co-sharer. A co-sharer is not entitled to compensation where the other co-sharer has used the land without opposition or resistance from the former.

Where in a suit by a co-sharer against another co-sharer for compensation for using and occupying lands which were the common property of the parties, the plaintiff adduced oral evidence that the defendant's employees being asked to divide the produce of her share in the *bakasht* lands did not do so and demand for partition was made:

Held, that the claim for partition of *bakasht* was not a claim for out and out partition of the village. What the plaintiff really wanted was that there should be such an arrangement between the parties that both of them might cultivate their proportionate area separately. The village *amlas* must be held to be authorized to make this arrangement. It was not the duty of the plaintiff to follow the defendant wherever he might have been in order to obtain his right from him. If the *amlas* of the defendant in spite of the demand of the plaintiff cultivated the entire area, the defendant would be answerable for this act of his agents whereby the plaintiff was excluded. A.I.R. 1937 Pat. 235=168 Ind. Cas. 597 =3 B.R. 449.

——Partition—Provisional deed — Construction —Covenant to make another partition at the end of term—Sale of undefined share by one of the sharers—Rights of vendee—Necessary party to suit—Suit for partition by vendors—Limitation Act, S. 22.

Three brothers partitioned their properties provisionally by means of an award which provided *inter alia* that until a certain year "Sarvajit" each should enjoy the lands allotted to his share according to the division then made, and that at the end of the term all profits and losses should be made equal and the said lands divided equally. One of the parties sold half a visam of his share to the plaintiff and allowed another portion to be sold for arrears of rent. In a suit by the vendee of the undefined share: *Held,* on a construction of the award—(1) That the joint tenancy-in-common which existed before the award was not finally put an end to but continued to remain till the end of Sarvajit though subject to separate enjoyment of special allotments till then. (2) That the conveyance by one of the sharers was a valid transfer of all the sharers' interest conveyed and that the plaintiff was entitled to maintain a suit for partition of the whole land within 12 years from Sarvajit. (3) That even assuming that the vendor's sharer was responsible for the rent sale of a portion of the property in the sense that he could have avoid-

ed the rent sale by payment of rent, the property sold must be held to have been impressed with the liability to re-partition at the end of Sarvajit and that the right to repartition of the vendor-sharer or his vendee was not consequently lost. (4) That the purchaser in rent sale was a necessary party to the suit for partition by the vendee. (5) That the purchaser in the rent sale having been made a party to the suit after the expiry of 12 years from Sarvajit, the suit was liable to be dismissed against all the defendants, it being impossible to give any relief to plaintiff against others without-joining the purchaser in the rent sale. (1905) 20 M.L.J. 79=33 M. 246 =7 M.L.T. 67=4 Ind. Cas. 392.

18. (b) Partition—Evidence of.

——Mere specification of shares does not amount to any division or partition. 122 Ind. Cas. 404=11 L.R.A. Rev. 90=1930 A.L.J. 811=A.I.R. 1930 All. 350.

——An entry in a *wajib-ul-arz* stating that a rendition of accounts took place among the co-sharers, is a strong piece of evidence of separation. 83 Ind. Cas. 833=11 O.L.J. 154=A.I.R. 1924 Oudh 428.

——Presumption.

Where one portion of a joint estate has been divided there is a presumption that the whole of it has been divided. It is, however, merely a presumption of fact and must depend on the particular circumstances of each case.

With the exception of *hujra,* all the other property which the plaintiff and the defendant jointly owned had been divided although their agricultural land was still shown as owned by them all jointly, though held separately by them almost in equal shares. It was not shown what compensation was given to the plaintiff if the *hujra* remained solely the property of the defendant:

Held, that the circumstances led to the conclusion that there had been no partition of this *hujra.* A. I.R. 1941 Pesh. 65=42 Cr.L.J. 872=196 Ind. Cas. 444.

——Zemindari—Bakasht land—Division of, between proprietors—Lands under tenancy undivided — Each pattidar collecting separately his share of rent.

The *bakasht* lands of the *zemindari* estate were divided between the proprietors but the land in occupation of the tenants was not at all divided although each of the *pattidars* collected his share of the rent from the tenants separately:

Held, that there was a complete partition of the proprietary interest. A.I.R. 1936 Pat. 77=17 P. L.T. 104=160 Ind. Cas. 921 (1)=2 B.R. 258 (1).

18. (c) Partition—Mode of division.

——Improving co-sharer may be allowed to reap advantage of his imprisonments—But he is not by right entitled to it.

Where a co-owner has expended money on the joint property and time comes for partition, it is reasonable and right to endeavour to give him such an allotment as may enable him to reap the advantage of what he has expended upon improvements but it is not the *prima facie* right of such a co-owner who has improved the whole or greater portion of the joint land to have in one way or another recouped to him by his co-owners the value of improvements which the other co-owners get in the shares allotted to them; the improver in the latter case is a mere volunteer and cannot without consent of his co-owners lay foundation for charging them with the improvements. 33 C.W.N. 1199=A.I.R. 1929 Cal. 553.

——Partition—Co-sharer being in exclusive enjoyment of part of common land—Mode of adopting rights of other co-sharers.

A co-proprietor is entitled until partition to appropriate to his exclusive use a part of the village common land which is in his exclusive possession for a number of years and his possession cannot be disturbed by any of the other co-proprietors unless his appropriation of a part of the common land has caused such material and substantial injury to the others as could be remedied on partition. The remedy of the other co-sharers in such cases is not to apply for ejectment of the co-sharer in possession or his transferee but to sue for partition. Case-law reviewed. A.I.R. 1930 Lah. 1061=130 Ind. Cas. 56.

——Partition—Mode of—Claim by one sharer to alter allotment—When allowed—Change of allotment interfering with compactness of parties—If can be allowed—Failure to hold local inquiry—Effect.

All parties at a partition among co-sharers cannot be allotted their *rasdi* in particular type of lands; and the fact that a co-sharer happens to be the largest co-sharer would not entitle him to have the partition re-opened and the allotment of properties changed while such change is not possible without seriously affecting the compactness of the parties. Nor would the fact that the Batwara office did not hold a local inquiry afford a ground for interference when the parties have not been prejudiced by the failure to hold such inquiry. 12 B.R. 207.

——Partition—Mode of division—Defendant co-sharer causing confusion of boundaries between joint property and his personal property—Equitable interference by Court on behalf of plaintiff.

Plaintiff sued for possession of property *X* which was in the possession of defendant, or in the alternative for partition of properties *X* and *Y*. He proved that the property *X* belonged to his father who had put defendant in possession of it, and further that the defendant by his misconduct had mixed up property with his own property *Y* so that plaintiff could not identify *X*. The trial Court passed decree for partition.

Held, that although as between independent proprietors confusion of boundaries *per se* does not furnish ground for Court's interposition, still plaintiff in this case had a right to complain inasmuch as he proved that the defendant by his misconduct brought about confusion of boundaries of the property after he obtained possession of it from plaintiff's father, and therefore he was entitled to invoke the equitable interference of the Court on his behalf. The trial Court was therefore right in passing decree for partition. 32 M.L.W. 957=A.I.R. 1931 Mad. 19=60 M.L.J. 85.

——Mining area.

In effecting partition, compactness is no doubt an important element, but in the case of mining areas, where mines have been opened and developed by different co-sharers at considerable cost and labour, it is fair and just that more importance should be attached to present possession so far as it will be consistent with fair and equitable partition. A.I.R. 1944 Pat. 261=23 Pat. 115.

——Absence of building at time of partition—Plot allotted to plaintiff on partition—Other co-sharers, if have right to remain in possession over that plot.

Where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901, and the site of the house of one co-sharer has been allotted to the share of another co-sharer, the presumption is that the owner of the house was to retain possession of the house. Where no building existed at the time of partition, the defendants have no right to remain in possession over a plot which has been allotted to the plaintiff in partition. A.I.R. 1935 All. 666=1935 R.D. 265=1935 A.L.J. 819=1935 A.W.R. 727=155 Ind. Cas. 667.

——Improvements to joint property by one co-owner—Equity—Partition by metes and bounds impossible—Compensation in money for enhancement in value due to improvements.

Where it is found that money has been spent on joint property by a co-owner, in making improvements, an equity is created in favour of the party who has made the improvement and the only way to recognise his equity is for the Commissioner directed to partition the property to allot to him that portion of the premises upon which the improvements and additions have been made. If that cannot fairly be done, then the party making the improvements must lose the value of his equity. In a case, where it is possible to divide a house by metes and bounds, and it is contended by one of the parties that he has spent money upon improvements or additions, it is not lawful to direct that the other parties should make compensation in money to the party making the improvements, in order to equalise the burden.

If it can be shown that the price which may be obtained for the premises has not been increased by the amount of the present value of the improvements, or by any amount in respect of the improvements, then the total received will have to be divided according to the shares already declared. If, on the other hand, it can be shown that the total price to be received has been enhanced by the money expended upon the improvements, then that sum must first he deducted, before the value of the premises so far as the other parties are concerned, can be ascertained. A.I.R. 1933 Cal. 502=60 Cal. 591=145 Ind. Cas. 313.

18. (d) Partial partition.

——If a sharer in joint property chooses to select a portion of the joint property for partition and to sue for partition of that alone his suit cannot proceed without the acquiescence of the defendant. 77 P.R. 1887, Foll. 99 Ind. Cas. 703=A.I.R. 1927 Lah. 814.

——Partial partition.

The rule that there can be no partial partition of a joint estate is aimed at preventing multiplicity of litigation which would result if separate suits for partition could be instituted in respect of fragments of a joint estate. The application of this rule may be relaxed, if the circumstances of a particular case or the interests of justice so require. A.I.R. 1941 Cal. 635=46 C.W.N. 212=198 Ind. Cas 348.

——Partial partition—Co-owners of an estate—Amount to be allowed only in the case of a joint Hindu family.

Partial partition is not allowed only in the case of a joint Hindu family. There is nothing to prohibit it in the case of co-owners of an estate. 28 A. 39, foll. (1908) 12 C.W.N. 640.

18. (e) Private partition.

——When co-sharers enjoy exclusively distinct portions of joint property by arrangement it should be held that there was partition.

An estate which had originally formed part of a larger estate belonged to three persons. These three persons separated in board and residence and separate accounts were opened for each of their shares in the estate. The estate, however, was not partitioned under the Estates Partition Act. Some of the lands were thenceforth in the separate and exclusive possession of each of the three co-sharers, who separately collected the rents from the tenants of those lands; in respect of some others they collected the rents, each according to his share and some waste or uncultivated lands were held jointly. However, there was no deed or writing indicating a formal partition. The plots of land in the exclusive possession of the proprietors were described in rent receipts and zemindari papers as kamat. When some of the plots in exclusive possession were compulsorily acquired under the Land Acquisition Act, the compensation moneys were separately paid and appropriated by the separate proprietors who had been previously collecting the rents in respect of those lands; and when a record-of-rights was prepared of these villages and finally published, the plots were recorded as being the separate property of their respective landlords, without any dispute or controversy on the part of the others. Further, on the map prepared, the plots lay, not in three compact blocks but in many cases isolated and scattered.

Held, that there was a partition between the different holders of the estate. 46 C.L.J. 237=104 Ind. Cas. 92=1927 M.W.N. 706=32 C.W.N. 170=A.I.R. 1927 P.C. 208=53 M.L.J. 325 (P.C.).

——Tenure created by one co-owner over a property which he got under a private partition is not affected by a subsequent partition.

Where there has been a previous formal amicable partition of an estate among the co-sharers, and if one of them creates a tenure comprising the lands of his co-sharer, a subsequent partition by the Collector with the consent of the co-owners will not affect the interest of tenure holder who was no party to the partition proceedings. If, however, the tenure-holder is himself a co-owner and was a party to the partition proceedings he cannot be heard to say that there was a previous partition between the co-owners. Again, if a co-owner claims under a grant from all the co-owners with regard to some lands within the estate, his interest in those lands is not affected by the partition proceedings. 97 Ind. Cas. 539=A.I.R. 1927 Cal. 65.

——Private partition is valid.

The co-sharers in a mahal have a right to effect a partition by private arrangement amongst themselves, and it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference between a partition effected by private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with the actual facts. 75 Ind. Cas. 835=45 All. 711=21 A.L.J. 634=4 L.R.A. Rev. 437=A.I.R. 1924 All. 57.

——Co-sharers of patti—Private partition—Validity and effect of—Partition by private treaty or through Court—Distinction.

The co-sharers in a *mahal* have a right to effect a partition by private arrangement. Partition among the co-sharers once effected either through Court or by private treaty puts an end to the joint ownership of the parties. Thenceforward the parcels of land allotted to different co-sharers are absolutely distinct in the eye of law and one has nothing whatsoever to do with the other. The only difference between a partition effected by private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village regards which are at variance with the actual facts. A.I.R. 1946 All. 200=I.L.R. (1945) All. 921=1945 All.L.J. 452=1945 A.W.R. (H.C.) 359=224 Ind. Cas. 67.

——Private partition between two co-sharers—One co-sharer assigned certain plot and remaining in exclusive possession for considerable time—Gift of property by him will not affect other's title.

Where, by a private partition between two co-sharers, a certain plot is assigned to one of them and he is allowed to remain in exclusive possession of it for considerable time, by reason of exclusive possession, he is armed with a right to make a gift of the plot but cannot deprive the other co-sharer of his title to the plot. The other co-sharer is not entitled to get the deed of gift cancelled, but can get a declaration that his title to the plot remains unaffected. A.I.R. 1945 All. 153=1945 A.L.J. 106=1945 A.W.R. (H.C.) 2 and 42=1945 O.W.N. (H.C.) 59=I.L.R. (1954) All. 159=222 Ind. Cas. 133.

——Mahal—Partition, whether can be cancelled by mere agreement.

The perfect partition of *mahal* into *pattis* between co-sharers cannot be cancelled by a mere agreement between the parties, and in any case, where some of the co-sharers are no parties to that agreement so that on any view their separate *pattis* cannot be regarded as having ceased to exist as a consequence of the agreement. A.I.R. 1936 Oudh 65=1935 O.W.N. 1183=158 Ind. Cas. 802=1935 R.D. 520.

——Unilateral act—Not binding.

A co-sharer by taking possession of half the land without the consent of his co-sharer cannot compel him to accept the other half as his share. 57 Ind. Cas. 495 (Nag.).

——Partition—Collection of rents and payments of revenue by each co-sharer—Liability to profits.

Under private partition in a village each co-sharer collected profits to the extent of his share and paid revenue separately. *Held*, there can, between the co-sharers, be no liability for profits so long as this arrangements remains in force. 6 O.L.J. 468=53 Ind. Cas. 776.

18. (f) Right to partition.

——Co-sharer's right to partition, a matter of right.

A tenant in common is entitled to partition as a matter of right, and the Court has no discretion in the matter. (1901) 24 M. 441.

——Inconvenience or loss no bar—Co-owner merely a life-tenant.

The fact of a co-owner being a life-tenant and not an absolute owner is no ground for refusing a partition. Neither mere difficulty in making a division of property, nor inconvenience, nor pecuniary loss likely to be produced by the division, suffices to bar a right of partition by co-owner. (1908) 9 C.L.J. 421=13 C.W.N. 611=2 Ind. Cas. 641.

——Partition — Right to—Defence—Acquisition of subordinate interest.

Where two persons are in joint possession as joint owners, entitled to claim partition against another it is no valid answer to a claim for a partition by one that the other has acquired a subordinate interest over the whole property. Property held in co-tenancy may be partitioned by suit and the only essential is that the property must be held in co-tenancy. 29 Ind. Cas. 467 (Cal.).

——Partition—Right to—Landlords and tenure-holders.

Persons in joint possession under permanent titles though of different grades, *i.e.*, as tenure-holders and landlords are entitled to partition. 37 Cal. 918=37 I.A. 198=14 C.W.N. 962=12 C.L.J. 240=8 M.L.T. 228=(1910) M.W.N. 691=7 A.L.J. 1137=12 Bom.L.R. 997=20 M.L.J. 907=7 Ind. Cas. 549 (P.C.).

——Partition—Right to claim.

Deceased co-sharer's widow has statutory right to partition which cannot be defeated merely because the widow once agreed to receive some maintenance allowance. 67 Ind. Cas. 356=54 P.L.R. 1922=A.I.R. 1921 Lah. 308.

——A person to whom a parcel of land has been allotted by a decree for partition does not take it subject to a settlement granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers. A.I.R. 1926 Cal. 714 (F.B.), Foll. 9 P.L.T. 259=106 Ind. Cas. 389=A.I.R. 1928 Pat. 202.

——Mortgage with possession by a co-sharer without hindrance by the other—Ejectment of mortgage by the other is illegal—His remedy lies in a suit for partition.

One co-sharer has no right to appropriate to himself a specific portion of the common land, and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Such a co-sharer or his transferee is entitled to continue in such possession, so long as such user does not interfere with the use by other co-sharers of what is in their possession. Where a co-sharer mortgages with possession a specific joint plot without any let or hindrance by the other co-sharer or his predecessor in interest, the other co-sharer has no right to eject the mortgagee and his action in so ejecting is illegal and unauthorized; his remedy is to obtain from Court a partition of the whole plot. 4 O.W.N. 871=105 Ind. Cas. 359=A.I.R. 1927 Oudh 467.

——When the joint property mortgaged by one co-sharer falls to another share, the mortgagee's remedy is only to sue the mortgagor for substitution of security or damages. 1 Luck. 210=13 O.L.J. 260=6 O.W.N. 1223=96 Ind. Cas. 75=A.I.R. 1926 Oudh 509.

——When co-sharers do not agree as to the use of common land, remedy is by way of partition and

not by a suit for joint possession. A.I.R. 1924 P.C. 144, Foll. 94 Ind. Cas. 921 (Oudh).

——The action of one co-sharer in cultivating the common land has not the effect of ousting the other co-sharer as the former has a right to cultivate and the latter's remedy if he has any objection to the plaintiff's user of the common land is to obtain a partition. A.I.R. 1924 P.C. 144, Foll. 95 Ind. Cas. 845 (Oudh).

——Partition is the remedy which a co-owner has if he and the other co-owners cannot agree as to how the lands which they hold in common should be managed. 80 Ind. Cas. 827=26 Bom.L.R. 651=51 Cal. 631=35 M.L.T. 169=51 I.A. 293=23 A.L.J. 76=5 L.R.P.C. 137=29 C.W.N. 34=20 M.L.W. 770=1924 M.W.N. 723=6 P.L.T. 750=3 Pat.L.R. Civil 193=A.I.R. 1924 P.C. 144=47 M.L.J. 23 (P.C.).

——In cases of partition on principle no distinction can be drawn between joint tenants and tenants-in-common for the right of partition belongs equally to each of them. 49 Mad. 939=24 M.L.W. 298=1926 M.W.N. 815=97 Ind. Cas. 622=A.I.R. 1926 Mad. 1018=51 M.L.J. 254.

——Partition proceedings—Treatment of certain land as khudkasht—Binding on the co-sharers.

Where a co-sharer who is a party to the partition proceedings has accepted a partition of the village on the basis that a certain land was the khudkasht of a certain zamindar, it is binding on him and he cannot treat it later as tenancy. (1948) R.D. 162=1948 A.W.R. (Rev.) 86.

——Claim for damages.

Where there is a certain area held in co-tenancy and the area enjoyed by one co-tenant roughly corresponds to the area to which he would be entitled by a strict division of the total area according to shares, he is not entitled to ask for damages because the area possessed by him is slightly smaller than that which mathematical division would give him. 115 Ind. Cas. 449=A.I.R. 1929 All. 324.

——A co-sharer under a partition decree cannot reprobate the decree after having obtained an advantage to the detriment of the other co-sharer. But if the decree was a nullity it cannot be affirmed by anything that a co-sharer does short of obtaining an advantage under it to the detriment of others. A.I.R. 1929 Cal. 586.

18. (g) Suit for partition.

——Co-sharers—Suit for partition—Defendant in possession being mortgagee-purchaser—Debt binding on all co-sharers—Form of decree.

Where an owner of a one-fourth share sues for a partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee-purchaser of the suit property as well as certain other properties, it is the duty of the Court to adjust the rights and liabilities *inter se* between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief which the Court is bound to grant. The co-sharer would be entitled to a decree for partition and recovery of a one-fourth share in the suit property conditional on his paying into Court the amount representing the *pro rata* liability of the share to contribute towards the mortgage-debt to be determined by the Court at the time of the passing of the preliminary decree. A.I.R. 1943 Mad. 370=56 M.L.W. 44=(1943) 1 M.L.J. 100=1943 M.W.N. 96=209 Ind. Cas. 330.

——Partition—Suit for, by a purchaser from co-owner—Purchaser can file suit for recovery of his share in one item without filing suit for general partition.

A purchaser of a co-owner's share in one particular item can file a suit for recovery of the share that he has purchased in one item without filing a suit for general partition. It is open in such cases to the co-sharers who are impleaded as defendants to ask the Court to effect the division of all the properties. A.I.R. 1946 Mad. 534=(1946) 1 M.L.J. 454=59 M.L.W. 339=1946 M.W.N. 429.

———Property belonging to several tenants-in-common in possession of stranger claiming adversely to them—Suit by one co-tenant for recovery of his share—Other co-tenants impleaded as parties—Partition claimed as ancillary relief—Decree.

Where property belonging to several tenants-in-common is in the possession of a stranger claiming title adversely to them, it is open to any one of them to sue and recover possession of his share or to recover possession of the entire property. Where a tenant-in-common sues to recover possession of the entire property, it may be open to him to join other tenants-in-common as parties to the suit and claim to recover joint possession on behalf of himself and the other co-tenants. But where a tenant-in-common only sues to recover possession of his share making the other co-tenants parties to the suit, and claims partition as an ancillary relief, a decree directing partition and awarding possession to other co-tenants of their shares cannot be made. A.I.R. 1940 Mad. 236=1939 M.W.N. 1073.

——Alienees of co-owners—Principle of priority of first purchaser over subsequent.

In a suit for partition, if what the co-owners sold or purported to have sold can be so allotted to their alienees on partition, it should be so allotted so that the alienees can get from their vendors what they sold or purported to sell to them.

The principle that the alienees under the first sale have priority with respect to the lands sold or purported to be sold to them over subsequent purchasers will have no application if the estate is not large enough for the alienees to get from their vendors' share all they purported to sell to them and if the vendors have not sold the same piece of land twice over. A.I.R. 1939 Sind 315=I.L.R. (1939) Kar. 597=185 Ind. Cas. 11.

——Alienee from co-sharer—Whether entitled to partition of alienated property—Hindu Law.

An alienee from a co-sharer is entitled to institute a suit for partition of the property in which he alone is interested. (1936) 163 Ind. Cas. 583=68 C.L.J. 114=39 C.W.N. 1044=62 Cal. 655.

——Partition—Suit for—Prior partition—Relevancy.

In a suit for partition, if it is found that there was previous partition, Court should determine what lands had been partitioned before and these lands should be separated from the other and the partition of the remainder be effected. If it cannot be determined what lands were partitioned before, then this suit has to be dismissed. 110 Ind. Cas. 638=A.I.R. 1928 Cal. 830.

——In a suit for partition, a prior partition for convenience of possession cannot by itself stand in the way of a partition decree being passed, so long as it is not found that it was in conformity with the shares of the respective parties. 69 C.L.J. 527=43 C.W.N. 181.

——Partition at proprietor's instance—Proprietor already giving plaintiff istimrari mukarrari lease—Plaintiff not party to proceeding—Whether bound by partition proceedings.

Partition proceedings were commenced at the instance of the proprietors of the village but the proprietors had already executed an *istimrari mukarrari* lease in favour of *P*, who was not a party to the partition proceedings:

Held, that *P*, as the rent receiver was a necessary party to the partition proceedings and, therefore, was not bound by any order passed by the Collector as to the splitting up of the holdings within the estate in *P's* absence. A.I.R. 1935 Pat. 524=160 Ind. Cas. 925=2 B.R. 394.

——Suit for partition—Court-fee.

Suit by co-sharer for partition of his share—Allegation of joint possession with defendant co-sharer—Suit is one for partition and *ad valorem* Court-fee need not be paid—Where Court finds that plaintiff is altogether out of possession, it can demand *ad valorem* Court-fee. A.I.R. 1935 Cal. 273=60 C.L.J. 377=155 Ind. Cas. 815.

——Appeal—Necessary parties.

Where a partition officer orders that a partition should be made in accordance with the existing entries in a *khewat*, it is an order jointly in favour of all the co-sharers and in an appeal from such an order all the co-sharers are necessary parties. A I.R. 1932 Oudh 288=9 O.W.N. 687=16 R.D. 490 =8 Luck. 115=140 Ind. Cas. 483.

——Partition, suit for—Shamilat—Cultivation of part of common land by one sharer—Remedy of others.

Where a co-sharer cultivated a part of the common land, the other co-sharers can apply for partition but are not entitled to an injunction restraining the co-sharer from cultivating the land. A fact that a fair is held on the land every year when the land is free from crop and it is reserved for camps of officers on tour, does not affect the matter. 36 P. L. R. 1919=51 Ind. Cas. 567.

——Partition—Landlord and tenant—Surrender of tenancy to one co-sharer—Suit for possession.

Plaintiffs and defendant were co-sharers in a village. Defendant took a surrender of tenancy lands. The other co-sharers gave notice to vacate their shares. No mention was made in the notice about contributing to the defendants for their share of the cost of acquisition of surrender. Two years after the notice plaintiffs filed a suit for joint possession with defendant. *Held*, that there had been unreasonable delay in instituting the suit. As the notice was simply of a threatening nature not making any mention of the intention to contribute to the costs of acquisition, the suit should be dismissed. Plaintiff's remedy was held to be a suit for partition. 45 Ind. Cas. 902 (Nag.).

——Partition—Suit for, by one member—Other co-sharers necessary parties.

In a suit for partition by one co-sharer the other co-sharers are necessary parties and the decree in the suit is binding on them. A subsequent suit for partition by one of the co-sharers who was a party to the previous suit is barred by *res judicata*. 1 L.W. 607=27 M.L.J. 76=16 M.L.T. 544=(1914) M. W.N. 948=21 C.L.J. 23=17 Bom.L.R. 1=19 C. W.N. 531=24 Ind. Cas. 294 (P.C.).

——Partition, suit for—Rights under law and custom—Remedy.

Co-sharer who was long been in possession of plots of land of the shamilat can retain possession and his co-sharers cannot forcibly dispossess him. If his possession is disturbed he need not sue for partition but can ask for restoration of possession. 13 P.R. 1910=20 P.W.R. 1910=60 P.L.R. 1910=5 Ind. Cas. 808.

——Suit for partition—Pendency—Joint possession—Right to.

A co-sharer is not entitled to recover joint possession merely because another co-sharer has taken possession of land. Where a suit for partition is pending, the Court would be unwilling to disturb the existing possession of the lands during the pendency of this suit, unless itself bound to do so for very cogent reasons. 18 Cal. 10, Foll. 68 Ind. Cas. 285=36 C.L.J. 155=A.I.R. 1923 Cal. 208.

——A claim for possession by one joint share-holder against another, is a claim which can only be met by partition. A.I.R. 1935 Pesh. 126=157 Ind. Cas. 994.

——Individual possession by one co-sharer before partition—Limitation based on adverse possession—Remedy.

In a case where there has been individual possession, but not adverse possession by a single share-holder prior to the partition, after partition, the person to whom the area falls by partition, can obtain it by a suit, the period for which can only be limited by reference to the date on which he obtained the right to sue.

But where limitation is by adverse possession, the remedy of any co-sharer is to bring a partition suit, thereby obtaining a right to individual possession and to enforce that right by execution (or possibly, by a suit) before the expiry of the time limit. A.I.R. 1935 Pesh. 97=157 Ind. Cas. 219.

——Defendant holding fractional interest of landlord.

The sole basis upon which a claim to partition is founded is the joint possession of the parties. Hence a suit for partition can be brought by a person holding a subordinate interest in land against others holding a similar interest though a partition at the instance of a subordinate interest holder among persons holding other subordinate interest will not be binding upon the superior interest holder and will enure till the interest of the party seeking partition lasts.

The fact that one of the defendants happens to be a fractional landlord of the *jote* does not make any difference.

Quaere.—Whether a person interested in a portion of a property can claim a partition of that property. A.I.R. 1932 Cal. 209=35 C.W.N. 1072=54 C.L.J. 234=59 Cal. 301=136 Ind. Cas. 594.

19. Party wall.

See also EASEMENTS ACT, S. 13.

——Party wall raised with consent of co-owner—Right in portion so raised.

Where one of the owners of a joint party wall raises its height with the consent or acquiescence of the other owner, such raised portion is also a party

wall. Neither party is at liberty to open a window in the portion so raised, and if any party opens his action amounts to a trespass. In that case, the other party can claim an injunction ordering him to close the windows in question. A.I.R. 1934 Lah. 817.

——**Right of co-owner of party wall—Interference.**

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfere with his reasonable use of the wall. A.I.R. 1935 All. 649 =1935 A.W.R. 477=155 Ind. Cas. 305=1935 R. D. 210.

——A claim by a co-owner to partition of a party wall cannot ordinarily be resisted even when the claim causes inconvenience and difficulty of partition:

Held, that in the case of party wall, it is impracticable to take any action under S. 2, Partition Act. A.I.R. 1934 Lah. 893=155 Ind. Cas. 223.

——**Tenants-in-common—One party, if can pull down and rebuild wall.**

Where a party wall belongs to plaintiff and defendant as tenants-in-common, the defendant is entitled temporarily to pull it down for the purposes of building a stronger and better wall provided he does the work in a reasonable manner and without negligence and so as to cause as little inconvenience as possible to plaintiff and provided he rebuilds the wall without undue delay. A.I.R. 1933 Sind 244=150 Ind. Cas. 337.

——**Contribution and builder unknown—Presumption.**

In the event of the circumstances in which a party wall was built and the amount of land contributed by each adjoining owner being unknown, it is presumed that the wall belongs to the adjoining owners as tenants-in-common. A.I.R. 1933 Sind 244=150 Ind. Cas. 337.

——**Raising with consent—Ownership of raised wall.**

Where one of the owners of a party wall raises its height with the consent or acquiescence of the other owner, the raised wall is also a joint party wall. A.I.R. 1932 Lah. 48 (1)=32 P.L.R. 755=135 Ind. Cas. 192 (1).

——**Erection of superstructure by one co-owner over half wall—Injunction—Right of each co-owner to use of whole width of wall**

A party wall belonging to two adjacent owners as tenants-in-common cannot be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. Each co-owner is entitled to the use of the whole width of the top of the wall, subject to a similar right of the other and the construction of a new wall on half the width by one of them can be restrained by an injunction at the instance of the other. A.I.R. 1931 Lah. 373=32 P.L.R. 340=12 Lah. 542=131 Ind. Cas. 233.

——Where a co-sharer is rebuilding his side of a party wall which belonged jointly to the parties, encroaches upon the land of the other co-sharer to the extent of 2½ inches in width, and the suit is not one for mere mandatory injunction but for possession the Court is bound to grant a decree for possession to the extent of the co-sharer's land which has been encroached upon. 124 Ind. Cas. 560= A.I.R. 1930 All. 396.

——**The co-owner is entitled to a reasonable use of a party wall.**

In the case of a party wall, each co-owner has reasonable use of the wall owned in common and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner, or without doing anything which would weaken damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A.I.R. 1930 All. 318=127 Ind. Cas. 585.

——There may be cases in which a wall which is a party wall up to a certain height may above that be the separate property of one of the owners. (1872) 8 Ch. A. 1084, Foll. 112 Ind. Cas. 520=A.I.R. 1928 Lah. 429.

——It is settled law that one co-sharer of a party wall is not entitled to raise its height without the consent or acquiescence of the others, and that if he does so he makes himself liable to an action for injunction or damages. 107 Ind. Cas. 481=10 L.L.J. 17.

——Where by agreement two co-owners were jointly in possession of a party wall one cannot build a second storey on the party wall so as to use the party wall exclusively for himself and make it impossible for the other to build a storey with the support of the party wall. 89 Ind. Cas. 746=A.I.R. 1925 Lah. 642.

——If one of the two tenants in common of a wall excludes the other from the use of it by placing an obstruction on it the only remedy of the excluded tenant is to remove the obstruction. 49 L. J. Ch. 243, Foll. 84 Ind. Cas. 254=26 Bom.L.R. 978= 26 Cr.L.J. 254=A.I.R. 1924 Bom. 486.

——**Party wall—Encroachment—Relief against—Sp. Rel. Act, S. 56.**

Where the encroachment was small the Court did not order the defendant to pull down his wall. But it declared that that portion of the defendant's brick building which went beyond the middle line of the wall belonged to plaintiff. 76 Ind. Cas. 521=A. I. R. 1923 Bom. 370.

——**When encroachment of few inches is made in re-building a party wall injunction refused.**

The conditions attaching to a party wall are not very easy to define. But if the wall is joint, then each party is entitled to act as owner of his own half, and he cannot compel the owner of the other half, to bear any greater burden that he chooses to place upon it, so that one joint owner cannot encroach on the other half of the wall in defiance of the other owner's rights. 76 Ind. Cas. 521=A.I.R. 1923 Bom. 370.

——**Party wall—Beams, insertion of, in the party wall—Posts, insertion of, in the party wall.**

Where one of the owners of a party wall, in constructing his house inserts beams and pillars into his side of the wall, the other owner has a right to complain only if the alleged acts amount to an ous-

ter or to a destruction of the party wall. (1904) 6 Bom.L.R. 682.

20. Pre-emption.

See under TITLE—PRE-EMPTION.

——Rights of co-sharer—Pre-emption.

As a mukarraridar cannot claim pre-emption, the co-sharer, on the doctrine of reciprocity which is well understood in the Mahomedan law, cannot claim pre-emption against the mukarraridar. A co-sharer therefore cannot pre-empt against a mukarraridar of another co-sharer. 5 P.L.J. 740, Foll. 117 Ind. Cas. 865=8 Pat. 251=11 P.L.T. 24=A.I.R. 1929 Pat. 214.

21. Rights and Liabilities.

(a) Alienation.
(b) Buildings.
(c) Contribution.
(d) Ejectment and encroachment.
(e) Leases and mortgages.
(f) Rights and remedies inter se.
(g) Miscellaneous.

21. (a) Alienation.

——Co-sharers—Right to alienate — Sale—Alienation of specific plot—Validity of.

A joint owner of properties may sell a portion of his share in the holding. One of the co-sharers of a joint holding can exchange his interest in certain specified fields and the transferee of such interest can sue for possession but they would be entitled to get a decree only for joint possession. 2 Lah.L.J. 601.

——Right to alienate—Sale.

A sharer has an absolute right to dispose of his own share even while the property is undivided, subject to the right of pre-emption by co-heirs. 4 BurL.T. 163=11 Ind. Cas. 781.

——Right to alienate—Donee's right—Shamilat—Gift of land to proprietary body.

A sold certain land to *M* in 1870 and in 1904-1905 the village shamilal was partitioned and *M's* descendants were given a share in respect of the *khewat* land held by them as owners, and a share in respect of the land purchased by *M* in 1870. In 1910 *A's* sons sued *M's* descendants for possession, of the latter share on the ground that the sale conveyed no right to a share in the shamilat, that at the time of sale there was no shamilat attached to the village and after the sale a large area was made over to the village by the Government and recorded as shamilat *deh*; *held* that the gift was made to the whole proprietary body as it then was and each proprietor was entitled to a share proportionate to his proprietary holding as it stood recorded at the date of the gift and therefore the defendants should retain the area in suit. 57 Ind. Cas. 132 (Lah.).

——Right to alienate—Donee's right—Shamilat—Gift of land to plaintiff — Whether confers full rights as regards the shamilat also.

When the plaintiff's suit for possession of half a share of the holding was dismissed and the defendants sometime after made a gift of a portion to the plaintiff, in a suit by plaintiff for their share of the shamilat it was held that the plaintiff was entitled to their share only of the shamilat in the area gifted to them. 25 P.L.R. 1912=37 P.W.R. 1912=13 Ind. Cas. 172.

——Right to alienate—Separate holding—Convenience of enjoyment.

Co-sharers in an undivided property may by arrangement among themselves take possession of definite portions of that property and hold them so as to enjoy their proper share of the profits. But a co-sharer cannot, alienate, to a third person, as his exclusive property, the portion which he has been occupying by agreement with his co-sharers. 18 A. L.J. 129=55 Ind. Cas. 94.

——Right to alienate—Common land—Ouster—Dealing with a portion of the property by one of co-sharers.

Before a Court will make in the case of co-sharers, an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others, should be restored to its former condition, the plaintiff must show that he has sustained by the act complained of, some injury which materially affects him. When there is a denial of the title of one of the co-owners by the other co-owners and there is in law an ouster, the co-owner ousted is entitled to a decree for joint possession. 52 Ind. Cas. 543 (Pat.).

——Right to alienate—Shamilat—Transfer of.

A co-sharer cannot object to a transfer of right of occupation of village common land, made by another co-sharer. 40 P.L.R. 1919=50 Ind. Cas. 895.

——Right to alienate—Alienee's right—Shamilat—Sale-deed—Onus of proof.

Purchaser of a share in shamilat does not acquire shamilat rights, unless an unequivocal and clear intention is clearly expressed. The onus of their existence is on the purchaser and it is not discharged though the deed might contain words like "right, title and interest." That the vendee incurred expenses, that he got compensation under Act, 1 of 1894, and that he got a share on incomplete partition, do not sufficiently show that he purchased vendor's share in the shamilat. 75 P.W.R. 1910=6 Ind. Cas. 1003.

——Right to alienate—Pledge of property.

Under the law which governs the right of co-owners, any two of them are not competent to pledge the credit of the others. 29 M.L.J. 632=31 Ind. Cas. 482.

——Right to alienate—Purchaser of "sir" land—Exproprietary rights—Partition.

Where one of the co-sharers of a *sir* land sold his share to the plaintiff but neither claimed exproprietary rights in the *sir* land to the extent of his share nor was this portion separated from the rest, and the plaintiff brought an ejectment suit against the tenant who claimed occupancy rights, *held*, that had the portion corresponding to his share been divided off, it would have ceased to be *sir* but this not having been done, it still remained *sir* land. 29 Ind. Cas. 64, (U.P.B.R.).

——Right to alienate—Sale — Property rights, sale of—Ex-proprietary tenant.

Where a co-sharer in a *patti* sells his proprietary right, he becomes, in respect of his *sir*, an ex-proprietary tenant of all the co-sharers in the patti, including the purchaser of his share. 35 All. 27=10 A.L.J. 437=16 Ind. Cas. 399.

——Right to alienate—Co-sharer—When liable to be ejected.

A co-owner cannot be ejected from joint property

at the instance of his co-sharer unless his act amounts to an ouster, so where one co-owner dealt, with the joint property and alienated it to a stranger who claimed the property in denial of the rights of the co-owners, then the act is hostile to them and they were entitled to recover possession of their share. 11 C.L.J. 189, Foll. 14 C.L.J. 646=13 Ind. Cas. 376.

——Right to alienate.

Co-owners of mining properties have a right to convey their interest without reference to other co-owners. 123 Ind. Cas. 250=50 C.L.J. 208=57 Cal. 170=A.I.R. 1930 Cal. 113.

——One of the several co-owners of a village cannot make a valid alienation of the common property so as to confer proprietary right in the purchaser. 95 Ind. Cas. 438=A.I.R. 1926 Oudh 500.

——Co-sharer cannot alienate more than his joint interest subject to right of partition by others.

A co-sharer of a *patti* and the plots in dispute, which have not been shown to have formed his *sir* or *khudkasht* land, cannot sell anything more than his joint interest in the said plots subject to the result of any partition which may be made among the co-sharers of the *patti* or village. If the purchaser was in possession of the plots, he is entitled to have his possession maintained subject to the result of any partition that may take place though his title would be confined to the interest which vendor held in the plots or was capable of transferring. A.I.R. 1922 Oudh 46.

——Rights of—Co-owner in exclusive possession of specified portion—Transfer of such portion—Validity.

Where under an arrangement between several co-owners of a joint property, a co-owner is allotted a defined and specified portion of the joint property as representing his share in it and is in exclusive possession thereof, he is competent to transfer his interest in the same with possession to a third party, and such transfer is valid as long as the arrangement between the several co-owners subsists. 7 J. & K. L. R. 201.

——Rights of co-sharer—Alienation.

A suit by a co-heir to recover his share in a portion of the specific property conveyed by another co-heir to a stranger is competent and there is no obligation on him to sue for a general partition of all the properties inherited by them. A.I.R. 1922 Sind 41 (F.B.), Foll. A.I.R. 1930 Sind 66=126 Ind. Cas.

——Under the Muhammadan Law, a gift of a house by one co-sharer in favour of another co-sharer already in possession of the house on behalf of all the co-sharers is valid, there being a constructive transfer of possession. A.I.R. 1932 All. 370=138 Ind. Cas. 841.

——Sale by some co-sharers—Co-sharer in possession, if can be presumed to know contents of deed.

A co-sharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document. A.I.R. 1935 All. 774=1935 A.L.J. 828=1935 A.W.R. 728=155 Ind. Cas. 824=1935 R. D. 267.

——Right of one to deal with right of alienation of other.

It is an elementary principle that no tenant-in-common can deal with the right of his co-tenant in the matter of alienations without that co-tenant's express authority. A.I.R. 1940 Nag. 241=1940 N. L. J. 268=I.L.R. (1942) Nag. 24=192 Ind. Cas. 630.

21. (b) Buildings.

——Right of co-sharers to erect building on joint land without consent of other co-sharers—Whether can do so on land which he is using as sahan darwaza—Change in nature of exclusive possession of plot enjoyed by co-sharer—Right of other co-sharers to object.

One of several joint owners cannot erect a building on joint land without the consent of other co-sharers. Whether he can erect a building on land which he has been using as *sahan darwaza* is a question which also, must be decided on the same principles. The right of a co-sharer to continue in exclusive possession of those portions of joint land of which he was allowed to acquire exclusive possession arises on the assumption that it was consented to by his other co-sharers. Such a consent, in case of plots in exclusive possession of one co-sharer in a village must be confined to the nature of exclusive possession already enjoyed. If the nature of the exclusive possession which has been submitted to or consented to by other co-sharers is changed, then the other co-sharers have a right to object to the change. The construction of a building on a *sahan darwaza* is to change the method of exclusive possession already enjoyed by one co-sharer and the other co-sharers will be well within their right to object to the construction of the building even in the absence of proof of direct injury to them. A.I.R. 1939 Oudh 275 =1939 A.W.R. 185=1939 O.W.N. 863=15 Luck. 61=184 Ind. Cas. 136=1939 R. D. 576.

——Temporary structure on joint land not in possession of another—Erection of permanent tructure without consent of others.

If the construction put upon joint land is of such a character as to amount to a permanent structure or, at any rate, of such a character as to give exclusive possession to one co-owner to the ouster of the other co-sharers then such exclusive possession is not justified and can be objected to by the other co-sharers: while if one co-owner occupies a piece of joint land not occupied by the others, by having some temporary structure or construction on it, there would be no ground for objection because the structure, is of a temporary character only. The construction of a permanent building on a plot of land which had been in the exclusive possession of one co-sharer would amount to changing the character of possession very materially and to a complete ouster of the other co-sharers. This, without their consent, is not allowable. A.I.R. 1937 All. 547=1937 A.L.J. 486=1937 A.W. R. 430=I.L.R. (1937) All. 609=170 Ind. Cas. 824=1937 R. D. 222.

——Co-sharer—Sale of—Buildings, property in, passing of.

On the sale of a share in Zemindary property, buildings, such as indigo factories, will not ordinarily pass to the vendee along with the zemindary share sold, unless there is distinct evidence of the user of such

buildings, as part and parcel of, or as appurtenant to, the zemindari. 1902 A.W.N. 27=24 A. 218.

——Permanent construction put up by one-co-sharer amounting to giving exclusive possession to one.

Where the construction put upon the joint land is of such a character as amounts to a permanent structure, or is at any rate of such character as to give exclusive possession to one co-owner to the ouster of the other co-sharers, such exclusive possession is not justified and can be objected to. On the other hand, if one co-owner occupies a piece of joint land not occupied by others by having some temporary structure or construction on it, there would be no ground for objection, because the structure is of a temporary character only. A.I.R. 1937 All. 293=1937 A.L.J. 126=1937 A.W.R. 20=168 Ind. Cas. 650=1937 R. D. 62.

——Suit for injunction—Injunction disobeyed—Court in appeal finding injunction unnecessary and allowing defendants to building at their risk—Court, if exceeds jurisdiction in deciding suit on merits.

Ordinarily one of the co-sharers of joint property is not entitled to build on it without the permission of the others, since such conduct on his part is likely to prejudice eventually a proper partition of the property.

Where one co-sharer sued for a perpetual injunction to restrain the other co-sharers from building on a portion of the joint land, and obtained a temporary injunction pending decision, but the defendants continued the building and characterising their conduct as reprehensible, the lower appellate Court found there was no need for temporary injunction and the defendants continued the building at their risk:

Held, that the Judge had really exceeded his jurisdiction in virtually deciding the suit on the merits before the trial had begun, and that there was no obligation on the plaintiffs to sue for partition. It was the defendants who were anxious to build on a portion of the joint land, which comprised an area larger than their proper share and it obviously lay on them to have the land divided before starting the construction, either by consent or through Court. There was no justification for departing from the rule that the *status quo* should be maintained. A. I. R. 1937 Lah. 288=173 Ind. Cas. 731.

——One co-sharer cannot erect building upon joint property without consent of others, although its erection may not cause direct loss to others.

One of several joint owners of land is not entitled to erect a building upon the joint property without the consent of other co-sharers notwithstanding that the erection of that building may cause no direct loss to the other joint owners. If he cannot build himself, it follows that he cannot let out any portion of joint land to his exclusive *riyaya* for the purpose of building.

The equities in a case where the construction has been completed would be entirely different from those of a case where objection has been taken just at the time when construction is started. A.I.R. 1940 Oudh 24=1939 O.W.N. 911=1939 A.W.R. 214=184 Ind. Cas. 266=1939 R. D. 590.

——One co-sharer in exclusive possession—No consent of others.

One of several joint owners is not entitled to make a building on the joint property without the consent of other joint owners notwithstanding that the erection of such building might cause no direct loss to the other joint owners. 158 Ind. Cas. 915=1935 A.W.R. 1116=1935 R.D. 450.

——Demolition.

A co-sharer in exclusive possession erecting a building of recent date, even after objection—Construction should be ordered to be demolished. 158 Ind. Cas. 915=1935 A.W.R. 1116=1935 R. D. 450.

——Building built long ago—No suit—Presumption.

One of several joint owners is not entitled to make a building on the joint property without the consent of other joint owners. But if the building has been erected long ago, it will be presumed that the co-sharer in exclusive possession, who erected the building, did so with the permission of the other co-sharers, especially when a suit is brought several years after the commencement of the constructions and when the constructions have been completed at a considerable expense. No such presumption can be made in a case where the erection is of recent date and has been objected to from the beginning. It is very necessary that a co-owner should bring his suit for demolition of a building constructed by another co-sharer and for joint possession within a reasonable time. A.I.R. 1935 All. 556=1935 A.L.J. 841=1935 A.W.R. 738=156 Ind. Cas. 897=1935 R. D. 286.

——Cattle-shed and enclosure for cattle in exclusive possession of co-sharers—One co-sharer constructing addition to cattle-shed, also for cattle—Demolition.

Where certain co-sharers in an agricultural village were in exclusive possession over an old cattle-shed and enclosure for cattle, the method and character of the exclusive possession is not altered by an addition to the cattle-shed by one of the co-sharers, the addition also being used for cattle. The other co-sharers are not, therefore, entitled to any relief of demolition. A.I.R. 1933 All. 655=1933 A.L.J. 510=150 Ind. Cas. 315=17 R. D. 212.

——Injunction.

Where a lane was jointly owned by two owners and one of them, setting up an exclusive title to the portion of the lane adjacent to his house, began to build a *chabutra* and the other owner sued for a permanent injunction restraining him from doing so:

Held, that the case was one in which an injunction was called for, especially in view of the denial of the plaintiff's title. A.I.R. 1932 Lah. 89=32 P.L.R. 694=133 Ind. Cas. 872.

——Transfer by one co-sharer—Until partition other co-sharers cannot prevent transferee from building on land.

Although a co-sharer in shamilat land not being the sole owner of the land cannot sell the full proprietary rights in the land, a sale by him nevertheless holds good to the extent of conveying the rights which he can sell including the right to retain possession till partition. When a co-sharer has been long in possession of a portion of the shamilat land no other co-sharer can oust him therefrom or even get joint possession with him as long as a partition

of the shamilat does not take place. A transferee from a co-sharer has the same rights in the land that his transferor had. He is entitled to undisturbed possession of the land as long as the shamilat is not partitioned and the other co-sharers have no right to prevent him from building on the land. 85 Ind. Cas. 553=A.I.R. 1925 Lah. 518.

21. (c) Contribution.

——Rights of co-sharer—Contribution.

Although all co-sharers are jointly and severally liable for Government Revenue, once the revenue is paid to Government by any co-sharer, he can recover from other co-sharers their proportionate shares separately. 99 Ind. Cas. 1049=8 L.R.A. Rev. 85 =A.I.R. 1927 All. 239.

——One sharer paying Government revenue has a right to contribution and he has a charge on the revenue of others even in cases governed by Madras Estates Land Act. A suit by him brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act. 26 Mad. 686 (F.B.), Foll. 90 Ind. Cas. 551= 23 M.L.W. 178=1925 M.W.N. 722=A.I.R. 1926 Mad. 141=49 M.L.J. 117.

——One co-sharer making improvements *bona fide* in the interests of the property is entitled to compensation, though improvements were made without consent of other co-sharers, total price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements. 88 Ind. Cas. 822=48 All. 34=23 A.L.J. 950=6 L. R. A. Civ. 547=A.I.R. 1925 All. 770.

——When one of several co-sharers reconstructs joint property without protest from the other co-sharers it is equitable that when the other sharers demand their share of the property they should be called upon to defray the proportionate expenses of the new construction. 76 Ind. Cas. 1017=A.I.R. 1925 Oudh 45.

——One tenant-in-common, who makes improvements on the property of the co-tenancy, cannot ordinarily be entitled to compensation for doing so, except when he had expended necessarily or with the concurrence of the other co-tenant. 71 Ind. Cas. 374=1923 M. W. N. 13=17 M.L.W. 77=46 Mad. 104=A.I.R. 1923 Mad. 358=44 M.L.J. 43.

——Co-sharer—Paying whole of land revenue—Charge or lien on other share's interest. *See* CHARGE—LAND-REVENUE. 4 Bom. L. R. 90 =26 B. 437.

——Voluntary contribution—Mesne profits—Damages—Suit by a sharer against co-sharers—Co-tenancy.

A suit by a sharer in the archakam office of a temple for recovery of the amount of his share of the voluntary offerings offered to the deity during the period he was kept out of office against his co-sharers is maintainable. (1907) 17 M.L.J. 493.

——Co-sharers—Joint liability—If could be contracted out.

The joint responsibility of all co-sharers for the rent of an under-proprietary tenure cannot be destroyed by a private agreement; it can only be severed by an order of the Settlement Officer as such. A.I.R. 1931 Oudh 316=8 O.W.N. 294= 131 Ind. Cas. 901=15 R.D. 180.

21. (d) Ejectment and encroachment.

——Rights of co-sharer—Ejectment.

Where a non-proprietor occupies a small area in a village under one of the big proprietors in the village and with the permission of a majority of the proprietors; he cannot be ejected at the instance of the non-consenting proprietors. 8 Lah.L.J. 313= 27 P.L.R. 565=94 Ind. Cas. 995=A.I.R. 1926 Lah. 506.

——One co-sharer in peaceful possession for a long time—Cannot be ejected.

The general rule regarding the enjoyment of joint property by the co-sharers is that one co-sharer has no right to appropriate specific portions of such property to the exclusion of his co-owners except by means of a lawful partition; this rule, however, is subject to the qualification that where one co-sharer has been for a long time in peaceable possession of a portion of joint property without hindrance or opposition by his co-owners the latter are not entitled to eject him except by means of a partition. 34 A. 150 and 21 O.C. 214, Foll. 63 Ind. Cas. 433 =24 O.C. 227=8 O.L.J. 637=A.I.R. 1921 Oudh 106.

——Rights of co-sharer—Encroachment.

The goredeh is a part of the common land of the village reserved for the common purpose of the proprietors and the mere fact that the plot encroached upon by one proprietor is small in size or that no special damage has been caused to the other proprietors is no ground for upholding the wrongful act of the former. In such a case it is not legally necessary to prove special damage. A.I.R. 1921 Lah. 157, Foll. 28 P.L.R. 217=102 Ind. Cas. 9=A.I. R. 1927 Lah. 416.

——Encroachments by some co-sharer—Others can sue to restore land to its original use.

Where the land encroached upon had been reserved for the common purposes of the village body and in consequence of the encroachments there was hardly sufficient space left on the spot for the common purposes of the village body.

Held, a decree can be passed for restoration of the land to its original use as there will be no exclusion of the defendants from joint possession of a legitimate character. 2 Lah. 73, Foll. A.I.R. 1923 Lah. 308.

——Encroachment by co-proprietors—No material and substantial injury which cannot be remedied on partition.

One of the village proprietors reclaimed a portion of the bed of a stream, which was a common land of the village, and erected a wall as an enclosure against cattle. The other proprietors brought a suit for ejectment and injunction against the repetition of the encroachment:

Held, that the defendant could not be ousted unless the plaintiffs showed that his possession had caused them such material and substantial injury as could not be remedied by a partition of the joint land. Erection of the wall alongside the plot was a prudent measure against the cattle and hence subsidiary to farming operations. A.I.R. 1934 Lah. 278=36 P.

L.R. 84=36 P.L.R. 202=15 Lah. 708=150 Ind. Cas. 99.

——Encroachment made by one of proprietors—Suit for mandatory injunction by another proprietor—Special damages.

Where an encroachment has been made by one of the proprietors into the common land, and another proprietor files a suit for mandatory injunction, the plaintiff should prove special damages and should take action within reasonable time; further he should show that the defendant had appropriated more area than would be allotted to him in case of partition. A.I.R. 1935 Lah. 250.

21. (e) Leases and Mortgages.

——Right to lease—Right of one to challenge—Effect of partition.

A co-sharer cannot grant a perpetual lease of any portion of the joint property so as to affect the right of co-sharers. The validity of acts done by one co-sharer to the prejudice of others can be challenged both before and after partition. 18 Ind. Cas. 281 (Oudh.)

——Right to lease—Permanent lease by majority—When binding—Suit to set aside by minority—Form of decree.

It is not competent to a majority of co-sharers to grant a permanent lease of common land so as to bind the minority except in cases of unavoidable necessity or obvious benefit to the whole body of co-sharers or a valid custom to that effect. Where a permanent lease so granted by the majority is sought to be set aside by the minority of the co-sharers and it is found that the transaction is not binding on the latter, the proper decree to be passed is one for possession in favour of the plaintiffs for themselves and on behalf of the other co-sharers. 41 Mad. 1068 =35 M.L.J. 402=48 Ind. Cas. 198.

——Right to alienate—Lease—Common land—Lease by one—Suit for damages by other co-sharers.

It is not trespass for one co-owner *A* either by himself or by his tenants to use or enjoy. The remedy of the other co-owner *B* is to sue *A* but not his tenants for compensation. A co-sharer landlord is not entitled to recover compensation for use and occupation from a tenant inducted into the land by another co-sharer landlord. 51 Ind. Cas. 31 (Pat.)

——Right to alienate—Lease by some—Consent of other.

A lease granted by one co-sharer even without the consent of other co-sharer creates a tenancy, whether the lessor has full authority to grant a lease or not is immaterial. It is for the co-sharers who object, to seek their remedy in any way they may be advised. 2 U.P.L.R. (B. R.) 78=57 Ind. Cas. 439.

——Right to alienate—Transfer of occupancy holding without landlord's consent.

The co-sharer landlord having purchased the occupancy holding in execution of a decree for rent can raise the question of transferability of the holding to the extent of his own share against the mortgagee of the holding though not as an execution purchaser, still in his superior right of co-sharer and evict him on proof of a mortgage without his consent. (1920) P.H.C.C. 200=57 Ind. Cas. 511.

——Right to alienate—Rights of—Mortgagee—Usufructuary—Allotment of plots to a different co-sharer on partition.

If a co-sharer mortgages specific plots in an undivided estate and those plots are allotted to some other co-sharer on partition the mortgagee is entitled only to a money-decree and cannot follow the lands in the hands of the other co-sharers. 3 P.L.W. 276=39 Ind. Cas. 95.

——Right to alienate—Mortgagee's rights—Mortgage by co-sharers—Fraudulent partition.

If the co-sharers fraudulently exchange lands in partition, the mortgagee has rights to the undivided share of his mortgagor. 58 Ind. Cas. 97 (All.).

——Right to alienate—Mortgage of undivided share by co-sharer—Subsequent partition—Mortgage property allotted to another.

In the case of a mortgage of an undivided share in joint property, the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. The mortgage lien is transferred to the portion of the joint property obtained by mortgagor at the partition. Where the final decree for partition was passed after a decree for sale of the mortgaged share had been passed in favour of the mortgagee but before the actual auction sale, the mortgaged share which had ceased to be the property of the mortgagor could not be sold under the decree and that decree could not affect the interests obtained by the co-sharer under partition. If a mortgagee before he obtains a decree for sale has to submit to a substitution of the mortgaged property effected by partition, he must also do the same even after his decree, unless the sale has already taken place before the partition. 42 All. 596=18 A.L.J. 807=58 Ind. Cas. 171.

——Right of one to lease joint khudkasht.

Where it is found that two co-sharers were in joint possession of khudkasht one of them is entitled to execute a lease in favour of a tenant. 1947 A.W.R. (Rev.) 15 (1)=1947 R.D. 16.

——Co-proprietor, if can grant occupancy rights in his own undivided share.

The grant of occupancy rights by a co-sharer in respect of his own undivided share is valid. The fact that the persons in whose favour those rights were created, were the tenants-at-will of the whole of the proprietary body including the transferor co-proprietor is immaterial. A.I.R. 1943 Lah. 217=45 P.L.R. 210=209 Ind. Cas. 520.

——Co-sharers—Profitable lease by one co-sharer in sole possession—Right of another sharer to set it aside without asking for partition—Remedy open to such co-sharer—Denial by lessee of his co-sharer's right—Cause of action.

Where some of the co-sharers of certain property which was in their sole possession and which was originally lying waste leased it at a profitable rate and the other co-sharers knowing of such lease, allowed the lessees to improve the property, the latter are not entitled in a suit for joint possession, to set aside the lease so far as their shares are concerned and obtain *khas* possession either with the tenants or with their lessors. The principle on questions like this is that when one co-sharer is holding possession of a certain property and deals with it in a particular way and in the ordinary course, if the other

co-sharers are dissatisfied with such dealing, or with such course of conduct, their proper remedy is by partition. *Quaere*: Whether such a lease would in the absence of a prayer for partition bind the co-sharer whose rights are denied? (1900) 28 C. 223.

——Separate leases by different co-sharers of lands in their exclusive possession—Right of one lessee to have joint possession with another—Right to partition—Equity.

The owners of an ejmali mehal severally leased out lands in the exclusive possession of each to different lessees. One of the lessees having obtained his lease in the *bona fide* belief that the land covered by it belonged in its entirety to his lessor reclaimed and improved it and was then sued by the other for joint possession:

Held, that it would be inequitable to give the plaintiff the relief he asked for and his proper remedy was to bring a suit for partition. (1906) 11 C.W.N. 143.

——Co-sharer cannot create occupancy right.

No co-sharer can, as against his co-sharer, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy in them. Where a co-sharer alleged that he purchased jote rights in lands held in common by the co-sharers,

Held, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished. 80 Ind. Cas. 827=26 Bom.L.R. 651=51 Cal. 631=35 M.L.T. 169=51 I.A. 293=23 A.L.J. 76=5 L. R. P. C. 137=29 C.W.N. 34=20 M.L.W. 770=1924 M.W.N. 723=6 P.L.T. 750=3 Pat.L.R. (Civ.) 193=A.I.R. 1924 P. C. 144=47 M.L.J. 23 (P.C.).

——Rights of co-sharer—Occupancy holding.

There is nothing inconsistent *per se* in a co-sharer being also an occupancy tenant in the *patti* or *mahal* in which he is a co-sharer. 123 Ind. Cas. 108.

——Rights of co-sharer—Occupancy right.

In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have, and in Bengal a middleman cannot obtain as a middle man a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. 80 Ind. Cas. 827=51 Cal. 631=26 Bom.L.R. 651=35 M.L.T. 169=51 I.A. 293=23 A.L.J. 76=5 L. R. A. P.C. 137=29 C.W.N. 34=20 M.L.W. 770=1924 M.W.N. 723=6 P.L.T. 750=3 Pat.L.R. (Civ.) 193=A.I.R. 1924 P.C. 144=47 M.L.J. 23 (P.C.).

21. (f) Rights and remedies inter se.

——Co-sharers—Rights and remedies inter se—Reclamation of unused common land by one of the co-sharers—Remedy of others.

If there be a common piece of land not used by any co-sharer and a co-sharer reclaims that piece of land and converts it into a source of income, Courts should be reluctant to disturb his possession by giving a decree for joint possession to a co-sharer, who stands by, while his co-sharer is spending money and labour in reclaiming the land. The remedy of such a co-sharer is a suit for the profits. A.I.R. 1950 All. 690.

——Rights and duties of—Remedies open to one against another—Injunction—Right to—Considerations—Delay in seeking relief—Effect of.

A co-sharer of joint property who seeks an order from the Court directing a portion of the joint property, alleged to have been dealt with by another co-sharer without his consent, to be restored to its former condition, must show that he has sustained, by the act complained of, some injury which materially affects his position. Each co-owner is in theory interested in every portion of the joint property, and each has the right, irrespective of the quantity or extent of his interest, to be in possession of every part and parcel of the property jointly with the other. But it does not follow that every use of joint property by one co-owner renders him liable to an action for account to the other. If there is no assertion of hostile title, no exclusion or ouster, no action of ejectment can obviously lie. If there is no destruction of property, no conversion, no action of trover can appropriately lie. Unless it is alleged and proved that one co-owner has received more than his due share or just proportion, no action for account will lie.

Before granting an injunction against one co-owner at the instance of another, the Court should weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. Long delay on the part of the plaintiff in seeking relief is also an important consideration. Where the plaintiff has slept over his rights for a long time (10 or 12 years) that would be a sufficient ground to disentitle him to the equitable relief, although the suit may be within time. I.L.R. (1946) Kar. 336=A.I.R. 1947 Sind 134.

——Right inter se—Co-sharer in exclusive possession of portion transferring such portion—Position of transferee—Remedy of other co-sharers.

It is an admitted principle of law that if a co-sharer is in exclusive possession of any portion of an undivided holding not exceeding his own share, he cannot be disturbed in his possession until partition. If instead of remaining himself in possession he transfers this portion of the joint khata his transferee will also have the same rights and cannot be dispossessed by the other co-sharers until a final partition between the co-sharers has taken place. The other co-sharers are only entitled to a decree in their favour for a declaration that the possession of the transferee will be that of a co-sharer subject to adjustment at the time of partnership. I.L.R. (1941) Lah. 583, foll. A.I.R. 1950 Pepsu 5.

——Rights inter se—Co-sharer in sole possession—Obligation to pay compensation.

A co-sharer out of possession cannot complain of the mere sole possession of another co-sharer, so long as he refrains from setting up any claim to share in that possession. Hence, in order to give rise to a cause of action for compensation against the co-sharer, it must be proved that his act has amounted to ouster. 2 D. R. 191.

——Rights of—Cultivation of banjar land—Relief in suit by other co-sharers.

A co-sharer has the right to bring *banjar land* into cultivation which is not being brought to use by anybody provided by doing so he does not in any

way affect or damage the rights of the other co-sharers. 18 Cal. 10, Rel. on.

Where the other co-sharers bring a suit they are entitled to a declaration that they were in joint possession as owners but the defendant's right to remain in cultivatory possession till partition would have to be also protected. 1949 A.L.J. 79=A.I.R. 1949 A. 562=1949 A.W.R. 171.

——Rights of—Decree for exclusive possession.

One co-sharer cannot obtain exclusive possession of joint undivided property from another co-sharer. He can at the most have joint possession with the other co-sharer or a declaration of his specific share. This is the only relief that he can get in a suit for possession. A.I.R. 1950 Kut. 40.

——Rights of—Exclusive possession of specified plot—Right of co-sharer to sue for.

A co-sharer is not entitled to sue for a declaration of title to and khas possession of a specified plot of land in the absence of any allegation or proof that there was any binding partition between the co-sharers. A co-sharer may, however, ask to be restored to possession of a specified plot, if his case is that he was occupying a specified plot as a co-sharer under an amicable arrangement between the co-sharers and was dispossessed by another co-sharer. A.I.R. 1950 Assam 1.

——Right of—Mokuraridar's interest and zemindari interest.

Where two parties are in joint possession of land under permanent titles, there is a right to partition even though the titles are not identical *e.g.*, as in this case mokuraridar's interest and zemindari's interest. And the fact that one of them (a mokurari interest) is liable to forfeiture in a certain contingencies does not affect the rule. 14 C.W.N. 962=20 M.L.J. 907=7 A.L.J. 1137=1910 M.W.N. 691=12 Bom. L.R. 997=7 Ind. Cas. 549=8 M.L.T. 228=12 C.L.J. 240=37 C. 918=37 I. A. 198 (P.C.). On appeal from 9 C.W.N. 699.

——Plot in exclusive possession of one co-sharer—Putting up of additional constructions—Nature of possession, if altered—If gives a right to other co-sharers to sue for their removal.

Where a co-sharer is in exclusive possession of common land having some old constructions on it and he puts up some additional constructions that would not give a right to the other co-sharers to sue for joint possession after removal of the construction. The nature of the possession is not altered nor is the land being put to a use to which it was not intended. 1950 A.W.R. 336.

——Refusal of some to sign patta—Rent due by tenant irrecoverable—Right of others to sue for damages.

Where in consequence of the refusal of some of the co-owners of a land to sign patta for acceptance by the tenant, rent due by the tenants became irrecoverable, the co-owners who so refused to sign would be liable to the others for the loss sustained by them as regards their share of rent. The fact that a remedy for partition was open to the other owners would not take away the right of the latter to sue for damages. (1902) 13 M.L.J. 222.

——Relation between tenants in common—Collection of rent by one tenant in common—Suit by the other for his share—Onus on plaintiff.

There is no relation of trust or agency in one co-owner of property towards the other. When one collects the rents of the whole, he does so not in the capacity of agent but in that of owner and is answerable to his co-tenant only if he received more than his just share and to the extent of the excess alone. In an action by one co-tenant against another for an account of the receipts of rent over and above what the defendant was entitled to, it is for the plaintiff distinctly to allege and show that the defendant's receipts did in fact exceed his due share. 27 M. 465=14 M.L.J. 81 (F.B.).

——Purchasing non-transferable tenancy by one co-sharer can be treated as a trespass by others.

It is settled law that if a non-transferable holding be transferred, the purchaser acquires no interest as against the landlords, that is, the entire body of landlords. If one of the co-sharer landlords purchases a non-transferable holding this is valid to the extent of his interest, but he cannot force the purchase on his co-proprietors. No co-sharer can, as against his co-sharers, obtain any *jote* right in the lands held in common. The principle that when one co-sharer landlord takes a transfer of a non-transferable holding from a tenant he may be treated by the other co-sharer landlords as a trespasser is a well-settled principle. A.I.R. 1924 P. C. 144 and A.I.R. 1925 Cal. 538, Foll.

As against the landlord purchasing a non-transferable holding his co-sharers are entitled to joint possessions to the extent of their shares. A.I.R. 1929 Cal. 253, Foll. 118 Ind. Cas. 129=10 P.L.T. 204=8 Pat. 650=A.I.R. 1929 Pat. 185.

——The purchaser of specific plots from a co-sharer in an undivided Mahal where the purchaser has never been in actual possession cannot resist a suit for declaration of title by the other co-sharers to those plots. 84 Ind. Cas. 8=5 L. R. A. (Civ.) 526=A.I.R. 1924 All. 880.

——Rights of co-sharer—Common land—Use by one to the prejudice of others is not justified.

It is a well-established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of the partition, and that plaintiffs who come into the Court to restrain such individual without any delay are not obliged to show material and substantial injury. 84 Ind. Cas. 917=6 L.L.J. 548=A.I.R. 1925 Lah. 287.

——A co-owner who is not a *lambardar* has a preferential right to possession against others who are only trespassers and can sue for ejectment. A.I.R. 1942 Nag. 49=1942 N.L.J. 72=I.L.R. (1942) Nag. 205=200 Ind. Cas. 54.

——Default by some co-sharers—Revenue sale of whole estate—One co-sharer by arrangement with purchaser obtaining property sold at revenue sale—No proof of fraud—Rights of other co-sharers.

A *zamindari* right in an estate vested in a number of persons and separate accounts had been opened under the Bengal Land Revenue Sales Act. In a certain year some of the co-sharers made default in payment of their share of land revenue, and as a result, the whole estate was put up for sale. By an arrangement with the purchaser, certain co-sharer obtained from him the property sold to him in order to avoid partially the disaster of sale. He was not

guilty of any acts of bad faith towards his co-sharers, he had not abused their confidence and he had done everything that was humanly possible for him to do to prevent the sale. All the co-sharers knew at all material times that the sale could not be prevented inasmuch as the arrears of revenue had not been paid. Further he did not do anything to prevent his co-sharers from becoming possible bidders:

Held, that as proof of fraud or bad faith towards the other co-sharers had not been proved, the other co-sharers could claim to recover their former interest in the estate by paying proportionate portion of the purchase-money. A.I.R. 1939 P. C. 86=20 P. L. T. 359=43 C.W.N. 529=69 C.L.J. 505=I.L.R. (1939) Kar. P.C. 140 Sup.=181 Ind. Cas. 380=5 B. R. 654 (P.C.).

——Equal shares—Liability of each to Government revenue—Presumption that each paid half amount, if can arise—Suit against defendant decreed—One of co-sharers dying pending second appeal—No substitution—Appeal held abated in toto—C. P. Code (Act V of 1908), O. 22, Rr. 3, 11.

Two persons had equal shares in the property, each being liable, between themselves, to half the revenue but each being liable to pay the whole revenue to the Government. The revenue was paid and both of them brought as one entity a suit for recovery of revenue from another person:

Held, that this raised no presumption that each must have paid half the revenue.

Where in the above instance, the suit was decreed in first two Courts and the defendant filed second appeal during the pendency of which one of the respondents died and no application for substitution was made:

Held, that since no presumption could be made about the payment made by the deceased, the appeal abated *in toto* A.I.R. 1939 Oudh 241=1939 O.W.N. 711=1939 A.W.R. 105=183 Ind. Cas. 479=1939 R.D. 430.

——Joint decree—Decree, if can be affirmed as to unascertained shares of some and reversed as to those of others.

Under no circumstances can a decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of the other joint share-holders. A.I.R. 1939 Pat. 198=182 Ind. Cas. 740=5 B.R. 816.

——Principle of English Law, if applies in India.

The principle that a joint tenant may put an end to his own demise, as far as it operates on his share, whether his companions join him or not, has no application in India. A.I.R. 1935 Cal. 577=39 C.W.N. 246=157 Ind. Cas. 1115.

——Exclusion from enjoyment of property in common—Right for compensation for use and occupation—Remedy of excluded co-sharer—Co-sharers holding various parcels of joint zemindari.

A co-owner can sue another co-owner for use and occupation when the former has been ousted and has been excluded from the enjoyment of his share in the property held by them as tenants-in-common. It is the right of each and every co-owner to enjoy the property in common with other co-owners and as soon as that right is denied or a co-owner is prevented from enjoying the property like other co-owners, he has a cause of action for recovering compensation for use and occupation of his share from which he was excluded. So long as the partition does not take place, the co-sharer in exclusive possession is liable to account for profits to the other co-sharers.

The case of co-sharers holding various parcels in joint *zamindari* held by them as tenants-in-common for the sake of convenience would stand on a different footing. Where different co-sharers have without force or fraud, been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation. In such a case, the only remedy left would be a suit for partition. A.I.R. 1933 All. 519=1933 A.L.J. 886=55 All. 728=146 Ind. Cas. 812.

——Procuring default in payment of revenue and sale—Reconveyance of property—Liability for—Whether depends upon direct liability to pay revenue.

In the case of a co-sharer who colludes to procure a default in the payment of revenue and to bring about a sale which would vest another co-sharer's estate in him, his (the first co-sharer's) liability to reconvey the estate of the owner does not depend upon the fact that he is directly liable to pay the revenue. A.I.R. 1932 Cal. 434=59 Cal. 180=56 C.L.J. 311=137 Ind. Cas. 875.

21. (g) Miscellaneous.

——Rights of co-sharer—Mutual relations.

A co-sharer in joint property cannot by dealing with such property affect the interest of other co-sharers therein. 48 Cr.L.J. 374=33 C.W.N. 526=114 Ind. Cas. 142=A.I.R. 1929 Cal. 83.

——Every co-owner of property is entitled to the enjoyment of the property so long as he does not interfere with the other co-owners like right of enjoyment. But in the case of agricultural lands where the mode of enjoyment is by a division of the produce of rent among the co-owners when one co-owner receives and keeps all the produce or rent, he necessarily deprives the other co-owners of their shares and he must therefore account to them for their shares. 4 Rang. 103=5 Bur.L.J. 47=95 Ind. Cas. 380=A.I.R. 1926 Rang. 137.

——One co-tenant can prevent use by the other co-tenant which is repugnant to his feelings, where differences occur remedy is partition only.

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants. A co-tenant has a right to insist that his own property should not be put to a use which is repugnant to his feelings except where the plaintiff has lost his undoubted rights to insist upon the continuation of the existing state of the possession of the common lands. In case a co-sharer is unreasonable and obstructs his co-tenant in making beneficial use of the joint property, the remedy of that tenant-in-common is to seek partition and not to take forcible possession of the joint pro-

perty to the exclusion of his co-sharers. 85 Ind. Cas. 796=29 C.W.N. 643=A.I.R. 1925 Cal. 1027.

——It is settled law that each co-owner is entitled to work the mines provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant-in-common or co-parcener, can enter upon and work the mine, or license another person to do so, subject only to restriction that he shall not take more than his share. 13 Ind. Cas. 250=50 C.L.J. 208=57 Cal. 170=A.I.R. 1930 Cal. 113.

——As between co-sharers the rule is that where there is land to be cultivated, each sharer may take into his own cultivation out of the culturable land an amount proportionate to his share. If he takes more he must recompense his other co-sharers, but until he has taken more he need not recompense anybody. 64 Ind. Cas. 922 (All.).

——Rights of co-sharer—Possession.

Where three brothers inherit, they are equally entitled to the property, and the mere fact that one of them has been found to have been in exclusive possession of the property will not extinguish the title of his brothers unless it was expressly found that his possession was adverse to his brothers. 48 All. 663=24 A.L.J. 753=97 Ind. Cas. 245=A.I.R. 1926 All. 663.

——A co-sharer cannot obtain exclusive possession of village-common land but he may be granted a decree for joint possession. 89 Ind. Cas. 199=7 Lah.L.J. 147=26 P.L.R. 177=A.I.R. 1925 Lah. 369.

——Rights of co-sharer—Proprietary right.

A grant of proprietary rights in a land to one of several co-sharers will enure to the grantee only, although the land was held jointly by them before the conferment of such rights. 103 Ind. Cas. 45 =A.I.R. 1927 Lah. 666.

——Rights of co-sharer—Purchase.

There is no doctrine which prevents one of the defaulting proprietors from being a purchaser at a revenue sale unless the default and the sale were fraudulently procured by him so that the law, in view of his fraud, would regard him as a trustee of all his previous co-owners. 115 Ind. Cas. 606 =32 C.W.N. 778=A.I.R. 1928 Cal. 870.

——Mere purchase by one co-sharer in a revenue sale does not give others right to obtain reconveyance.

The mere fact that the purchase of joint property at the revenue sale was by one of the co-sharers would not of itself give the other co-sharers an equity to obtain a reconveyance of their shares from the purchaser on their paying to him the proper proportion of the expenses which he had incurred. But where the largest co-sharer of the estate deliberately allowed the estate to go into arrears with the intention of purchasing it for himself.

Held, he should in equity be asked to reconvey to the co-sharers who desire to repurchase, on the payment of their share of the dues, their share of the property. 97 Ind. Cas. 885=30 C. W. N. 1004=A.I.R. 1926 Cal. 1195.

——Rights of co-sharer—Settlement.

A co-sharer has no right to deal with joint property in such a way as to affect the right of the other co-sharer, a co-sharer therefore not a party to the settlement is not bound by the settlement made by other co-sharers. 8 Pat. 258=116 Ind. Cas. 781=A.I.R. 1929 Pat. 208.

——Rights of co-sharer—Succession—When proprietor dies without heirs, no community of interest between several land-holders is established, the property escheats to Crown.

In the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body, only if the village is a homogeneous one and complete community of interest is maintained. Where no general community of interest between the several landholders in the village has been preserved the estate of a heir-less proprietor escheats to the Crown and does not devolve upon the proprietary body. 100 Ind. Cas. 917=A.I.R. 1927 Lah. 255.

——Joint decree in favour of mortgagee and guarantor does not make them co-sharers.

A was indebted to **B** under a mortgage. **C** was the guarantor with no interest in the mortgage except his right to be secured by the property against his liability as guarantor. **B** and **C** obtained a decree on the mortgage against **A** and sold the property, and **C** purchased it. Sale was confirmed in **C's** name and he was given liberty to set off the amount of the purchase price against what was due to him and **B** under the decree.

Held, that in law the property did not belong to **B** and **C** in equal shares when the order of confirmation of sale was made.

Held, further, that **C** held the property to secure himself and subject thereto was a trustee of it for **B,** with no power to sell the property without the concurrence of **B,** who was entitled in equity to redeem it. 124 Ind. Cas. 887=A.I.R. 1930 P. C. 205=32 Bom.L.R. 1166=52 C.L.J. 1=32 M.L.W. 467=59 M.L.J. 328 (P.C.).

——Share in specie—Money value of the shares.

It is a leading principle of law in cases of partition that when several persons are co-owners or co-sharers of immoveable property, partition should be effected between them by giving to each his share in specie, as far as is practicable. The right of each sharer is to his slice of the property, and not merely its money value. What has to be borne in mind in effecting a partition decreed by a court is not the convenience of one party, but the convenience of all the parties and the partition should be made so as to be equitable to all of them. (1905) 7 Bom.L.R. 482.

——Settlement of land to tenant by one—If valid as against others.

A settlement made by one co-sharer may in some instances be treated as having been made with the authority of all the co-sharers. 1945 P. W.N. 393=A.I.R. 1946 Pat. 102=227 Ind. Cas. 615=13 B.R. 102.

22. Shamilat land.

——One co-sharer planting grove — Remedy—Suit for damages—Oudh Rent Act (22 of 1886), S. 108.

No distinction can be drawn between the con-

struction of buildings and the planting of a grove, since both the construction of buildings and the planting of a grove change the character of a plot. A co-sharer is entitled to object to the character of the plot, in which he has a share, being so changed by another co-sharer who takes the plot into his exclusive cultivation on being vacated by a tenant, by planting of a grove. In such a case, the co-sharer plaintiff is entitled to a decree for joint possession and for removal of the trees but not for damages, for his remedy is by a suit for profits under Cl. 15 of S. 108 of the Oudh Rent Act and S. 108, excludes the jurisdiction of Civil Courts in respect of such a suit. A.I.R. 1943 Oudh 123=1942 O.W.N. 750=203 Ind. Cas. 613.

——**Garden and nursery on plot of joint land—Other co-sharers given joint possession over land but defendant co-sharer declared entitled to maintain his garden and nursery—Later on defendant co-sharer erecting small building for purposes of garden and nursery.**

One of the co-sharers planted over a plot measuring one **bigha,** four **biswas** of the joint land, a large number of trees and established a garden and a nursery. As a result of a litigation between the parties, the other co-sharers were put in the joint possession of the plot but the co-sharer who established the garden was declared entitled to maintain his garden and nursery and to that extent he was entitled to put the plot under his exclusive use. Later on, for the purposes of his garden and nursery, the co-sharer concerned put up a small building over the plot of land six by six yards. Thereupon the other co-sharer instituted a suit for demolition of the building and for injunction restraining the defendant co-sharer from making further construction on the plot:

Held, that the defendant could not be said to have enlarged the scope which had been reserved to him for the use of the land for maintaining the garden and nursery and that, therefore, the plaintiffs were not entitled to the decree for demolition of the building. A.I.R. 1941 All. 353=1941 A.L.J. 402=1941 A.W.R. Rev. 638=197 Ind. Cas. 492=1941 R.D. 697.

——**Right of co-sharers.**

All the co-sharers have the right to use **shamilat** land. 42 Punj.L.R. 142.

——**Right in shamilat, whether mere accessory to land—Both parties sharing equally shamilat—Plots of unequal revenue allotted in partition—Right to hold equal shares in shamilat.**

The rights of a proprietor in the **shamilat** of a village are not a mere accessory to the land separately held by him, and a transfer of the latter does not **ipso facto** convey any rights in the former to the transferee.

Where, therefore before the partition of the proprietary holding, both the parties were entitled to share equally in the **shamilat** land.

Held, that the mere fact that the revenue of the area allotted on partition to one party happened to be more than that of the area allotted to the other could not have the effect of disturbing their vested rights in the **shamilat**, unless the parties intended that the **shamilat** should not be held in equal shares. A.I.R. 1931 Lah. 768=32 P.L.R. 544=133 Ind. Cas. 892.

——**Shamilat Land—"Hasab rasad khewat" means in riverside villages, "according to area of khewat holding".**

Although in ordinary village the meaning of the word "hasab rasad khewat" in respect to partition of **shamilat** land is "according to the revenue assessed on the holding" in a village subject to river action, where the revenue assessed is fluctuating and the khewat holding includes submerged land, it must be held to mean according to the area of the khewat holding. 69 P.R. 1913, Foll. 102 Ind. Cas. 587=A.I.R. 1927 Lah. 807.

——Rights in **shamilat** lands are independent rights. A sale of khewat holding without any reference to the **shamilat** would not result in the conveyance of **shamilat**. 65 Ind. Cas. 725=4 Lah.L.J. 221=A.I.R. 1922 Lah. 34.

——The rights of proprietors in the **shamilat** of the villages are not a mere accessory to the land separately held by them and the **onus** lies on the purchaser of the proprietary land to show that the sale to him included also a share of the **shamilat**. 79 Ind. Cas. 84=A.I.R. 1925 Lah. 99.

——The **shamilat** lands are not accessories to the **khewat** holdings. 84 Ind. Cas. 113=A.I.R. 1923 Lah. 350.

——**Co-sharer in shamilat deh erecting bara on part of shamilat deh and being in exclusive and long possession of it—Possession cannot be disturbed by other co-sharers.**

Where a co-sharer in the **shamilat deh** has elected a **bara** on it and has been in long and exclusive possession, he may keep that possession until partition. Other co-sharers in the **shamilat deh** cannot disturb his possession without suing for partition and without proving that the co-sharer had been occupying a greater area of the **shamilat deh** than would fall to his share on partition. A.I.R. 1939 Lah. 288=41 P.L.R. 109.

——**Suit by proprietors—Land in suit declared to be shamilat deh in possession of all proprietors for common advantage—Proprietors who had brought that suit building gurdwara on land in suit—Demolition by other proprietors.**

In a suit by some proprietors against other proprietors, the land in suit was declared to be **shamilat deh** in the possession of all the proprietors. No proprietor had a right to individual possession. Subsequent to this suit, the proprietors who had brought that suit built a **gurdwara** on the land and obstructed other proprietors from using it for common advantage. Hence these proprietors brought a suit for demolition of the **gurdwara:**

Held, that the proprietors were entitled to the demolition of the **gurdwara**. A.I.R. 1939 Lah. 514=41 P.L.R. 587.

——**Accretion of shamilat—Purchaser before accretion—Right to share, proportionate to his proprietary holding on date of accretion.**

A certain **shamilat** was for many years separate from a village by a river. In 1904, by a change of course in the river, the area of **shamilat became** attached to the village. Before 1904, some proprietors in a **tarf** of the village sold certain lands therein to a stranger along with the **shamilat** pertaining to the land sold, and the purchaser was recorded as co-sharer. The plaintiffs, co-sharers in the **tarf** filed a suit for declaration against the

purchaser's descendant that the latter had no right in the shamilat. The wajib-ul-arz provided that the shamilat was to be partitioned according to shares mentioned in the mislihaquiyat:

Held, that each proprietor was entitled to a share proportionate to his proprietary holding as it stood on the date of accretion of shamilat and that the defendants were entitled to their share. A.I.R. 1937 Lah. 428=39 P.L.R. 656=175 Ind. Cas. 138.

——Shamilat—Appropriation by section to its use —Appropriation for particular use.

It is not permissible to convert a takia built on a shamilat into a mosque thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use. 51 Ind. Cas. 853=92 P.W.N. 1919=3 L.L.J. 17.

——Shamilat—Right to graze.

The members of a village community can graze their cattle when wajib-ul-arz entitles them to do so. 122 P.R. 1918=48 Ind. Cas. 846.

——Shamilat—Suit for declaration—Shamilat deh recorded as Shamilat taraf—Acquisition by Government.

Plaintiffs sued for a declaration of ownership of a share of the village shamilat. The suit land was entered as a shamilat deh in settlements of 1856, 1868, 1891 and 1892, but in 1893 the land was shown as shamilat of taraf Bedi—one of the 3 tarafs in the village. Portions of the land having been acquired by the Government in 1906 and again in 1911 compensation money was taken by the Bedis. Held, that the old entries being all in plaintiff's favour, the admission of Bedis meant nothing more than that the Bedis should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur. The action of the Bedis in 1911 in taking all the compensation money was a fresh invasion of the plaintiffs' rights and the suit was, therefore, within time. 43 P.W.R. 1918=21 P.L.R. 1918=44 Ind. Cas. 31.

——Co-sharer—Shamilat Patti in Thak—Effect of.

Where a village consists of various thaks, divided into various pattis, the revenues of which are payable and the rents of which are collected by each pattidar separately, the mere fact that the partition of a particular thak is imperfect as containing a shamilat patti does not make pattidar in one patti a co-sharer in another patti. 3 O.L.J. 309=36 Ind. Cas. 55.

——Shamilat—Agreement to partition according to revenue shares.

The latest settlement is the guide for enforcing an agreement to divide according to revenue shares. 29 P.W.R. 1916=33 Ind. Cas. 1006.

——Shamilat—Right to or grazing dues—Proprietary rights.

The mere payment of terni or grazing dues by a person who is not a proprietor, paying land revenue, does not confer any right to share in the shamilat of a patti. 19 C.W.N. 1023=29 M.L.J. 137=2 L.W. 706=(1915) M.W.N. 642=6 P.R. 1916=1 P.W.R. 1916=29 Ind. Cas. 1005 (P.C.).

——Shamilat — Malik-i-quabza's incompetency to get share in shamilat.

Ordinarily a malik-i-quabza cannot have a share in the shamilat and he must prove that he has a share. The mere fact of his having broken a bit of shamilat and having been allowed to retain it on partition of a portion of the shamilat does not sufficiently discharge the burden of proof specially wherein three successive settlements he is recorded as being malik-i-quabza only. 53 P.R. 1879. Foll. 10 P.W.R. 1911=9 Ind. Cas. 230.

——Shamilat land—Suit for profits—Parties.

All co-sharers are necessary parties to a suit in respect of the profits of the shamilat land. 8 Ind. Cas. 742 (Oudh).

23. Sir land.

——Sir land held in severalty—Absolute ownership does not follow—Co-sharer in occupation of sir land holds it as an agent of general body of co-sharers—It does not become his exclusive property until hostile title is asserted and perfected by prescription. 1939 N.L.J. 92.

——Lease by co-sharer of sir or khudkasht for non-agricultural purpose—Building erected—Suit for demolition of building by other co-sharers.

A co-sharer in possession of land as his sir or khudkasht which is agricultural land and not abadi is not entitled to alter the nature of that land by turning it into building land (as distinct from building appurtenant to an agricultural holding). If he turns it into building land either by building on it himself or by letting it to a tenant for the purpose of building, he is using the land in a way which is contrary to the interest of the other co-sharers in the mahal. By doing so, he gives the other co-sharers a right to sue for joint possession and a right to have the building demolished. A.I.R. 1935 All. 967=1935 A.W.R. 1369=161 Ind. Cas. 358=1935 R.D. 410.

——Some co-sharers having sir rights—All, if proprietors of area comprised in sir—Transfer of proprietary title in land by persons whose sir it is.

The land over which sir rights exist is the property of all the cosharers in the sense that they are all owners of it in accordance with their shares. The sir rights are something separate from the proprietary rights. They are an addition to them. The sir holder has certain rights against persons to whom he may lease the land and he has certain rights against the other proprietors, i.e., he is entitled to occupy the land personally and to cultivate to the exclusion of the other co-sharers who can do no more than claim their share of the profits from him. If the person who has the sir rights, transfers his share as a proprietor, he becomes the ex-proprietary tenant of the land. He is of course the tenant of the whole body of co-sharers because he is a tenant and they are in accordance with their shares the landholders. If he relinquishes his ex-proprietary rights in the land, that land becomes ordinary land which may be held by a tenant or which may be cultivated by any of the proprietors as his khudkasht.

Where there are several co-sharers in a mahal and some one or other of those co-sharers have sir rights, all the co-sharers are the proprietors of the area comprised in the sir and consequently the

person whose sir it is, is not entitled to transfer the whole of the proprietary title in the land. It does not, however, necessarily follow from this proposition that the mortgage by such co-sharer is an invalid document. It fails no doubt to transfer such part of the title as did not vest in the mortgagors, but it cannot be invalid in respect of such part of the title as did vest in them. A.I.R. 1935 All. 781=1935 A.L.J. 1072=1935 A.W.R. 759=156 Ind. Cas. 45=1935 R.D. 310.

——One co-sharer merely planting trees on sir—Whether takes that portion out of the mahal—Owner's duty.

The mere planting of trees upon **sir** land cannot take that portion of land out of the **mahal** or the co-sharer out of the **co-parcenary** body. The owner of the **sir** must account to the general co-parcenary body and it makes no difference whether he uses the land for growing wheat or for growing fruit. A.I.R. 1934 All. 692=3 A.W.R. 486=151 Ind. Cas. 355=18 R.D. 165.

——Rights of co-sharers in the sir land.

Sir lands are held by proprietors and not by tenants. The particular privileges under which a particular proprietor is allowed to hold certain portions of the land in the **khewat** are summed up in the phrase "sir land." When the proprietor loses the right of a proprietor, he acquires the right to hold the lands on certain easy terms. This privilege he may give up. When he does so, the whole body of co-sharers become entitled to hold the land. But none of the proprietors can hold the land as their **sir**. A.I.R. 1930 All. 657=1930 A.L.J. 1413=128 Ind. Cas. 396.

——The circumstance that a co-sharer is himself in exclusive possession of certain home farm land which is recorded as his **sir** at the Settlement is a good ground for not awarding joint possession of the land in dispute. 78 Ind. Cas. 390=A.I.R. 1924 Nag. 345.

24. Suits by Co-sharers.

——Co-sharers—Suits by—Parties—Suit for recovery of share in inam village—Suit against khots and not against managing inamdar—Maintainability.

Where the name of a co-sharer of an **inam** village is not registered as a sharer, and he is not recognised as a managing **inamdar**, he cannot bring a suit in a Civil Court to recover his share direct from the **khatedar** of the village. He can sue the managing **inamdar** who is liable to account to his co-sharers, not only for the land revenue recovered by him, but also for damages if he has failed to recover owing to his negligence or laches or default.

But where it is shown that although there was a recognised **inamdar** yet he was not recognised as the manager on behalf of all, since he allowed each sharer to bring separate suits to recover his share without any objection on the part of the **khots**, then in view of that practice, a suit against **khots** is maintainable. A.I.R. 1945 Bom. 364=47 Bom.L.R. 376=I.L.R. (1945) Bom. 477.

——Suit by some—Suit for ejectment—Decree.

One of several co-sharers of **ijmali** property may partially eject a person who has intruded upon such property against his will, but with the consent of another co-sharer by obtaining a decree for possession of his share jointly with the intruder. A.I.R. 1942 Pat. 397=23 P.L.T. 294=200 Ind. Cas. 769=8 B.R. 727.

——Suit by one only of co-owners to eject tenant on sufferance.

Where a tenancy is entered into for a fixed term with co-owners of property, and the tenant continues on sufferances after the expiration of the period of the tenancy, a suit brought to eject the tenant by one only of the co-owners is maintainable. The rule that where the landlord's rights belong jointly to several persons, a suit to eject a tenant can be instituted only by all the co-owners suing jointly as plaintiffs only applies where there is a subsisting relationship of landlord and tenant. A.I.R. 1940 Bom. 13=41 Bom.L.R. 1213=186 Ind. Cas. 92.

——Suit by other co-heirs for declaration of right as co-owners—Whether must seek remedy against Receiver.

In a suit by co-heirs for the declaration of their rights as co-owners, they need not seek any remedy against the Receiver. The claim of the mortgagee in such a suit that he had a charge on their property which they must redeem is entirely irrelevant. The co-heirs need not ask for the further relief of partition. A.I.R. 1940 Rang. 83=187 Ind. Cas. 460.

——Co-sharer—Suits by—Jurisdiction for.

Suit by co-sharer against other co-sharers for contribution in respect of payment made under decree passed against all, is not triable by Small Cause Court. A.I.R. 1939 Nag. 64=1938 N.L.J. 457=181 Ind. Cas. 123.

——Share in royalty—Co-sharers having lease-hold right in colliery—Sub-lease granted—Demise not joint—Recital that certain amount was to be paid as royalty to each co-sharer according to his share—Payment made separately to each co-sharer—Default—Suit by one co-sharer alone to recover his share.

Plaintiff along with other co-sharers had undivided share in certain lease-hold rights in a colliery. They granted a sub-lease of the colliery. The demise was not joint. The indenture was made between the parties of the first party collectively called the lessors. It recited the shares owned by the co-sharers separately and that a certain amount was to be paid to them according to their respective shares and finally it witnessed that each of the co-sharers respectively granted, transferred and demised unto the sub-lessee his respective right, title and interest. The sub-lessee paid for a certain time separately to each co-sharer his share in royalty but subsequently he failed to pay. One of the co-sharers thereupon brought a suit to recover his share alone joining the other co-sharers as defendants:

Held, that apart from the contents of the demise, the dealing between the parties, **i.e.**, the regular payment by sub-lessee to the plaintiff co-sharer of his share separately was sufficient evidence to imply an agreement that each co-sharer should be paid his separate share of the royalty and, therefore, plaintiff co-sharer could alone sue for the recovery of his share of royalty. A.I.R. 1938 Cal. 243=I.L.R. (1938) 1 Cal. 206=176 Ind. Cas. 114.

——Suit for ejectment by one co-sharer landlord—Other co-sharer landlords made pro forma defendants—Joint decree, if can be passed.

Where in a suit for ejectment, the plaintiff-co-sharer landlord has made the other co-sharer landlords pro forma defendants, the plaintiff is entitled to get a decree for recovery of possession of the property in suit, to the extent of his share jointly with the pro forma defendants. A.I.R. 1934 Cal. 127=58 C.L.J. 133=149 Ind. Cas. 559.

——Co-sharer agreeing to lease entire property believing other co-sharer had given consent—Other co-sharer refusing to join—Suit for specific performance:

Held, that no suit can lie against entire body of proprietors. A.I.R. 1932 P.C. 43=55 C.L.J. 46=62 M.L.J. 243=36 C.W.N. 231=35 M.L.W. 825=59 Cal. 1025=59 I.A. 47=136 Ind. Cas. 405 (P.C.).

——Communal bond—Village graveyard reserved for the use of a community — One member of community, whether can sue.

A village graveyard reserved for the use of the inhabitants of a particular community in a village, cannot be said to be a trust in favour of anybody. The members of that community are only co-owners in that land, and hence one of them can sue other co-owners, who prevent the use of the common property. A.I.R. 1932 Lah. 423=33 P.L.R. 768=138 Ind. Cas. 691.

——Death of one—Rights of others to continue suit.

A single co-sharer of tenant-in-common may institute a suit for ejectment against a trespasser without impleading the other co-sharers of tenants-in-common as parties to the suit.

On the death of one of the co-sharer-plaintiffs to a suit in ejectment of another co-sharer the non-joinder of the legal representatives of the deceased plaintiff respondent in appeal would not be fatal to the appeal. A.I.R. 1932 Sind 220=26 S.L.R. 362=141 Ind. Cas. 711.

——Ejectment—Suit by some alone.

It cannot be laid down as an inflexible rule of law that in no case can a suit for ejectment by some of the co-sharers be maintained without joining the other co-sharers as plaintiffs, even though they have been impleaded as defendants. The answer to the question depends upon a variety of circumstances and the proper course is to investigate the facts in each particular case. A.I.R. 1931 Lah. 253=32 P.L.R. 239=133 Ind. Cas. 441. See also 134 I.C. 409=8 O.W.N. 890.

——Suit for lands—In possession of tenants—Maintainability.

A suit for partition of land subject to a subsisting lease and subsequently in the possession of tenants is maintainable. (1902) 26 M. 78.

——Co-sharers—Right of suit.

Where plaintiff after obtaining symbolical possession of a 10 anna share of some land which was in the actual possession of other co-sharers took no steps for obtaining actual possession nor brought a partition suit but brought a suit for joint possession with his co-sharers and for mesne profits.

Held, that there being no subsequent dispossession of the plaintiff, the possession of the co-sharers was not adverse to that of the plaintiff; consequently, no suit for joint possession would lie; but that the plaintiff was entitled to her share of the profits which the defendants received from the lands. (1899) 4 C.L.J. 254.

——Right to sue—Suit by one for ejectment after termination of tenancy—If maintainable.

If the tenancy was determined either by efflux of time or by a service of notice issued with the consent of all the co-owners, a co-owner can maintain an action for the eviction of the trespasser without impleading the other co-owners. A.I.R. 1947 Lah. 388.

——Right of suit—Suit for damages to the whole property—Disclaimer of interest by other co-sharer subsequent to suit, effect of.

Where a person sued for damages done to a particular property, and the defence was that others were also interested in the property and that he alone could not sue for all, and the said other persons, after the suit was instituted, disclaimed all interest in the property, such disclaimer is evidence of the plaintiff's right to the property, at the time of the suit. The plaintiff does not derive any new title by such disclaimer. (1902) 30 C. 207=7 C.W.N. 126.

——Right of suit—Tenants-in-common — One sharer alone registered as owner—Such sharer's right to sue for damages to the entire property.

The mere fact that one tenant in common alone is entered in the Revenue records as the owner of a particular property will not give him the right to sue on behalf of all the co-owners for damages and injunction for any damage done to the common property. (1902) 30 C. 207=7 C.W.N. 126.

——Mines—Accounts—Working by one co-sharer—Money spent on mines—Partition—Equities.

In the absence of proof of actual ouster or distruction of property one co-sharer cannot demand accounts from another co-sharer for minerals taken by him out of the joint property unless he had shown that he had worked more than his fair share. No claim for account is maintainable were the co-sharer knowing that the other co-sharer had been spending large sums of money to develop the mines acquiesced. His remedy is by a suit for partition in which case the other co-sharer should, if possible, be maintained in possession of the portion of the property upon which he has spent money. 22 C.W.N. 441=44 Ind. Cas. 297.

——Rights of co-sharer—Declaratory suit.

The transfer by the co-sharer in sole possession of the land to a stranger amounts to a denial of title of other co-sharers—Other co-sharers are entitled to a declaration that the transfer is invalid against them, and also for joint possession with the transferor and ejectment of the transferee. 25 A.L.J. 983=106 Ind. Cas. 656=A.I.R. 1928 All. 59.

——A co-sharer can claim declaration that he is entitled to a share in the property sold.

So long as partition has not taken place each co-sharer has a share in every fragment and portion of the joint holding, and if his rights are infringed by his co-sharer alienating or selling them, he is entitled to a decree at any time to the effect that he is a joint owner of any portion alienated, sold or charged. This is not the same

thing as saying that he is entitled to physical possession of that portion without partition, but he is always entitled to his decree. 124 P.R. 1879, Foll. 92 Ind. Cas. 721 (Lah.).

——Where the suit was for declaration of title against a co-sharer and the share of the plaintiffs could not be determined on evidence.

Held, that a decree for declaration of title to such unknown share cannot be made. 41 Cal. 743; 25 C.L.J. 537; 38 Mad. 6, Foll. 82 Ind. Cas. 392=40 C.L.J. 30=A.I.R. 1924 Cal. 1046.

——Tenancy-in-common—Suit by five persons for possession of share in land dismissed—Appeal by four only—Suit, if can be decreed in favour of all.

Five persons brought a suit for possession of share of land. The parties followed custom and each one was entitled to his specific share as a tenant-in-common and not as joint tenant. The suit was dismissed, but an appeal was preferred by four of them only. The appellate Court decreed the suit **in toto:**

Held, that the suit should have been decreed to the extent of the shares of the four appellants only and not **in toto**. A.I.R. 1937 Lah. 578=I.L.R. (1937) Lah. 618=40 P.L.R. 427=174 Ind. Cas. 942.

——Purchaser of share of one in one item—Suit to recover such share — If to be by one for general partition—Right of co-owners impleaded as defendants to ask Court to divide all properties.

The purchaser of co-owner's share in one particular item of property can file a suit for recovery of that share in the item without filing a suit for general partition. It is open in such a case to the co-owners impleaded as defendants to ask the Court to effect a division of all the properties. 59 L. W. 339=1946 M.W.N. 429=A. I. R. 1946 Mad. 534=(1946) 1 M.L.J. 454.

25. Suit for possession.

——Co-sharers—Exclusion of one from possession—Suit for possession or partition alone.

A suit for partition alone cannot be brought by a co-owner who is completely excluded from possession of the property. To permit such a suit to be brought would enable the plaintiff to evade payment of court-fees and would also tend to mask the possible pleas of limitation and adverse possession. On the other hand, there is nothing to support the proposition that a co-owner, who is out of possession cannot bring a suit for possession alone, without suing for partition. He has just as much right to possession as a co-owner as he has to possession by partition. A suit for possession cannot be dismissed on the ground that the plaintiff should have sued for possession by partition. A. I. R. 1943 Oudh 243=1943 O.W.N. 50=19 Luck. 109=206 Ind. Cas. 7.

——Suit for possession—Landlords—Suit for partition of a small portion of joint estate.

Parties having, as **patnidars,** a joint interest only in a small portion of a joint estate can sue for partition of that small portion. 37 Ind. Cas. 939 (Cal.)

——Suit for possession—Lands held in severalty—Dispossession—Rights of parties.

A co-sharer dispossessed by another in a mahal where lands are held in severalty, is entitled to recover separate possession even apart from the provisions of the Specific Relief Act. 14 Ind. Cas. 580 (All.).

——Suit for possession—One co-owner dispossessing another by force—The Court can reinstate the former.

Where forcible possession is taken Civil Courts should restore possession without exercising their discretion in the matter of equitable relief to the persons who have taken forcible possession. Thus where a plaintiff co-owner acquires a tenant right for his exclusive benefit the defendant co-owner has a right to claim joint occupancy or occupancy in common in the acquired land but where the latter who is also a lambardar, forcibly dispossesses the former the Court should pass a decree restoring possession. 25 N.L.R. 186=A.I.R. 1930 Nag. 56=122 Ind. Cas. 439.

——Where a co-owner in physical possession of property jointly with other co-owners is dispossessed by the latter he can institute a suit for recovery under S. 9 of the Specific Relief Act. 8 N.L.J. 182=93 Ind. Cas. 657=A.I.R. 1926 Nag. 148.

——When one co-sharer is ousted by another co-sharer the remedy of the other is to sue for actual possession which he had before and not only joint possession.

In 1322 the defendant ousted the plaintiff and took possession of the plot in dispute. In a suit by plaintiff for **khas** possession the defence put forward was based on the fact that in the year 1322 Fasli the defendant acquired a share in the village and that therefore the most the plaintiff could obtain was a decree for joint possession.

Held, that as the plaintiff co-sharer was in sole actual physical possession of the plot in suit and he had been ousted therefrom by the defendant, he was entitled to be restored to the actual possession which he had before and not merely to joint possession. A.I.R. 1922 All. 314, Foll. 71 Ind. Cas. 649=A.I.R. 1923 All. 446.

——Where co-sharers were in exclusive possession of parts joint property, a lesee of one of the co-sharers can sue for possession if he is dispossessed by other co-sharers. A.I.R. 1922 Cal. 147.

——Defendant in exclusive possession for 25 years—Plaintiff must show that he is co-owner.

A plaintiff wishing to succeed on the ground that he is co-owner must establish that fact, where the defendant has beyond question been in exclusive and uninterrupted possession for a long period, **e.g.,** 25 years. A.I.R. 1941 Rang. 111=195 Ind. Cas. 234.

——Sale of house by tenant to one co-sharer—Other co-sharers can sue for joint possession of site by removal of materials.

All the coparceners in a joint **patti** or **mahal** are joint owners of the site of the house of tenants and **raiyats** situated in that **patti** or **mahal.** If the tenant or **raiyat** dies without leaving any heir or abandons the house, the right to the joint possession of the site and the materials vests in all the co-sharers and in such a case, one co-sharer has no right to take possession of the materials or of the site to the exclusion of the other co-sharers. It is also clear that a tenant or a **raiyat**

has the right to transfer the materials of the house to any person he likes provided the materials belong to him and there is no custom prohibiting such a transfer. A sale of his house by a tenant or **raiyat** to one of the co-sharers, does not entitle that co-sharer to retain possession of the house along with the site to the exclusion of the other co-sharers. The tenant or **raiyat** has a disposing power only so far as the materials of the house are concerned and has not a transferable interest in the site of the house. The retention of possession by one of the co-sharers of the house of a tenant or **raiyat** that has been purchased by him furnishes the other co-sharers with a cause of action for a suit for joint possession of the site by removal of the materials. The question of special damage does not arise and the cause of action in such cases is constituted by the invasion of the right of the co-sharers to joint enjoyment of the site of the house. A.I.R. 1940 All. 79=1939 A. W.R. 840=187 Ind. Cas. 39=1939 R.D. 612.

——One tenant-in-common setting up hostile title —Suit for exclusive possession—Joint possession, if can be given.

A tenant-in-common setting up a hostile title to the whole or part of the common property and seeking exclusive possession thereof against another tenant-in-common who has dispossessed him of the same is not entitled to exclusive possession or even necessarily to joint possession, if he fails to substantiate his claim. A.I.R. 1936 Mad. 666 =43 M.L.W. 646=1936 M.W.N. 529=71 M. L.J. 145=163 Ind. Cas. 825.

——Mortgage by one to another—Mortgage redeemed—Mortgagee claiming raiyati rights in lands as against mortgagor—Suit by mortgagor for joint possession and mesne profits.

One of the co-sharer landlords who was the mortgagee of the share of another co-sharer did not deliver possession to the mortgagor co-sharer of his share which was duly redeemed but asserted therein **raiyati** rights for himself and adversely to the co-sharer mortgagor. The mortgagor co-sharer who had redeemed his mortgage instituted a suit for joint possession of his share and for mesne profits:

Held, that the suit was perfectly maintainable. A.I.R. 1936 Pat. 231=16 P.L.T. 484=14 Pat. 824=162 Ind. Cas. 235=2 B.R. 423.

——Plaintiff must succeed on strength of his title —Practice in Calcutta High Court.

In an action for ejectment, the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. The practice of the Calcutta High Court has been to give the co-sharer a decree for joint possession with the trespasser leaving the plaintiff to work out his further rights by a separate suit for partition. A.I.R. 1935 Cal. 646=40 C.W.N. 81= 158 Ind. Cas. 445.

——Two proprietors having share in separate account in taluk—Lease by them and sale by lessee to one of them—Other suing for joint possession—Parties.

The plaintiff and the defendant had a share in a certain separate account in a certain **taluk**. They leased the land to the lessee who sold it to defendant. The plaintiff then instituted the present suit to establish his title and to get joint possession with defendant:

Held, that the result of the sale was that the tenancy had ceased to exist and the plaintiff and the defendant were not now entitled to hold the land in **khas** possession:

Held, also, that until a suit for partition was instituted, the co-sharers of the plaintiff and defendant had no interest in the matter and were not necessary parties to the suit. A.I.R. 1935 Cal. 93=60 C.L.J. 34=154 Ind. Cas. 712.

——Alinee from one co-sharer—Suit by, for possession against the other co-sharers—Form of decree—Decree for joint possession is proper.

A mortgages certain property with possession to **B**. **B** is obstructed in taking possession by **C** whereupon **B** files a suit for possession impleading **A** and **C**. It is found that the property is the joint property of **A** and **C**. A decree for joint possession can be passed in favour of **B** and **C**, and the parties may be left to work out their rights inter se subsequently in a suit for partition. A. I. R. 1946 Pat. 231=221 Ind. Cas. 683=25 Pat. 708=12 B.R. 218.

——Limitation, when can be pleaded.

In a suit for possession by one co-sharer against the other, limitation cannot be pleaded by the defendant, unless he shows that before the prescribed period, he converted his joint possession into adverse and exclusive possession by some overt act. A.I.R. 1935 Lah. 91=157 Ind. Cas. 1024.

——Limitation.

A suit for declaration by a person in possession that he is the owner of the land and that the defendant who is also shown as co-sharer in the revenue records has no right in it, is not barred by time if brought within 6 years from an attempt to oust him from possession, even though it be more than 6 years from the date of the entry in favour of the defendant. A.I.R. 1932 Lah. 81 =32 P.L.R. 731=135 Ind. Cas. 501.

——Power to award compensation for period subsequent to institution of suit—C. P. Code (Act 5 of 1908), O. 20, R. 12.

In a suit by a co-sharer for joint possession, the Court may award compensation even in respect of a period subsequent to the institution of the suit until date of delivery of possession or three years from the date of the decree in accordance with the principles of O. 20, R. 12, C. P. Code. The rule that the Court has no jurisdiction to give plaintiffs a decree in respect of a cause of action that had not accrued to them at the date of the institution of their suit does not prevent the Court from awarding such compensation. A.I.R. 1931 P.C. 209=12 P.L.T. 737=35 C.W.N. 949=1931 M.W.N. 1301=35 M.L.W. 49=11 Pat. 22=58 I. A. 299=133 Ind. Cas. 730=61 M.L.J. 186 (P. C.). [Reverses A.I.R. 1928 Pat. 565=7 Pat. 491=113 Ind. Cas. 577.]

——Co-sharer—Suit for joint khas possession—Chakran land, resumption of, by Chakran Commissioner, effect of—Order of Chakran Commissioner, if necessary to be set aside—Location of land not necessary in suit for joint possession.

A suit for joint khas possession with the co-sharers-defendants of the silted up portion of a tank leased out by those defendants within three

years of the institution of the suit is maintainable, especially when the lessees of the defendant landlord have not in any way improved the silted up portion of the tank and when the defendants proceeded only to cultivate it and the plaintiffs never stood by and allowed the defendants to improve the land or to do anything which would render it inequitable for the plaintiffs to obtain khas possession of the land. Where the plaintiff has not asked for exclusive possession but only joint possession of the land in dispute with the defendants, it is not necessary for the plaintiff to locate the land which formed only a portion of the entire area of the land, part of which was duly resumed by the commissioner as Chakran land, nor to ask to have the order of the Chakran Commissioner set aside. (1908) 10 C.L.J. 103=3 Ind. Cas. 399.

——Co-sharers—Suit for possession — Alternative claim to be put into joint possession.

Where a co-sharer sues for exclusive possession and in the alternative for joint possession the proper order to make is a decree declaring the rights of the parties. A co-sharer is not entitled to a decree for joint possession. 1906 A.W.N. 194.

——Exclusive possession.

Where the area over which grazing rights extend is larger than that required by the persons with those rights a proprietor may use the excess for his own purposes. The defendants cannot prevent him from developing any excess area and using it to its best purposes, 31 Cal. 503; 86 P. R. 1911; 119 P.R. 1899; 100 P.R. 1830, Foll. 67 Ind. Cas. 306=2 Lah. L. J. 44=77 P. L. R. 1922.

——A co-sharer against whom a decree for possession of a specific portion of the shamilat of a village has been obtained by another co-sharer, cannot avoid that decree by becoming a co-sharer by purchase and continuing in possession of that specific portion. 63 Ind. Cas. 894 (Lah.).

——An arrangement by which co-owners are in separate possession of different items of property can be put an end to by any one of them and when a suit is filed by one of them for joint possession, such an arrangement is put an end to and the plaintiff is entitled to joint possession. 102 Ind. Cas. 110=8 L.R.A. (Rev.) 181=A.I.R. 1927 All. 578.

——An order passed by a Mutation Court even on consent cannot be deemed to be the mutual arrangement under which the title to property is finally settled by the parties. 31 All. 73 (P.C.), Foll. 96 Ind. Cas. 783 (All.).

——Plaintiff co-sharer failing to prove alleged actual possession cannot be allowed to plead constructive possession through defendant.

When the plaintiffs co-sharers were found to have no connection with the ancestral properties for over 30 years, and their positive case that they were in actual possession of the lands for themselves failed,

Held, that they cannot be allowed to contend that the co-sharers-defendants were in possession on behalf of the plaintiffs. 92 Ind. Cas. 908=A.I.R. 1926 Cal. 589.

——A co-sharer cannot maintain a suit for recovering possession of a specific portion of the property where he is not able to prove the existence of a mutual arrangement among the co-sharers by which they are to be in possession of separate portions of the property. In such a case the dispossessed co-sharer's remedy lies by way of suit for partition. 82 Ind. Cas. 31=A.I.R. 1925 Cal. 272.

——One of the co-owners can maintain a suit for possession and other co-owners are not necessary parties. 79 Ind. Cas. 59=A.I.R. 1925 Sind 36.

——Even before a general partition among co-sharers, one of them can have a possessory right over a particular plot, which right is transferable by him. 74 Ind. Cas. 161=A.I.R. 1924 Bom. 297.

——Where a co-sharer takes and retains possession of a portion of the **shamilat** (for as long as 20 years in this case), he cannot be dispossed therefrom until partition takes place. The plaintiffs co-sharers in such a case have no right to oust defendant or even to get joint possession with him so long as there has been no partition of the **shamilat**. 69 Ind. Cas. 671=A.I.R. 1924 Lah. 293.

26. Suit for Rents and Profits.

(a) Assessment of profits.
(b) Interest on profits—When could be granted.
(c) Lambardar—Rights of.
(d) Liability of co-sharers inter se.
(e) Maintainability.
(f) Negligence—Liability for.
(g) Parties to suit.
(h) Proportionate share—When could be claimed.

26. (a) Assessment of Profits.

——Co-sharers—Suit for profits—Assessment.

In a suit for profits by co-sharers against the managing co-sharer it is open to the managing co-sharer to state the details of payment made by him on behalf of the estate, and such payments should be taken into account in assessing the profits due to co-sharers and such sums cannot be regarded as set-off necessitating additional court-fee by the defendant. 7 O.W.N. 147=A.I.R. 1930 Oudh 140.

——Claims for profits—Basis of assessment.

Profits in respect of land should be allowed not on the basis of actual collections nor according to the gross rental as calculated for the entire village, nor should they be allowed according to the circle date; but should be allowed according to the boundary rate of the lands of the village in which it is situate. 107 Ind. Cas. 865=A.I.R. 1928 Oudh 300.

——Jagir—Profits.

Profits of co-sharers in jagir land can be ascertained according to the letting value of the home farm land. 55 Ind. Cas. 652 (Nag.).

——Suit for rent—Decree—Defendant not to be liable except for surplus not realized from sale of patni.

Where a co-sharer zemindar obtained a decree against the tenant on condition that she can hold them personally liable only for any surplus remaining unsatisfied after the sale of the property in

arrear and in execution, the patni was purchased by the zemindar co-sharer herself, held in a suit for arrears of rent accrued due prior to the purchase that the plaintiff could not obtain a personal decree against the defendants that the decree which the co-sharer landlord obtained was a money decree and the purchase was subject to the liability to the rent due prior to the sale. 14 Ind. Cas. 49 (Cal.).

——Purchasers or mortgagees of specific plots from other co-sharers—Form of decree.

When a co-sharer makes a usufructuary mortgage of part of his share or of specific plots of which he is in exclusive possession, the Court in a suit for profits should regard the co-sharer and his mortgagee as a single unit. If that co-sharer and his mortgagee together are in receipt of a greater share of profits than they are entitled to, then a decree should be passed against them in favour of a plaintiff who is in receipt of less profits than he is entitled to by his share. The adjustment between the co-sharer and his mortgagee of the liability which they jointly incurred to such a plaintiff is a matter for the co-sharer and his mortgagee to settle between themselves.

The question of the sale of a specific plot by a co-sharer is similar. If a co-sharer chooses to sell a specific plot, then that plot must still be considered as part of his share for the purpose of a suit for profits. A.I.R. 1931 All. 668=1931 A. L.J. 589=53 A. 794=133 Ind. Cas. 476=15 R. D. 554.

——Co-sharers—Suit or profits—Onus of proof.

Where the plaintiff himself calls upon the defendant to produce account books and the defendant denies having any, the only course for the Court to follow is to issue a preliminary decree against the defendant to render an account. 9 N.L.J. 7=93 Ind. Cas. 196=A.I.R. 1927 Nag. 62.

——Suit for profits—Claim for deductions—Onus of proof.

In a suit for profits when certain deductions are to be made from the gross income for expenditure it is for the defendant to prove each item of expenditure alleged by him and not admitted by the plaintiff, with proper accounts and vouchers. 93 Ind. Cas. 196=9 N.L.J. 7=A.I.R. 1927 Nag. 62.

——Appropriation of profits by some—Compensation for loss due to deprivation.

Some of co-sharers deprived of use and occupation of land and of the use of profits by other co-sharers appropriating the profits—In a suit for share of profits, former should be compensated for the loss which they have suffered by such deprivation. A.I.R. 1936 All. 706=1936 A.L.J. 984=1936 A.W.R. 700=1936 R.D. 298=165 Ind. Cas. 266.

——Suit for Profits—Nature of profits.

A co-sharer can claim his proportionate share of the profits of the property but these profits must be the real profits of the property. 107 Ind. Cas. 192 (Oudh).

26. (b) Interest on profits—When could be granted.

——Co-sharers—Suit for profits—Interest—Liability to pay.

A co-owner who has appropriated the profits to the joint property for a number of years is liable on equitable grounds to pay interest even for period anterior to the suit. 83 Ind. Cas. 572=3 Pat. 311 =6 P.L.T. 297=A.I.R. 1924 Pat. 633.

——Interest whether can be awarded—Power to award interest on equitable grounds—Contract Act (9 of 1872), S. 73 (n), scope of.

Where a co-sharer has collected rent on behalf of himself and other co-sharers, in a suit by the latter for their share of the rent, an equitable rate of interest may be awarded in favour of the plaintiffs on the amount due to them for the period during which it was withheld from them. A.I.R. 1932 All. 505 =1932 A.L.J. 733=139 Ind. Cas. 158.

——A co-owner who has appropriated the profits from the joint property for a number of years is liable on equitable grounds to pay interest even for period anterior to the suit. 83 Ind. Cas. 572=6 P. L.T. 297=3 Pat. 311=A.I.R. 1924 Pat. 633.

26. (c) Lambardar—Rights of.

——Lambardar cannot claim a specific percentage as expenses incurred in collection of profits in a suit for profits among co-sharers. 88 Ind. Cas. 134= 12 O.L.J. 272=28 O.C. 217=A.I.R. 1925 Oudh 432.

——Where the lambardar planted some usar in the groves jointly held and he contended that he should retain the profits accruing thereupon:

Held, that in the absence of clear evidence of an agreement amongst the other co-sharers, the lambardar should re-imburse himself for any expense in planting the *usar* by taking the whole profits, the plea of the lambardar was not maintainable. 88 Ind. Cas. 134=12 O.L.J. 272=28 O.C. 217=A.I. R. 1925 Oudh 432.

——In a suit for profits by a co-sharer against a *lambardar* the question is one of accounts and unless the *lambardar* has deliberately or contumaciously refused to render accounts or pay what is due to the co-sharer he cannot be made liable for interest on what may eventually be found due when the accounts are adjusted. 65 Ind. Cas. 373=8 O.L.J. 630= A.I.R. 1922 Oudh 107.

——A Court is certainly competent to award a share of the profits of an estate in favour of a sharer as against a lambardar on the basis of a demand when there is a finding to the effect that the lambardar has collected more than he admits that he has collected. A.I.R. 1926 Oudh 593, Foll. 100 Ind. Cas. 526=A.I.R. 1927 Oudh 559.

——Lambardar is prima facie entitled to recover rent on behalf of all co sharers.

In the absence of a clear indication to the contrary the lambardar is the person who would be entitled to recover the rent. (42 All. 414, Foll.) Where the record-of-rights gives the lambardar a right to recover the rent; the lambardar is the appointed agent of the co-sharers within the meaning of S. 194. If the lambardar is not entitled to bring a suit for arrears of rent he cannot sue to recover only his share of it. 87 Ind. Cas. 197=A.I.R. 1925 All. 817.

——Suit for profits—Liability to pay.

Where a lambardar makes a collection not only on his own account but also for other co-sharers, even if the profits may not be in excess of his own share, the lambardar is liable to pay other co-sharers their share in collection. 1930 A.L.J. 286=A.I.R. 1930 All. 313.

26. (d) Liability of Co-sharers inter se.

——Co-sharer in exclusive possession not bound to pay profits to others.

Where one co-sharer is in separate possession of the common land (whether or not the portion of the land which he is occupying is in excess of the area that would fall to him upon partition) without objection from or ouster or exclusion of the other co-sharers, he is under no obligation either to account or to pay compensation to such co-sharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession. 55 Cal. 396=32 C.W.N. 291=109 Ind. Cas. 747=A.I.R. 1928 Cal. 216.

——Co-sharers colluding to deprive other co-sharers of property by purchase at Court sale for arrears of rent cannot retain property as against other co-sharers and aggrieved co-sharers are entitled to mesne profits, while out of possession.

A property was put up for sale for arrears of rent. One of the co-sharers charged to deposit the amount in Court and avoid sale colluded with the third person who was also a co-sharer and with a view to deprive the other co-sharers of the property caused the property to be sold. The property was purchased by the (third person) co-sharer promising four annas, share to the co-sharer charged to deposit the amount. Aggrieved co-shares brought a suit for setting aside the sale.

Held, that the purchasing co-sharer was to be regarded to be in possession of the property for the benefit of the aggrieved co-sharers according to their several interests at the date of sale. The purchasing co-sharer and the colluding co-sharers were in the position of trustee on behalf of the co-sharers and as soon as the aggrieved co-sharers deposited in the Court their share of the purchase money according to their share of the estate with interest thereon they would be entitled to a reconveyance of the property with respect to their shares as well as to profits received by them. A.I.R. 1929 Cal. 558.

——Where two co-sharers start a **hat** on joint land and where subsequently one of them makes improvements in the *hat* at his own expense, he cannot on that account, exclude the other co-sharer from that *hat* which the two had started for their joint benefit. 82 Ind. Cas. 290=A.I.R. 1925 Cal. 266.

——Property in possession of one of partners—Produce received by, on behalf of all partners.

Where the produce of the property was being received by the firm on behalf of all the partners who composed that firm, the possession of the property by one of them must be, in the absence of any overt and adverse act, regarded the possession on behalf of the others as well. A.I.R. 1944 Lah. 58=45 P.L.R. 441=212 Ind. Cas. 416.

——Where a co-sharer has been kept out of possession wrongly by another co-sharer, a suit for contribution by the latter for rent paid by him during the period of dispossession does not lie against the former, for it is the latter that has enjoyed the profits of the land during the year for which he seeks contribution from the former. 6 C.W.N. 903, Foll. 110 Ind. Cas. 435 (Cal.).

——Profits.

A co-sharer in possession of land in excess of his share under a private arrangement between the co-sharers is not liable to account for profits to the co-sharer who has land less than he is entitled to. 33 Ind. Cas. 371 (Pat.).

——Mesne profits—Recovery of possession by one co-sharer from another.

In a suit by one co-sharer against another for recovery of possession of his share in certain joint property, mesne profits will be awarded only if there has been an ouster. 23 Ind. Cas. 122 (Cal.).

26. (e) Maintainability.

——Co-sharers—Suit for profits—Maintainability of.

Suit for profit by co-sharer on ground that defendant realized in excess of his share does not lie where plea is not substantiated. 118 Ind. Cas. 804=A.I.R. 1930 Oudh 16.

——Suit for profits alone—Without a relief for possession is maintainable.

Where one co-sharer stated in his plaint "accordingly 25 acres of home farm and of the *izara* was to be partitioned, but defendant No. 1 did not partition the same and wrongly cultivated it and enjoyed the produce thereof, and accordingly, the defendants should have paid the amount of the plaintiff's share to them, but they did not pay it and wrongfully appropriated it to themselves."

Held, the suit is in substance one by a person claiming to be a joint owner against the managing proprietor for his share of the village profits that in the passage quoted above the plaintiffs mean to assert that the defendant No. 1 refused to effect a partition and put the plaintiffs in possession of their share and withheld their share of the profits which he had no right to do and that the suit is maintainable without a relief of possession. 72 Ind. Cas. 45=A.I.R. 1923 Nag. 229.

——Suit for profits against lambardar in respect of one plot does not lie.

A suit for a half share of the profits against *lambardar* was brought by the plaintiff assignee of a possessory mortgagee executed by the owners of a half share in a village in respect of their share in an *abadi* plot in the village:

Held, the suit as framed against an agent was not maintainable at the instance of the plaintiff alone and in respect of one plot. The principle enunciated in the English Statute, 4 Anne. 16, does not apply to *malguzari* villages. 18 N.L.R. 39=A.I.R. 1922 Nag. 164.

——Purchaser obtaining symbolical possession of an undivided share cannot sue for profits without suing for partition.

Plaintiff, who had purchased at an execution sale an undivided share in an ancestral property and got symbolical possession, sued for village profits:

Held, that the plaintiff cannot sue for profits when he has not sued for partition. 59 Ind. Cas. 428=A.I.R. 1921 Nag. 129.

——Co-sharers—Suit for rent—Suit by some of the landlords—Subsequent suit.

A subsequent suit by a co-sharer landlord for the arrears of his share of rent is not maintainable when in the previous suit for rent between another co-sharer and the tenant he was a party. 48 Ind. Cas. 536 (Cal.).

——Father dying intestate — Representatives of father entitled to rent till date of his death—Suit, for share in rent by some representatives against others—Suit if cognizable by Small Cause Court—Provincial Small Cause Courts Act (9 of 1887), Sch. II, Art. 28.

Under an award, a Muhammadan father was to remain in possession of a property and thereafter it was to belong to the sons of his first wife, the defendants. The lessee paid the rent in respect of one year, Rs. 500 on 1st Juy, 1928, to the defendants in the belief that on the father's death a few days before, the defendants alone were entitled to receive the rent in view of the award. The plaintiffs, the other wife of the father and her son, instituted a suit for recovery of their share of the sum of Rs. 500 paid by the lessee after the father's death to the defendants treating it as the father's property in which the plaintiffs were entitled to a share under Muhammadan law:

Held, that as between the father or those representing his estate and the defendants, rent payable by the lessee for the year was to be apportioned, that those representing the estate were entitled to rent in respect of the greater part of the year, that is from 1st July to date of the father's death while rent for the rest of the year belonged to the defendants:

Held, also, that the suit being clearly one for a share in property of the father who died intestate, it was excepted from cognizance of a Small Cause Court by Art. 28, Sch. II, Provincial Small Cause Courts Act. A.I.R. 1934 All. 453=149 Ind. Cas. 323=18 R.D. 351.

——Arrangement to set-off rent due from one co-sharer to another and to pay the balance, does not prevent a co-sharer from bringing a suit for recovering rent.

An arrangement whereby when rents are due to zamindars, each paying the rent to and receiving from the other, instead of each paying the amount to the other, the rent is set-off against each other and if there is any balance payable to either of them only the balance is paid cannot prevent the rent from being realized by a suit unless it is shown that the rent has been paid either by set-off or otherwise, but it is open to a defendant in such a suit to show that the rent has already been paid by set-off between the parties. 92 Ind. Cas. 905=A.I.R. 1926 Cal. 679.

——Rent suit—Compromise by one of the co-sharers—Effect.

Where a suit for rent at an enhanced rate was instituted by the whole body of co-sharer landlords, but subsequently one of the plaintiffs compromised the suit with the defendants:

Held, that the nature of the suit, as being one instituted by the whole body of the landlords, did not alter and that notwithstanding the compromise it was maintainable. 89 Ind. Cas. 177=A.I.R. 1926 Cal. 188.

——Landlord, whether can sue any co-sharer-tenant—Frame of suit, not so as to obtain rent decree—Presumption.

It is open to the landlord to sue any co-sharer in a tenancy as the co-sharers are jointly and severally liable in respect of the rent. He is entitled to a decree against such defendant and it is not a matter of concern in the suit itself whether the decree obtained is a rent decree or a money-decree, and indeed he must be presumed to accept the less valuable relief if he has not framed his suit so as to obtain a rent decree. A.I.R. 1935 Pat. 152 =1 B.R. 836=158 Ind. Cas. 51.

——Suit for village profits and rent suit, distinction—S. 116, Evidence Act (1 of 1872).

A suit for village profits does not stand on the same footing as a suit for rent to pay which is a recurring liability. A suit to recover rent proceeds on the relationship of landlord and tenant, irrespective of the title of the landlord. That is not so in a suit for village profits, in which the very right of the claimant to profits is his title, that is, the fact that he is a proprietor. S. 116 of the Evidence Act estops a tenant from disputing his landlord's title but it does not preclude a person from questioning the title of another person who claims to be his co-sharer. A.I.R. 1940 Nag. 396=1940 N.L.J. 499=191 Ind. Cas. 881.

——Suit for profits—Limitation.

Suit between co-sharers for a share of profits realized by the co-sharer in possession is governed by Art. 120 and not Art. 89, Limitation Act. A.I.R. 1936 All. 706=1936 A.L.J. 984=1936 A. W.R. 700=165 Ind. Cas. 266=1936 R.D. 298.

——Share in Moglai Hak sold by co-sharer without knowledge of another co-sharer—Suit by latter for share of sale proceeds—Limitation.

A co-sharer plaintiff claimed a share along with the defendant in a *Moglai Hak* (which was a right granted by the State to receive revenue) to receive the revenue in cerain village. The denfendant sold the *hak* without the plaintiff's knowledge. The plaintiff' demand in 1920, for his share in the sale proceeds was refused in 1925, and in 1927, the plaintiff instituted a suit to recover his share:

Held, that Art. 120 and not Art. 62 applied and the suit having been brought within six years from 1925, *i.e.*, the refusal of the demand, was in time. A. I. R. 1937 Bom. 217=39 Bom.L.R. 277=169 Ind. Cas. 232.

——Rent suit—Nature of decree.

Decree in rent suit instituted by a co-sharer without adding other co-sharers as party is merely a money decree and cannot be executed as rent decree. A.I.R. 1929 Pat. 588.

26. (f) Negligence—Liability for.

——Suit for profits—Negligence—Relevancy.

Where in a suit for profits against the lambardar the plaintiffs establish gross negligence on the part of the defendants, it is the duty of the latter to prove that he could not collect more than a percentage of gross rental. In the absence of such proof, a decree on the basis of the gross rental should be passed. 87 Ind. Cas. 1013=A. I. R. 1926 Oudh 159.

——Jagir village in Berar—Suit against managing co-sharer for profits of village—Negligence on part of managing co-sharer—Onus of proof — Method of calculating emoluments of village offices in Jagir.

In a suit by co-sharer against the manging co-sharer the plaintiff must prove that the managing co-sharer's negligence is responsible for short collections. The method of calculating emoluments of village offices in a Jagir explained. 13 N. L. R. 127=41 Ind. Cas. 848.

26. (g) Parties to suit.

——Suit for profits—Parties.

In a suit by a co-sharer for profits in a *mal guzari* village against lambardar—Other co-sharers need not be made parties even if he claims profits from excess *sir* and *khudhasht* land in their possession. 38 All. 223, Foll. 11 N.L.J. 113=A.I.R. 1928 Nag. 176.

——Suit for rent—Landlords—Right to .sue for rent—Parties.

A co-sharer landlord who has no right to separate collection, cannot maintain a suit for rent without implcaing the other sharers. 31 Cal. 707; 6 C.W.N. 326, Foll. 2 P. L. W. 227=42 Ind. Cas. 452.

——Suit for rent—Parties.

A suit for rent by some of the co-sharers making other co-sharers defendants is maintainable but not a suit for enhancement of rent. 38 Cal. 270=38 I.A. 1=15 C.W.N. 74=9 M.L.T. 1=13 C.L.J. 51=8 A.L.J. 1=13 Bom.L.R. 1=21 M.L.J. 92=(1911) 2 M.W.N. 149=8 Ind. Cas. 842 (P.C.).

——Suit for rent—Landlords—Rent — Purchase of under-tenure by one of them—Effect of.

Where a *darputni* is purchased by one of two landlords the other becomes the sole landlord, the rent due being one half of the original rent; and a suit may be instituted by him for recovery of arrears of rent under the provisions of the B. T. Act. 10 C.L.J. 517=3 Ind. Cas. 34.

——All co-sharers, whether should be impleaded—Co-sharers not necessary parties impleaded beyond limitation.

There is no statutory provision for the view that all the co-sharers must be impleaded in a profit suit whether they have collected any rent or not. The implication of all the co-sharers is desirable but not absolutely necessary. It is desirable but not absolutely necessary, that the Court must determine what the co-sharers are likely to get from the other co-sharers, or what the defendants have to pay to the other co-sharers who have not been impleaded. Consequently, where co-sharers, not necessary parties, were impleaded after limitation, the entire suit is not barred but only against those who were impleaded after limitation. A.I.R. 1936 Oudh 193=1935 O.W.N. 398=165 Ind. Cas. 33=1935 R.D. 160.

——Suit for rent—Parties.

In a suit for assessment of rent, the other co-sharers are not ordinarily necessary parties. 115 Ind. Cas. 518=32 C.W.N. 1238=A. I. R. 1929 Cal. 90.

——Suit for Rent—Parties.

A suit by a co-sharer landlord for an assessment of the rent of a tenant's holding is not maintainable where the other co-sharers have not been made parties either as plaintiffs, or defendants. 88 Ind. Cas. 687=4 Pat. 604=6 P.L.T. 367=1925 P.H.C.C. 125=A.I.R. 1925 Pat. 559.

26. (h) Proportionate share—When could be claimed.

——Co-sharers—Suit by one for his share of the rent.

In the absence of a contract between the individual landlord and the tenant, for payment of the share of the individual landlord separately, a separate suit by one of the landlords for his share of rent is not maintainable. 31 Cal. 707 and 4 Cal. 96, Foll. 7 P.L.T. 797=97 Ind. Cas. 569=A.I.R. 1927 Pat. 44.

——A suit for rent or customary dues of a raiyat must be a suit for the whole of the rent or dues. 19 Cal. 735 and 35 Cal. 744, Foll. 103 Ind. Cas. 624=A.I.R. 1927 Lah. 639.

——Co-sharer landlords cannot get a decree for rent of their share, if they fail to establish that there was a separate collection of their share of rent before. 96 Ind. Cas. 584 (Cal.).

——Suit for rent—Proportionate share—If binding on other co-sharer.

A joint owner is not entitled to sue for proportionate rent. But if the parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it. It is a question whether stranger co-sharers will be bound by the agreement between other sharers and the tenants. 23 M.L.J. 161=16 Ind. Cas. 458.

——Suit fof rent—Landlords—Suit for share of rent—Division.

A co-sharer can sue for his share of the rent if there is such an arrangement, without actual division of the lands. In the absence of separate collection, one co-sharer can maintain a suit for the whole rent making the other co-sharers parties to the suit. 16 C.W.N. 774=14 Ind. Cas. 292.

——Landlords—Settlement with tenant by some.

It is open to some of the co-sharer landlords to make a settlement proportionate to their share. 53 Ind. Cas. 260 (Cal.).

——Co-sharers—Successive rent suits against tenant.

In a suit for the entire rent by a co-sharer on the ground of an arrangement with the other co-sharers making the other co-sharers defendants in the suit, who do not contest the arrangement the tenant has no reason to complain if the plaintiff gets a decree for the entire rent as the co-sharers cannot sue the tenant again for the rent. 97 Ind. Cas. 444=A.I.R. 1927 Cal. 79.

——Co-sharer's right to sue for entire rent.

A co-sharer has a right to bring a suit for the entire rent by making his co-sharers parties to the suit. This is a general right which is conferred upon a co-owner irrespective of the special provisions of the Bengal Tenancy Act. 35 Cal. 331, Foll. 90 Ind. Cas. 673=A.I.R. 1926 Cal. 333.

——Suit for rent by a co-sharer cannot be changed into one for apportionment of rent.

A simple suit for rent cannot be converted into a suit for apportionment of rent. A suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants who are necessary parties. A co-sharer cannot as a matter of right, claim from the tenants what he estimates to be his proportiosate share of the rent; 83 Ind. Cas. 931=28 C.W.N. 967=A.I.R. 1925 Cal. 197.

——By co-sharer landlord — Other co-sharers joined as pro forma defendants—Their liability.

Co-sharer landlords who are joined as *pro forma* defendants in a rent suit by one of the co-sharer landlords are not entitled to treat the suit and exe-

cution of the rent-decree obtained therein as nullity. A.I.R. 1941 Pat. 546=22 P.L.T. 388=43 Cr. L.J. 101=197 Ind. Cas. 63.

——Without executing a decree for possession, a decree-holder cannot become a share-holder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. A.I.R. 1941 Pesh. 25=1941 Pesh. L.J. 25=193 Ind. Cas. 819.

——One of two co-sharers of ex-proprietary tenancy accepting whole of ex-proprietary rent in lieu of profits—Whether estopped from subsequently claiming profits.

Where in a suit for arrears of rent on the ex-proprietary holding, one of two co-sharers of the *khewat* number accepts the whole of the ex-proprietary rent from the other co-sharer who is the ex-proprietary tenant in lieu of his share of the profits, he is estopped from subsequently claiming a share of profits in the remaining portion of the *sir* land. A. I. R. 1940 All. 17=I.L.R. (1940) All. 8=1940 A.W.R. 129=187 Ind. Cas. 369.

——Division of profits, method of.

In the matter of division of profits between the co-sharers, the co-sharer *thikadar* is entitled to more favourable treatment:

Held, under the circumstances of the case that the plaintiff co-sharers should get their proportionate share out of fifty per cent. of the value of the total produce. A.I.R. 1940 Pat. 384=21 P.L.T. 1055 =186 Ind. Cas. 397=6 B.R. 365.

——Suit for rent by two co-sharer landlords—Execution of decree—Sale—Right of other co-sharer.

Where two co-sharer landlords have obtained separate decrees for rent and one of them sells the tenure in execution of his decree, the other cannot claim to execute his decree by sale of the properties after the same has passed into the hands of the auction-purchaser. 16 C.W.N. 701=14 Ind. Cas. 568.

——'Profits on account of a year,' meaning of.

The expression "profits on account of a year" means the profits which arise out of the rental demand for that particular year irrespective of the year in which the collections are made. This expression cannot include arrears previous to the year with reference to which the profits are stated to arise. A.I.R. 1939 All. 449=1939 A.L.J. 353=1939 A. W.R. 321=183 Ind. Cas. 432=1939 R.D. 236.

——Co-sharer mortgaging part of share or specific plots—Decree.

When a co-sharer makes a mortgage of part of his share or of specific plots of which he is in exclusive possession, a Court in a suit for profits should regard the co-sharer and his mortgagee as a single unit and a decree can be passed against the mortgagee also. A.I.R. 1938 All. 108=1937 A.L.J. 1354=1938 A.W.R. 19=174 Ind. Cas. 60=1938 R. D. 139.

——Suit for arrears of ex-proprietary rent by some only of co-sharers — Ex-proprietary rights arising on sale and on mortgage.

A co-sharer, who transfers his share to another, becomes an ex-proprietary tenant not only of his transferee but of the entire body of co-sharers. There is no distinction between the incidents of ex-proprietary rights arising on a sale and those of such rights arising on a mortgage. It is because of the fact that a co-sharer, is not an absolute proprietor of his Sir land but owns it jointly with the other co-sharers that an ex-proprietary tenant has been held to be a tenant of all the co-sharers, and this reason exists both in the case of a sale and of a mortgage. A.I.R. 1936 Oudh 147=1936 O.W.N. 36=11 Luck. 640=159 Ind. Cas. 778.

——Profits from building lease—Sayar, meaning of.

There is no provision in the Agra Tenancy Act by which the profits from a building lease, even if an annual rent had been reserved, could be taken into account in a suit for profits. *Sayar* which is defined in S. 3 (4) is not defined in a way which would include the annual rent from a building lease. A.I.R. 1935 All. 967=1935 A.W.R. 1369=161 Ind. Cas. 358=1935 R.D. 410.

——If cognizable by Civil Court.

A suit by a co-sharer of an ex-proprietary tenure against other co-sharers, for his share of the profits, is within the jurisdiction of the civil Court. A.I.R. 1935 All. 545=1935 A.L.J. 482=1935 A.W.R. 453=57 All. 854=1935 R.D. 159=155 Ind. Cas. 38.

——Recorded co-sharers—Grove land held in patti exempt from revenue—Co-sharers' liability to pay revenue.

Recorded co-sharers will not be exempt from liability to pay revenue according to their recorded shares in the *patti* on the ground that the grove land is exempt from revenue and that they enjoy the grove in lieu of their share of profit. A.I.R. 1934 All. 937=152 Ind. Cas. 828=18 R.D. 324.

——Profits collected in one year—Suit after its expiry — Payment of revenue by original proprietor.

As a matter of practice, suits are instituted and decreed in respect of collections made in a certain year for that year and the years preceding. There is nothing in law to prevent a co-sharer from claiming his share of the profits for a certain year collected in that year and after its expiry. A co-sharer is entitled to a share of profits left after payment of Government revenue and other charges even if revenue had been paid by the original proprietors. A.I.R 1934 All. 311=3 A.W.R. 325=148 Ind. Cas. 884 (2)=18 R.D. 91.

27. Trespassers—Rights against.

——Co-sharer—Right against trespasser—Ejectment—Tenant—Trespasser.

No co-sharer landlord singly can eject a tenant unless he represents the other co-sharers, but the case of a trespasser is different. A man inducted into the land by a co-sharer and who remains therein for many years is *prima facie* a tenant. 45 Ind. Cas. 496 (Nag.).

——Right against trespasser—Ejectment—Right of one to eject.

A person who is wrongfully, dispossessed from property is entitled to sue for its possession. It is not a defence to the suit that the plaintiff is not the sole owner of the property. 43 Ind. Cas. 395 (Nag.).

——Right of suit of one to eject a trespasser.

One co-owner may sue to eject a mere trespasser when his object is to remove an intruder from the

joint property without at the same time claiming any portion of it himself. (1904) 1 A.L.J. 543.

——Right against trespasser—Ejectment—Suit to be brought only by the entire body of co-sharer landlords.

If a lambardar co-sharer landlord seeks to maintain such suit, he can do so only as the agent of the whole body. The institution of a suit for ejectment against a purchaser is not one of the duties which a lambardar has to perform as the representative of the landlords. A lambardar has no power to eject trespassers or tenants. 3 P.L.J. 88=44 Ind. Cas. 317.

——Co-sharer—Right against trespasser.

Any one of co-owners or co-tenants is entitled individually to maintain an action in ejectment against a trespasser. 7 Cal. 414; 15 Cal. 40; 5 All. 602; 6 M.L.J. 27, Foll. 39 Mad. 501=28 M.L.J. 598 =2 L.W. 460=17 M.L.T. 387=29 Ind. Cas. 60.

——Suit against, if can be brought by one of co-parceners or co-owners—Decree.

Where property is held in coparcenary or in co-ownership, it is not necessary for all the coparceners or co-owners to join in a suit for the ejectment of trespassers and a decree for the recovery of possession of the entire property can be passed even when the suit is brought by only one of the several coparceners or co-owners. The principle on which the rule is based is that the right of each co-parcener or co-owner extends to the whole property jointly with the others and the step taken to recover the property is for the obvious advantage of all the coparceners or co-owners. The same rule applies to a claim for mesne profits or compensation and one of several co-owners is entitled to recover from the trespasser the whole of the profits which are payable by the trespasser on account of his wrongful possession, and the whole of the compensation payable on account of injury caused to the property. A.I.R. 1942 All. 358=1942 A.L.J. 411=I.L.R. (1942) All. 671= 1942 A.W.R. 278=203 Ind. Cas. 223.

——Rights against trespasser—Suit by one joint owner — Other co-owners made defendants—Decree, form of.

In a suit against a trespasser by one joint owner where the other joint owners are made defendants because they would not join as plaintiffs, the decree should be one for possession in favour of the plaintiff on his own behalf and on behalf of his co-owners to the extent of their respective shares. 12 A.L.J. 23=22 Ind. Cas. 841.

——Suit by one co-owner alone without joining others.

One of several co-owners is entitled to maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. Where the plaintiff is the owner of a share of one of the mortgagors, in principle there is no bar to his obtaining possession of the mortgaged property. A.I.R. 1941 Pat. 351=193 Ind. Cas. 253=7 B.R. 520. *See also* A.I.R. 1941 Pesh. 69=196 Ind. Cas. 301 and A.I.R. 1931 All. 695=133 Ind. Cas. 427.

——Stranger in possession with express sanction of one of co-sharers—Other co-sharers, if can eject him from whole land.

If two persons are joint owners and a third person holds the land with the express sanction and acquiescence of one of the co-sharers, he cannot be ejected from the whole of the land by the other co-sharer. The latter can get a joint possession to the extent of his share. A.I.R. 1935 Cal. 646=40 C.W.N. 81=158 Ind. Cas. 445.

——Right against trespasser — Ownership — Tenants-in-common—Right.

The right of a tenant-in-common to recover the whole property as against a trespasser is a right which he is entitled to assert, only on behalf of himself and his co-tenants. He cannot do so in the assertion of right in himself to the whole property. A tenant-in-common is not bound to make a claim on behalf of his co-tenants. 17 Ind. Cas. 136 (Mad.).

——Rights against trespasser—Ejectment by co-sharer landlord — Trespasser — Tenant—Effect.

A co-sharer landlord cannot by himself sue to eject a tenant; but he can so sue a trespasser such as a transferee of a non-transferable holding. 11 Ind. Cas. 84 (Cal.).

——One of co-sharers, if can maintain suit against trespasser — Muhammadan law — Bequest of whole estate to one heir.

One co-sharer of property can maintain a suit against a trespasser without impleading all the other co-sharers. Under Muhammadan law a bequest of the whole of the estate to one heir is *prima facie* not valid. A.I.R. 1942 Pesh. 9=198 Ind. Cas. 803.

28. Who are co-sharers.

——Co-sharers — Intention of parties — Jugal relationship.

In execution of a rent decree, *A's* land was sold and purchased by *B* who sold a part of it to *C* and the remaining portion to *D* who in his turn sold it to the plaintiff. A title suit in connection with this land by *A* was eventually compromised. By the compromise *C* and the plaintiff surrendered half to *A*. No terms *inter se* were arranged between them as to the mode in which the balance was to be divided:

Held, that the plaintiff could not claim *khas* possession. He was really a co-sharer with *C* and *A*. Since both *C* and the plaintiff allowed *A* to recover half, it was only reasonable to suppose that the intention was that they should each surrender half of their own respective interest. A.I.R. 1941 Cal. 449=197 Ind. Cas. 495.

——Partners, if co-owners.

The view that partners cannot be regarded as joint owners of the partnership property is not correct. A.I.R. 1937 Mad. 308=(1937) 1 M.L.J. 174=45 L.W. 123=1937 M.W.N. 379=I.L.R. (1937) Mad. 553=167 Ind. Cas. 439 (S.B.).

——Usufructuary mortgagee becomes co-sharer by virtue of a mortgage.

Where a holding was undivided and the mortgagors remained in possession as proprietors of half the holding and the usufructuary mortgagee was in possession of the other half:

Held, that the mortgagee became a co-sharer by virtue of his possessory mortgage of the other undivided half. A.I.R. 1935 Lah. 441.

——Plaintiffs alleging to be fractional landlords but alleged by defendant to be trespassers.

The fact that the plaintiffs claim to be fractional landlords will not make them co-sharers with the person who alleges them not to be his co-sharers but

to be trespassers. A.I.R. 1934 Pat. 485=15 P.L. T. 342=154 Ind. Cas. 1032. *See also* A.I.R. 1930 All. 729.

——When a village is partitioned into separate mahals, proprietors who merely own properties in the village, but in separate mahals, cannot be deemed to be co-sharers of each other. 95 Ind. Cas. 268=A. I.R. 1926 All. 479. *See also* A.I.R. 1930 All. 729.

——A person who has got an undivided share in the holding as well as a person who has become interested in a particular area of the holding is co-sharer and is entitled to maintain a suit for apportionment of rent. 5 Cal. 902, Foll. 90 Ind. Cas. 673=A.I.R. 1926 Cal. 333.

——Co-ownership of Muhammadans and joint ownership of Hindu family—Distinction.

There is a difference between the co-ownership of Muhammadans and the joint ownership of a joint Hindu familly, for, while in a joint Hindu family all the coparceners have a share in the whole property. among Muhammadans who inherit as heirs each one has a specific share. A.I.R. 1939 Sind 315=I. L.R. (1939) Kar. 597=185 Ind. Cas. 11.

——One co-sharer alienating plot of land in mahal to stranger—Whether gets good title.

Partition of a *mahal* can only take place by consent of all the co-sharers or through Court at the instance of one or more of them. It cannot be begun by some of the co-sharers alienating part of the joint property without the consent of the others. And where such an alienation is made by one of the co-sharers, the stranger-alienee does not become a co-sharer and he can only get valid title to the plot by adverse possession. A.I.R. 1937 Oudh 503=1937 O.W.N. 1036=171 Ind. Cas. 89=1937 R.D. 528.

——Co-owners—Evidence of title—Living together—Not indicative of joint ownership.

Two Mahomedan cousins living together on a property would not indicate that they were joint owners thereof. 19 C.L.J. 539=25 Ind. Cas. 588.

29. Miscellaneous.

——Principles governing grant of injunction claimed by tenant-in-common are different.

Where the parties are not divided but are only tenants-in-common in a house and for the sake of convenience each is in possession of some particular portion, the principles governing the Court in respect of grant of injunction at the instance of one tenant-in-common as against other are essentially different from those governing the Courts in respect of a grant of injunction between neighbouring owners of land or houses. Where there are no materials on record from which the Court can come to the conclusion whether a proper case has been made out for the grant of an injunction as between tenants-in-common, no injunction can be granted. 120 Ind. Cas. 737=A. I.R. 1930 Mad. 236.

——Whenever a property is found to be not partible, it does not necessarily follow that the propery cannot be joint. 104 Ind. Cas. 563=28 P.L.R. 590=A.I.R. 1927 Lah. 718.

——If all the co-owners of property acquiesce in a gift of it by one of them it is a gift by all of them. 97 Ind. Cas. 331=A.I.R. 1926 Nag. 320.

——Delay in taking legal proceeding is immaterial if remedy is not barred.

The caution and the carefulness which is expected of a co-owner with reference to an infringement of his right are greater than those expected of a neighbouring owner. But mere delay in taking legal proceedings is not acquiescence so long as the remedy is not barred by limitation. The onus of proving acquiescence is on the party alleging it. 82 Ind. Cas. 309 =A.I.R. 1925 Cal. 288.

——Transferee of a co-sharer cannot be saddled with liabilities for misdeeds of negligence of transferor subsequent to the transfer. 80 Ind. Cas. 920 =A.I.R. 1925 Nag. 68.

——Execution of mortgages and their registration by one co-owner cannot be held to give to other co-owners notice of dealings with the property. 77 Ind. Cas. 516=A.I.R. 1923 Lah. 522.

——Right of survivorship negatives the rights of the representatives of co-owner to succeed to him on his death. 64 Ind. Cas. 481=14 M.L.W. 33=1921 M.W.N. 434=A.I.R. 1922 Mad. 357.

——Even if the settlement is by some of the landlords the title of the tenant cannot be said to be so defective as to render him a trespasser on the strength of it. 80 Ind. Cas. 568=6 P.L.T. 142= 4 P.L.T. 696=A.I.R. 1921 Pat. 463.

——Common well—Right to irrigation—Implied right.

Where several persons jointly own a well, it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent field. The line of irrigation, once determined, cannot be altered at the caprice of any co-sharer and it is a fair presumption that the shortest line would be that selected by the co-sharers. 2 P.W.R. 1920=2 U.P.L.R. (Lah.) 18=54 Ind. Cas. 104.

——Co-owners—Rights in joint property.

One joint owner of private property cannot do anything which will enhance his interest in the joint property. If one joint owner of a passage builds a balcony projecting over the passage, the other joint owner can sue for its removal. 15 A.L.J. 293=39 Ind. Cas. 739.

——Dispossession of one parcel, whether by co-owners or trespassers.

Where there is nothing to show that all disputed parcels form one property, the mere fact that the defendants dispossessed the plaintiffs of the first parcel would not lead to the inference that the acts of possession must be attributed to their character not of co-owners but of trespassers. 1 Ind. Cas. 252 (Cal.).

——Ejectment—Joint holding—Co-sharer in possession for cultivation—If can create occupancy tenure—Remedy of other co-shares.

No co-sharer of a joint holding can create an occupancy tenure in any field though he is in possession of it separately for purposes of cultivation and any one who creates such a tenure can be treated as a trespasser and a suit will lie to eject him from the joint holding. 8 P.W.R. 1912=144 P.L.R. 1912 =13 Ind. Cas. 857.

——Landlords—Suit for injunction by one co-sharer against tenants

It is competent to one of several co-sharer landlords if he can make out a case, to obtain, an injunc-

tion against a tenant, especially where the rights of the landlords are in danger of being jeopardized. 55 Ind. Cas. 951 (Cal.).

——Landlords—Purchase of occupancy holding by one—Purchaser, if settled raiyat.

Where a co-sharer landlord acquires the occupancy right of a raiyat, he holds the raiyat's interest without the right of occupancy. Though, he occupies the land for more than 12 years, he does not become a settled raiyat so as to be protected from eviction by an auction-purchaser under the Bengal Land Revenue Sales Act. 55 Ind. Cas. 510 (Cal.).

——Patti Ikrar Malikkam debt—Custom—Ejectment.

Plaintiff pattadars sued to eject defendants other pattadars of the village who had directly obtained portions of house sites from the tenants of the plaintiff and added them to their own. This was contrary to the Ikrar Malikkam debt:

Held, that the plaintiff could maintain the suit. 21 Ind. Cas. 256 (Oudh).

——Raiyati interest—Purchase by co-sharer landlord—Rights of.

A co-sharer landlord purchasing the interest of a *raiyat*, does not obtain all the lawful privileges of the *raiyat* but if he purchases the rights of a person in *khas* possession he is entitled to all the rights. 19 Ind. Cas. 615 (Cal.).

——Right to set aside patni sale.

One co-sharer of a *patni* Taluk may sue alone to set aside the whole auction sale on the ground that it is illegal, fraudulent or without jurisdiction especially if all co co-sharers are parties to the suit. 14 C.W.N. 128=11 C.L.J. 34=2 Ind. Cas. 77.

COSTS.

(i) Cross references.

(a) Discretion of Court.
(b) Minor—Costs against.
(c) Mortgage suit—Costs in.
(d) Particular cases.
(e) Suit for.
(f) Taxation of.
(g) Miscellaneous.

Costs.

See also C. P. CODE, Ss. 35, 35-A, 140, 145 AND 148.

——Adjournment. See (1) C.P. CODE, O. 17, R. 1. (2) CR. P. CODE, S. 344.

——Compensatory. See (1) C. P. CODE, S. 35-A. (2) CR. P. CODE, S. 250.

——Legal practitioner's lien. See (1) BAR COUNCILS ACT, S. 12. (2) LEGAL PRACTITIONER.

——Maintenance proceedings. See CR. P. CODE, S. 488.

——Mortgage suit. See C. P. CODE, O. 34, R. 10.

——Security for. See C. P. CODE, O. 25

——Appeal. See C.P. CODE, O. 41. Rr. 10 AND 35.

——Privy Council appeals. See C. P. CODE, O. 45, R. 7.

——Set-off. See C. P. CODE, O. 20, R. 6.

——Transfer of crimina , case. See (1) CR.P. CODE, S. 526. (2) PRACTICE.

(a) Discretion of Court.

——Discretion as to—Order by trial Court—Interference by appellate Court—Rule.

It is very rarely that a Court of appeal interferes with an order of costs made by the trial Court which is purely discretionary; special grounds for interference must be shown before the Appellate Court will interfere. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

——Order as to—Pauper minor plaintiff—Direction to pay costs—If a proper exercise of discretion.

Though a trial Judge undoubtedly has a discretion as to the manner in which he would deal with costs, it is not a sound exercise of his discretion to order costs to be paid by a minor suing as a pauper. Obviously such an order is not likely to be effective. 75 I.A. 259=I.L.R. (1948) Bom. 639=51 Bom. L.R. 173=62 L.W. 35=A.I.R. 1949 P.C. 35=(1949) 1 M.L.J. 172 (P.C.).

——Matrimonial suit—Discretion of Courts—Costs of wife—Award against her husband—Guilty and unsuccessful wife—If to be refused costs.

The general rule in matrimonial suits is that the wife should be given her costs from the husband even where she is unsuccessful and irrespective of whether she was the plaintiff or the defendant. The question of costs is one entirely in the discretion of the Court and in a fit case the Court has power to refuse to allow a wife, her costs. It is not the normal practice, however, to deprive an unsuccessful and guilty wife of her costs. 48 Bom. L.R. 36.

(b) Costs against Minor.

——Minor suit by—Costs—When could be ordered.

Where a defendant admitted liability for a debt but refused to pay it to the minor legal representative of the deceased creditor unless his interests were safeguarded:

Held, that the defendant was not legally bound to pay the money to the minor till he was satisfied that his interest would not suffer and that therefore in a suit by the minor's next friend for the debt the defendant should not be made liable for the plaintiff's costs. 64 Ind. Cas 385 (Lah.).

——Minor—Defendant is not entitled to costs.

Where the plaintiff sued for cancellation of a bond, held, as the defendant could not enforce the contract being void, he was not entitled to costs. 69 Ind. Cas. 888=9 O.L.J. 404=25 O.C. 237=A.I.R. 1922 Oudh 271.

(c) Costs in Mortgage suits.

——Redemption suit—Huge difference between parties as to amount.

Where in a redemption suit there is a huge difference between the parties as to the amount, the successful party ought to get costs in proportion to his success. In such a case it would not be proper to order each party to bear his own costs. A.I.R. 1950 Kut. 90.

(d) Particular cases.

——Administration suit—Order that cost of parties should be paid to their respec ve

attorneys out of estate—Payment to plaintiff's attorney pursuant to o d:r—Order subsequently set aside wi'hout no:ice to him—Fresh order directing him to refund money—Legali'y.

An order for costs was passed in an administration su t d rect ng that costs of the parties should come out of the estate and be paid to their respective attor eys. Pursuant to this order a sum of money was paid to the plaint.ff's attorney. Subs quently on an appl cation by one of the parties this order was s t aside without notice being given to the plaint ff's attorney in his personal capacity, and a fresh order was made that the pla nt ff should bear her own costs and that her attorney should refund the money paid to him.

Held, (i) that the prev ous order did not purport to create any rights in the attorneys directly, that the parties alone were affected by that order and in the application made to set aside that order there was absolutely no neces:ity to give notice to the attorneys of the part es in their personal capacity.

(ii) that the payment made to the plaintiff's attorney was really a payment to the plaintiff through her attorney and that the subsequent order which altered the plaintiff's rights rendered her, and not her attorney, liable to refund the s me. 1 L.R. (1945) 1 Cal. 443=A.I.R. 1949 Cal. 422.

——Advantageous position—When in an advantageous position, appellant was asked to bear his costs.

A property was leased to the Appellant on condition that the lease could not be cancelled for three years. The property was sold to the lessee. A creditor or rather the Receiver of his estate got the sale set aside in the High Cou t. He d.d not appear to support the dec:sion set aside in Privy Cou:cil. Held, if for commercial reasons it suited the lessees to accept the order of the Chief Court to hold the premises during the remainder of their lease and then get out of what m ght by reason of changes in commerce be a bad bargain, they were in a position to do so by abandoning their appeal. If, on the other hand, it suited them, as apparently it had suited them, to re-establish their sale in th s case, they had only to bring their case to a hearing. In these circumstances, there was no hardship in making them b.ar their costs of the appeal to His Majesty. 69 Ind. Cas. 356=32 M L.T. 15=27 C.W.N 509=1923 M.W.N. 388=A.I.R. 1922 P.C. 361=47 M.L.J. 322 (P.C.).

——Costs—Agitation in appeal—Court-fee—Necessity.

Where the entire decree is appealed against it would be open to the appellant to argue against the order of costs made against him without paying a separate court-fee for costs. 1949 A.M.L.J. 73=A.I.R. 1950 Ajmer 7.

——Appeal as to costs only—When lies—Scop- of the powers of the appellate Court—Compee tency of the appellate Court to go into merits of the case and come to a different conclusion from that of the trial Court.

Appeal lies against an order of costs only when that order involves a matter of principle or where there has been no real exercise of discretion in making the order of costs. If the discretion was exercised in fact, the appellate Court would not interfere merely because it would itself have exercised the discret on in a different way.

The trial Court while decreeing a plaintiff's suit and declaring that he was entitled to irrigate his lands from a particular canal negatived his right to cut a vent in the canal at a part cular point and suggested that the pla ntiff should seek the help of the Govenment in the matter and allowed the plaint ff only half the costs of the suit. In an appeal by the plaintiff against the order of costs the lower appellate Court in holding that trial Court was not just fied in disallowing the plaintiff half the costs, w nt into the whole question and came to the conclusion that the plaintiff was entitl d to cut a vent in the channel at the place claimed by him. In second appeal,

Held, as it could not be sa d that the exercise of discretion by the trial Court was not proper in the circumstances, the lower appellate Court was not justfied in go ng into the m rits and com ng to a different conclusion from what the trial Court came to, in appeal for costs only, without there being any appeal on the other parts of the decree. A.I.R. 1950 Mad. 36=(1949) 2 M.L.J. 243.

——Contribution when could be ordered.

Where all the defendants equally contested the partit on su t and were directed to pay the plaint.ff's costs and one of the defendants paid the costs,

Held, that the plaintiff is entitled to contribution from h s co-defendar ts unless there are equities to defeat this course. 80 Ind. Cas. 526=48 Bom. 351 =26 Bom. L R. 218=A.I.R. 1924 Bom, 318.

——Contribution for—Presumption as to.

When a person institutes a suit and obtains a decree and puts it in execution and the property is purchased by him finally there is a *prima facie* ground for holding that he has incurred the necessary expenditure relating to these proceedings and the plaintiff claiming against him under a better title must contributo in respect of the said expenditure. 78 Ind. Cas. 393=10 O.L.J. 481=A.I.R. 1924 Oudh 218.

——Contibution—Su't for.

Suit for contribution lies in respect of costs awarded jointly against co-plaintiffs or co-defendants. 77 Ind. Cas. 749=26 O.C. 196=A.I.R. 1924 Oudh 48.

——Costs as a charge—Costs being a charge on property or not depends on interpretation of the decree in each case.

Cons'ruction of a decree should accord with C. P. Code, O. 34, R. 7.

It is open to the appellate Court either to pass a personal decree against the unsuccessful party or to make the costs payable out of the mortgage property. In every case it was a matter of interpretation what was intended by the appellate Court. That construction of the decree should be adopted which is in accordance with the law as laid down under O. 34, R. 7 and the universal practice of the Courts in such cases is that the costs of the suit should form part of the sum payable in order to effect redemption. 87 Ind. Cas. 585=6 L.R.A. Civ. 225=A.I.R. 1925 All. 492.

——Criminal cases—when could be claimed.

Where a person claims damages for obstruction while going by a public road, he cannot claim damages for costs incurred in employing and instructing counsel and assisting Prosecuting Inspector in the riot case consequent upon such obstruction. 119 Ind. Cas. 149=29 M.L.W. 604=1929 M.W.N. 341 =A.I.R. 1929 Mad. 493.

——Decree for plaintiffs—Defendants alienees of portions of property—Possession with mesne profits and costs decreed—Word 'respectively' omitted in the decree in the allocation of costs—Whether decree declaring liability to pay costs by defendants severally or jointly.

In a suit to recover possession of property from alienees from limited owners a decree for possession and mesne profits and costs was passed. In the matter of costs the defendants were made liable and the total amount of costs under the decree was also mentioned. On the question whether the decree in regard to costs was joint or several,

Held, read in the light of the judgment the decree was several and not joint, especially when the suit was for recovery from a number of individuals, possession of particular items together with mesne profis and costs relating to them. 1948 M.W.N. 592=A.I.R. 1949 Mad. 113=(1948) 2 M. L.J. 141.

——Decreeing of suit in part with proportionate costs — Defendant's right to his proportionate costs—Interference by appellate Court with order as to costs.

Where a Court decrees the claim of a plaintiff in part and awards him proportionate costs, the ordinary rule as to costs is that the defendant would also be entitled to his proportionate costs unless there is something on the record to disallow it.

Where a trial Court departs from the ordinary rule as to costs but does not give reasons for it, the appellate Court can interfere with its order as to costs. Case-law fully referred to. 1950 A.L.J. 61.

——Third party—Costs against.

Even if a person is known to have financed an appellant, it will not give a cause of action to the respondents to recover damages from the financier personally because they have been unable to recover their costs from the appellant. 119 Ind. Cas 837=A.I.R. 1929 All. 797.

——Costs of translation and printing—Apportioning.

When there are papers common to the appellant's list and the special list of the respondent with reference to his objections the costs of translating and printing such common papers are, to that extent, to be apportioned. 80 Ind. Cas. 790=39 C.L J. 342=A.I.R. 1924 Cal. 874.

——Usual order as to—Suit for partition or dissolution of partnership.

Costs in a suit for partition or dissolution of partnership are ordinarily payable out of the assets, unless untenable pleas, which involve expense to one party are raised in a suit. A.I.R. 1950 M.B. 56.

(e) Suit for costs.

——Suit for—Independent action for costs does not lie.

A claim for damages which are too remote cannot be maintained. An independent action cannot be maintained to recover the balance of costs over and above that awarded by the Court which tried the matter. If under any particular proceeding the Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court. 65 Ind. Cas. 513=20 A.L.J. 205= A.I.R. 1922 All. 143.

——Subsequent suit for costs does not lie.

If the Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit. If the Revenue Officer has power to award costs, and he does not do so, he must be held to have disallowed them and a subsequent suit will not lie. All Revenue Officers holding enquiries of the nature described in S. 95 of the Tenancy Act which includes enquiries under S. 93 have, by rules having the force of law, been given the powers of Civil Courts in the matter of costs. 65 Ind. Cas. 67=18 N.L.R 65=A.I.R. 1922 Nag. 169.

(f) Taxation of.

——Taxation — Agreement by third party to pay costs of suit—Taxation against such party—Permissibility.

If a solicitor has any claim against a third party under an agreement with him for the costs of a party to a suit, he must file a suit against the third party in Court. But that agreement cannot entitle him to have the cost of the suit taxed under the warrant of attorney executed by the party to the suit. I.L.R. (1945) 2 Cal. 192=A.I.R. 1949 Cal. 346.

——Taxation as between attorney and client—Suit for specific damages—Collision between two motor cars. I.L.R. (1944) 2 Cal. 346=48 C.W.N. 330=A.I.R. 1946 Cal. 163.

——Taxation—Bill of costs up to preliminary decree in mortgage suit—Permissibility.

The plaintiff's solicitor in a mortgage suit can lodge for taxation his bill of costs up to the preliminary decree. It is not necessary that there should be one complete bill for all costs ordered in the suit. I.L.R. (1944) 2 Cal. 581=A.I.R. 1947 Cal. 233.

——Taxation—Rules amended after filing of suit—Costs, if regulated by rules in force on date of suit.

It cannot be said that once suit is filed the costs of that suit must be regulated by the rules of taxation then in force. There is no authority which lays down that litigants have such a vested right in the rules of taxation that a subsequent amendment of the rule will not affect such right even in respect of costs incurred after the amendment. I.L.R. (1944) 2 Cal. 581=A.I.R. 1947 Cal. 233.

(g) Miscellaneous.

——Memo. of objections not moved—Jurisdiction of Court to award. See C. P. CODE, S. 561. 18 M.L.J. 490.

——Application for security for costs—Case printed—Appeal ready for hearing—Security not to be ordered. I.L.R. (1945) Mad. 562=220 Ind. Cas. 377=57 M.L.W. 621=A.I.R. 1945 Mad. 121=(1944) 2 M.L.J. 407.

——Costs against—Officers—Protected by Judicial Officers' Protection Act, 18 of 1850—Jurisdiction of Court to award. See C. P. CODE, S. 35. 4 Bom.L.R. 109.

——Partition suit. See PARTITION SUIT. 10 C.L.J. 503=3 Ind. Cas. 247.

——Decree for against trustee suing on behalf of trust—Executability against trustee

personally. See EXECUTION — DECREE FOR COSTS. (1949) 1 M.L.J. 384=A.I.R. 1949 Mad. 789.

——Costs in habeas corpus applications. See CR P. CODE, S. 491—COSTS IN APPLICATIONS UNDER. (1950) 2 M.L.J. 186=A.I.R. 1951 Mad. 267.

——Respondent ex parte in appeal to Privy Council—Direction for payment of the costs of the appellant on appeal being allowed—Justification. See TRUST—DEDICATION. (1947) 1 M.L.J. 400=A.I.R. 1947 P.C. 88 (P.C.).

——Privy Council. See C. P. Code, S. 112.

——Receiver. See C. P. CODE, S. 35 AND RECEIVER—COSTS OF.

——Redemption suit. See C. P. CODE, O. 34, R. 7.

——Appeal—Costs in. See C. P. CODE, O. 41, R. 35.

——Security for—In appeal. See C. P. CODE, O. 41, R. 10.

——Solicitor. See C. P. CODE, S. 35 and also SOLICITOR AND CLIENT.

——Suit for. See C. P. CODE, S. 9.

CO-TENANCY. See CO-SHARER.

CO-TENANTS. See (1) CONTRACT ACT, S. 69.

(2) CO-SHARERS.

——Entry in name of a member of joint Hindu family —Tenancy not shown to have been taken in representative capacity—Presumption as to correctness of entry—Right of other members to co-tenancy.

There is no presumption that when a member of a joint Hindu family takes a tenancy, he does so in a representative capacity on behalf of the family. In the absence of evidence to the contrary, he is alone the tenant of the holding and no amount of possession by the others or payment of rent by them would make them co-tenants. 1946 R.D. 19=1946 A.W.R. (Rev.) 14.

——Ouster—Assertion in rent suit by tenant in possession that he is the sole tenant.

The mere assertion in a rent suit by a tenant in possession that he is the sole tenant will not do away with the rights of his co-tenants. It can hardly amount to ouster. 1948 R.D. 100=(1948) A.W.R. (Rev.) 48.

——Possession of one—Extinction of rights of others by lapse of time.

The possession of one co-tenant is in trust for the others and hence no amount of lapse of time will operate to extinguish co-tenancy rights in the land. 1948 R.D. 324.

——Possession — Nature of—Adverse possession —Presumption and proof.

The possession of one co-tenant must be regarded as the possession of all and as such adverse posession inter se cannot be presumed. It has to be proved by clear evidence that possession was actual, physically exclusive, hostile and continuous. It must be proved by some overt act or denial of the party's right to his kuowledge. 1949 R.D. 288.

——Possession of one—Nature of.

The rule that possession of one co-tehant is the possession of all will hold good only where the co-tenancy has been admitted and not where the co-tenancy rights are denied. 1948 A.W.R. (Rev.) 303=1948 R.D. 400.

——Possession of one being possession of all—Limits to the applicability of the rule.

The principle that the possession of one co-tenant is the possession of all can be relied upon by a co-tenant whose name has ot been entered in the register only if he proves that he is a co-tenant and that the holding is is ancestral holding. 1949 R.D. 381.

——Proof of co-tenancy.

Mere possession of part of a holding does not necessarily mean that the occupiers were co-tenants in the whole holding and so would not be enough to establish co-tenancy. 1950 R.D. 57.

CO-TRUSTEE. See TRUSTS ACT, SS. 26, 27, 44 AND 54.

COTTON CLOTH AND YARN (CONTRACTS) ORDINANCE, (II OF 1944).

——Applicability—Completed sale whether governed by ordinance. See SALE OF GOODS ACT (3 OF 1930), SS. 20 AND 23. (1947) 2 M.L.J. 79.

——Retrospective effect.

The Ordinance has a retrospective effect and applies to all contracts made before the commencement of the Ordinance and to sales made on or after August 15, 1943, in pursuance of a contract made before or after the Ordinance. I.L.R. (1945) Mad. 848=(1945) 1 M.L.J. 436=1945 M.W.N. 471.

COTTON CLOTH AND YARN CONTROL ORDER, 1943.

——S. 2—Retrospective effect—Deliveries on 29th September, 1943, of yarn contracted for on 15th April, 1943—Buyer compelled to pay contract price which was higher than the maximum price fixed under the Cotton Cloth and Yarn Control Order, 1943—Right to refund of excess. I.L.R. (1945) Mad. 848.

——S. 2—Applicability—Ceiling price fixed after completion of sale.

Where the fixing of maximum prices under Cotton Cloth and Yarn Control Order, 1943, was after the date on which the sae is alleged to have been comleted, the Cotton Cloth and Yarn (Contracts) Ordinance (1944) will confer no benefit on the buyer who will not be entitled to the refund of anv excess over the maximum price paid by him. 1947 M.W.N. 194=60 L.W. 238=A.I.R. 1947 Mad. 455=(1947) 1 M.L.J. 249.

——Publication of order in Government of India Gazette—Affected persons duly informed.

The Cotton Cloth and Yarn (Control) Order, 1943 was duly published according to law in the Govern-

ment of India Gazette, so as to affect the persons concerned with notice of the order. 225 Ind. Cas. 255=1946 A.L.W. 337=1946 A.W.R. (H.C.) 432 47 Cr.L.J. 706.

——Publication of order in Government of India Gazette—Sufficient notice to affect persons concerned.

When the Central Government published Cotton Cloth and Yarn (Control) Order, 1943, in the Government of India Gazette, it must be held to have been duly published according to the requirements of law, *i.e.*, R. 119, Defence of India Rules, so as to affect the persons concerned with the notice of order. A.I.R. 1946 Pat. 1=24 Pat. 781=12 B. R. 367 (F.B.).

——Order not notified as required by Defence of India Rule 130-A (b)—R. 81 (2) under which the order is made notified—Prosecution for contravention of order—Applicability of Cr. P. Code in matter of granting bail.

Notification of Defence of India Rule 81 (2), cannot connote notification of an Order made thereunder. Where the Cotton Cloth and Yarn (Control) Order, 1943, was not notified in *Local Gazette* as required by R. 130-A (*b*) of Defence of India Rules, it cannot be deemed to have been notified by specification in the *Gazette* of only certain classes of R. 81 (2), although the Cotton Cloth and Yarn (Control) Order is one made under R. 81 (2). Hence the person accused of contravening the Control Order must be dealt with according to the provisions of the Criminal P.C. subject to the requirements of R. 130-A (*a*) in the matter of granting bail under S. 498, Criminal P.C. 1945 Nag.L.J. 223.

——and Defence of India Rules, R. 119—Publication in the Government of India Gazette—Effect.

When the Cotton Cloth and Yarn Control Order was published in the Government of India Gazette, it must be presumed that the Government was aware of R. 119 of the Defence of India Rules and that the publication was made in compliance with all its provisions including the provision as to the determination of the most suitable form of publication. Such publication is enough to effect the persons concerned with notice of it. I.L.R. (1946) All. 716=A.I.R. 1947 All. 12=1946 A.L.W. 337=225 Ind. Cas. 255=1946 A.W.R. (H.C.) 432=47 Cr. L.J. 706.

——Tex. marking—Point of time.

The rules and notifications issued under the Cotton Cloth and Yarn Control Order clearly provide that it is the month and the year when the marking is done which should be the month and year put down on the bale and this is obvious because it is after that that the dealer is given further six months within which to sell his goods. I.L.R. (1947) A. 833=1947 A. Cr.C. 34=1947 A.L.W. 79=1947 A. L.J. 563=49 Cr.L.J. 32=1948 A.W.R. (H.C.) 96=A.I.R. 1948 All. 95=1948 O.A. (H.C.) 96.

——Cl. 3 (b)—"Dealer"—Meaning of—Salesman or servant of owner of business.

A salesman or a servant of the owner of a business can be a "dealer" within the meaning of the definition in Cl. 3 (*b*) of the Cotton Cloth and Yarn (Control) Order, 1943. There is no warrant for holding that the definition of "dealer" necessarily excludes a salesman or servant of the owner or proprietor of the business or involves or imports the idea of ownership or proprietorship as a necessary ingredient of the expression "dealer". 26 Pat. 683=A.I.R. 1948 Pat. 266.

——Cls. 6 and 12—Sale of cloth in absence of master by servant at price higher than controlled price—Responsibility of dealer.

Where the servant effects sale of cloth in the absence of the dealer at a price higher than the controlled rate, the dealer is criminally responsible under Cls. 6 and 12 of the Cotton Cloth and Yarn (Control) Order, 1943. Servant effecting the sale would be guilty of abetting the offence.

[Law as to the extent of the liability of the master or principal for the criminal acts of servant or agent explained.] A.I.R. 1946 Oudh 53=1945 A. W.R. (C.C.) 228=1945 O.W.N. (C.C.) 374=20 Luck. 529.

——Cl. 12—Applicability—Salesman or dealer selling cloth at excessive price—Dealer absent from shop and place—Liability to conviction.

Where a salesman employed by a cloth merchant sells cloth from his shop at a price in excess of the controlled price, the merchant or dealer (employee) is criminally liable and can be convicted under S. 12 of the Cotton Cloth and Yarn Control Order. The circumstance that the merchant or dealer was not present in the shop at the time or that he was not even in the place at all cannot absolve him from liability to conviction. 26 Pat. 359=49 Cr.L.J. 65 (2)=A.I.R. 1948 Pat. 110=29 P. L. T. 73=13 Cut.L.T. 47.

——Cl. 12—Liability of dealer for sale by servant —Servant also if liable. 20 Luck. 529=1946 A. I.Cr.D. 1=A.I.R. 1946 Oudh 53.

——Cls. 12 and 23—Bihar Cotton Cloth and Yarn Dealers' (Licensing and Control) Order, 1944, Cl. 8—Prosecution for selling cloth above control rates—Charge framed with reference to Cl. 8 of 1944 Order and not Cl. 12 of 1943 Order—Sanction of Provincial Government under Cl. 23 of 1943 Order, if necessary—Object of Cl. (8) of 1943 Order.

Where a person is sought to be prosecuted for selling cloth or yarn above the control rate, the fact that the charge was laid, not under the Cotton Cloth and Yarn (Control) Order of 1943, but under Cl. 8, Bihar Cotton Cloth and Yarn Dealers' (Licensing and Control) Order of 1944 cannot obviate the necessity of obtaining the sanction of the Provincial Government under Cl. 23, Cotton Cloth and Yarn (Control) Order, 1943. The reason why Cl. 8 was inserted in the Bihar Licensing Order was to make it clear that the mere issue of license is not intended to exempt the licensee from the operation of the Central Government's Cotton Cloth and Yarn (Control) Order of 1943, that is to say, to make it clear that he is bound to keep his prices within the limits fixed by the Textile Commissioner in exercise of the powers conferred on him. A.I.R. 1945 Pat. 375=26 P.L.T. 85=24 Pat. 257=47 Cr.L.J. 190 =221 Ind. Cas. 426.

——Cls. 12 (1), 12 (4) and 23—Applicability and scope—Bihar Cloth and Yarn Dealers Licensing and Contralling Order (1944), Cl. 8—Applicability—Offence under.

On 14th October, 1944, a test purchase was made at the shop of the petitioner, of three coating lengths

of cloths. The purchaser was charged Rs. 94-4-0 but a cash memo. was given for Rs. 88-13-0 only. The matter was reported to the sub-divisional officer and sanction for prosecution of the petitioner was given under S. 23 of the Cotton Cloth and Yarn Control Order, 1943, on a charge under S. 12 (4) of the Order. The petitioner was prosecuted and convicted under S. 12 (4) of the Cotton Cloth and Yarn Control Order (1943) and fined. He was also convicted under Cl. 8 of the Bihar Cotton and Yarn Dealers Licensing and Control Order, 1944, but there was no separate sentence on this latter. It appeared that the Textile Commissioner had fixed the maximum price for cloth of the kind purchased, which was less than that at which the petitioner sold the same. but that it was not notified in the Gazette as required by R. 10 of the Order (1943).

Held: (1) that the order required that the price fixed should be notified in the Gazette, and since it was no offence to sell cloth at a price above that fixed until it was so notified, the petitioner could not be convicted for an offence under S. 12 (1) of the Order, 1943;

(2) that further the prosecution of the petitioner under S. 12 (1) had not been sanctioned and hence he could not be prosecuted and convicted for an offence of contravention of that clause;

(3) since there was no charge of refusal to sell cloth or yarn and there was no evidence of any such refusal, there was no contravention of Cl. 12 (4) of the Order of 1943 and the conviction on that count was therefore bad and unsustainable;

(4) that the conviction under Cl. 8 of the Bihar Cotton and Yarn Licensing and Control Order, 1944, was also bad and liable to be set aside, as there was no sanction for prosecution on that count. 229 Ind. Cas. 545=48 Cr.L.J. 448=13 B.R. 400=(1947) P.W.N. 31=A.I.R. 1948 Pat. 78.

——Cl. 12 (4)—Sale in excess of control rate by partner of firm—Liability of other partners—Guilty knowledge or intention—Proof of—If necessary—Defence of India Rules, R. 81 (4).

All the members of a firm are liable to conviction under R. 81 (4) of the Defence of India Rules when one member of that firm sells cloth over the control rate prescribed by the Cotton Cloth and Yarn Control Order (1943), Cl. 12 (4). and on premises not licenced for sales of this nature. It is no good defence for one partner to deny his connection with the management of the business by reason of a private contract or arrangement among the partners; he cannot evade his liability by merely stating that he has no control in the management or in the affairs of the business. It matters not whether any individual member of the firm has or has not guilty knowledge or intention, if the conditions of the control order and of the licence are broken. I.L.R. (1946) Kar. 276=229 Ind. Cas. 599=48 Cr.L.J. 419=A.I.R. 1947 Sind 130.

——Cls. 12 (5) and 3 (b)—Maximum price—Failure to display—Servant of dealer if liable—Plea of not being informed and ignorance as to how to obtain information—If a good defence.

The duty of displaying the authentic prices as notified by the Textile Commissioner is cast upon the dealer by Cl. 12 (5) of the Cotton Cloth and Yarn Control Order. A servant of 'dealer' cannot come within the definition of 'dealer' as defined in S. 3 (*b*) of the order and so such a servant cannot be charged and convicted for failure to display the price list.

It will not avail a 'dealer' who is prosecuted for such failure to display to plead either that he was not informed or told as to how and where the true copies of the relevant notifications were to be obtained. 22 Luck. 190=1947 A.W.R. (C.C.) 37=1947 O.W.N. 80=229 Ind. Cas. 107=1947 A. Cr. C. 57=48 Cr.L.J. 235=A.I.R. 1947 Oudh 158.

——Cl. 13—Contravention — Proof—Failure to produce notification contravened—Effect.

It is the duty of the prosecution in a case of contravention of the terms of the Cotton Cloth and Yarn (Control) Order to prove what exactly is the order or notification which has been contravened by the accused. Failure of the prosecution to produce in evidence the Notification in question is fatal, and there can be no conviction in such a case. 49 Cr.L.J. 375=A.I.R. 1948 Pat. 290.

——Cls. 13 and 14—One proprietor in management of shop—Unstamped cloth found on premises—Other co-proprietors not proved to have knowledge of such cloth being there—Such other co-proprietor cannot be said to be in actual control of the cloth.

No doubt where the shop is in the hands of a manager other than the managing proprietor it is possible that the proprietors may be criminally liable for the acts of their manager committed within the ordinary scope of his employment in the case of some criminal offences which involve no *mens rea*, but that principle cannot be applied as between co-proprietors so as to make a co-proprietor liable for the Acts of his co-proprietor.

Where it has not been proved that a co-proprietor either knew that an offence was being committed or was likely to be committed or that he had any reason to suppose that the unstamped cloth was on his premises or was likely to be there. it cannot be said that the cloth was actually under the control of the co-proprietor. A.I.R. 1946 Pat. 30=12 B.R. 485.

——Cl. 14—If applicable to persons merely in charge of goods during transit.

Clause 14 (before its amendment on November, 24, 1943) was not intended to apply to persons who were merely in charge of the goods during transit and who had no legal right to interfere with the packages. The clause related only to dealers or those who were the owners of the bales and had the legal right and authority to open them. A.I.R. 1945 All. 214=1945 A.L.J. 180=1945 A. W. R. (H.C.) 174=1945 O.W.N. (H.C.) 192=46 Cr. L.J. 678=I.L.R. (1945) All. 617=220 Ind. Cas. 324.

——Cl. 14—Scope and effect of.

Cl. 14 of the Cotton Cloth and Yarn (Control) Order makes the mere possession of cloth manufactured before August 1943, after 31st December, 1944, an offence. I. L. R. (1948) All. 251=1948 A.W. R. (H.C.) 83=1948 A.L.J. 78=A.I.R. 1948 A. 276=49 Cr.L.J. 338=1948 A.L.W. 198.

——Cl. 14—Scope—Interpretation—Court not to question the policy of law—Its business is simply to enforce it as it is.

It cannot be believed that the order intended to

say in Cl. 14 that a person should not be in possession of cloth of a certain kind and then in Cl. 15 that he might legally be in possession of it. It seems that these clauses read together clearly mean that no person is to be in possession of any kind of cloth unless the Textile Commissioner allows such person to be in possession of cloth of some kind on certain conditions.

It is not the business of the Court to question the policy of the law. Its business is only to enforce the law such as it is. Rules of this kind are easy to evade, and the Courts should enforce the rules with a certain strictness in order to prevent the hoarding of cloth and the sale of it in bla k markets. 1946 A.W.R. (H.C.) 433=1946 A.L.W. 341=1946 A.L.J. 308=A. I. R. 1947 A. 250.

——Cl. 14—Mere possession of cloth after 31st Dec. 1944—If amounts to contravention of that clause—Absence of lawful excuse—If necessary—Dealer, if must take active steps for getting rid of cloth—Defence of India Rules, Rr. 5 and 81 (4).

Mere possession of cloth which was not to be possessed after 31st December 1944, does not amount to a *"contravention"* of Cl. 14, Cotton Cloth and Yarn Control Order, 1943, so as to be punishable under R. 81 (4) of the Defence of India Rules. Further a mere breach of Cl. 14 (1) (*a*) would not amount to a *"contravention"* of it within the meaning of R. 5 of the Defence of India Rules, but the failure to comply with it would amount to such contravention only if it is without lawful authority or excuse. 1947 All. 394, overruled. I.L.R. (1945) Nag. 902, 1946 Oudh 234 and 1947 All. 250, approved. The proper construction of the expression "lawful excuse" would be an expression which though not expressly sanctioned by law, is reasonable and not prohibited by law, or opposed to any principle of law.

The fact that the authorities did not, either in this control order or in directions issued thereunder, provide for the mode in which the dealers were to act in the event of such cloth remaining with them undisposed of, would itself amount to lawful excuse. The existence of *lawful excuse* does not *necessitate* any active steps on the part of the dealers prior to 31st December. 1944, for getting rid of the cloth either before the expiry of the period or afterwards. I.L.R. (1949) A. 956=1949 A.L.J. 383=A.I.R. 1949 All. 473=50 Cr. L.J. 701 (F.B.).

——Cl. 14 (1) (a) and (3) (iii)—Applicability and scope—Possession by dealer of 25 pieces of unmarked cloth—Offence.

Where a dealer is found in possession of 25 pieces of unmarked or unstamped cloth, it has to be presumed, in the absence of proof to the contrary, that such cloth was manufactured in India before 1st August, 1943, and possession of such cloth after 31st December. 1944, is an offence, under Cl. 14 (1) (*a*) and (3) (*iii*) of the Cotton Cloth and Yarn (Control) Order, 1943. No question arises under Cl. 14 as to whether the cloth is held by the dealer for his *bona fide* personal requirements. 230 Ind. Cas. 426=48 Cr. L.J. 646=A.I.R. 1948 Cal. 40.

——Cls. 14 and 15-A—Construction and scope—Cl. 15 if overrides Cl. 14—Reference in Cl. 15—If to old Cl. 14 or new amended Cl. 14—Possession of undisposed of cloth or yarn after 31st December, 1944—Offence.

Cl. 15-A of the Cotton Cloth and Yarn (Control) Order was inserted long before the recasting of Cl. 14 (4th November, 1944), and the reference in Cl. 15-A to Cls. 14 (1) (*b*) and 14 (2) (*b*) should therefore be taken to be a reference to the old clause as it stood before the amendment of 4th November, 1944. There is no sub-clause (2) (*b*) in the amended Cl. 14; and there was no consequential amendment in Cl. 15-A, after Cl. 14 was amended on 4th November, 1944. Cl. 15-A would be meaningless unless the reference to Cl. 14 is read as a reference to old Cl. 14; and when so read it overrides the provisions of Cl. 14 and allows a dealer to be in possession of undisposed of cloth or yarn, such possession being subject to such conditions as may be notified by the Textile Commissioner. It being the duty of the Textile Commissioner to notify the conditions subject to which undisposed of cloth or yarn could be possessed after the relevant date, no dealer can be penalised for a contravention of Cl. 14 because the Textile Commissioner did not think fit to notify such conditions. The Legislature could not have intended to penalise dealers who for reasons beyond their control were unable to dispose of the cloth or yarn before 31st December, 1944. Cl. 14 has to be read with Cl. 15-A and it cannot be read as meaning that any possession of undisposed of cloth or yarn after 31st December, 1944 is a contravention of the clause. A penal clause has to be construed strictly. The Crown cannot be permitted to take advantage of the mistake in omitting to make consequential amendments in Cl. 15-A, after Cl. 14 was recast. 25 Pat. 487=1946 P.W.N. 315=12 Cut. L.T. 46=A.I.R. 1947 Pat. 181=230 Ind. Cas. 39=48 Cr. L.J. 483=27 P.L.T. 273=13 B. R. 444.

——Cls. 14 and 15-A—Effect of various amendments considered—Clauses held unworkable—Retention of yarn on 1st January, 1945, held was with lawful excuse and did not contravene Cl. 14.

Though the amendment of Cl. 15-A in 1944 made that clause applicable to new Cl. 14 (dated 4th November. 1944) of the Order, there was no amendment of the rules framed under Cl. 15-A by Notification No. T.C. (6) 2|44 (dated 27th November, 1944) which still related to the period specified in the old Cls. 14 (1) (*b*) and 14 (2) (*b*) and was, therefore, inapplicable to Cls. 14 and 15-A as amended. Nor was there any notification under Cls. 10 and 15-A specifying under what conditions cloth could be kept by the dealer after 31st December, 1944. The dealers who had cloth or yarn in their possession on the morning of 1st January. 1945, were left in an impossible position of not being able to retain the cloth or yarn themselves or handing it over to any one on their behalf after 31st December, 1944 on account of Cl. 14 (3) (*i*). Clauses 14 and 15-A are thus unworkable and a dealer having cloth or yarn in his possession on 1st January, 1945, does not contravene Cl. 14 of the Order as he has, in these circumstances. lawful excuse for keeping the same in his possession. A.I.R. 1946 Oudh 234=1946 A. W.R. (C.C.) 97=1946 O.W.N. (C.C.) 178=224 Ind. Cas. 384.

——Cl. 14 (as amended in 1944), Cls. 14 (1) and 15-A—Mere possession of cloth falling under Cl.

14 (1) (a) and (b)—If per se an offence—Cl. 15-A if governs or controls Cl. 14.

The mere possession of cloth falling within the categories referred to in Cl. 14 of the Cotton Cloth and Yarn Control Order after its amendment in 1944 would be an offence because their possession would be a clear contravention of the prohibition laid down by the clause and would therefore be an offence punishable under R. 81 (4) of the D. I. Rules, Cl. 15-A could not possibly apply to Cl. 14 after its amendment in 1944, much less govern or control its provisions. 1947 A.L.J. 103=229 Ind. Cas. 539=1947 A.L.W. 165=48 Cr. L.J. 443=1947 A. Cr. C. 87=A.I.R. 1947 All. 394.

——(as amended in 1944), Cls. 14 and 15-A—Scope—Cloth covered by period expiring on 31st December, 1944 midnight—Person in possession of same on 1st January, 1945—Offence.

It must be held that Cls. 14 and 15-A of the Cotton Cloth and Yarn (Control) Order, as amended by notification of November, 1944. are unworkable, and a person in possession of cloth on 1st January. 1945, for which the period of retention expired on midnight of 31st December. 1944 must be deemed to have lawful excuse for being in possession of such cloth on 1st January, 1945, and he cannot be held to have contravened the clauses in question. 224 Ind. Cas. 384=1946 A.W.R. (C.C.) 97=1946 O.W.N. 178=1946 A.L.W. (C.C.) 127=47 Cr. L.J. 609=1946 A. Cr. C. 40=(1946) O.A. (C. C.) 97=A.I.R. 1946 Oudh 234.

——Cls. 14 and 15—Scope and effect of.

Persons charged with a contravention of Cl. 14 of the Cotton Cloth and Yarn Control Order cannot be convicted for being in possession of cloth against the provisions of the order, if they could prove that they had a lawful excuse for such possession. Clause 15 cannot be said to repeal Cl. 14. These two clauses read together only mean that no person is to be possession of any kind of cloth unless the textile commissioner allows it on certain conditions. it does not follow that if no conditions are imposed, one can be in possession of cloth in contravention of Cl. 14. If conditions are imposed one complying with the conditions can be in possession of cloth, but if no conditions are imposed, nobody can be in possession of cloth at all. 1946 A.L.J. 308=1946 A. W.R. (H.C.) 433=1946 A.L.W. 341=A. I. R. 1947 All. 250=228 Ind. Cas. 155=48 Cr. L.J. 91.

——Cls. 14 and 15-A—Scope and effect of—Nature and extent of the prohibition in Cl. 14—Effect of Cl. 15-A on Cl. 14.

The prohibition in Cl. 14 of the Cotton Cloth and Yarn (Control) Order is absolute and is subject only to the condtition that if a notification under Cl. 15-A about special markings, etc. has been issued by the Textile Commissioner, the dealer may retain the cloth for a further period of 6 months from the date of the marking in accordance with the notification. It follows that if there is no such notification the dealers were not intended to have the right to keep the cloth indefinitely and defeat the very object of the order. Cl. 15-A is in the nature of a proviso and an enabling clause and it cannot therefore override the provisions of Cl. 14 which are mandatory. I. L.R. (1948) All. 143=1947 A.L.J. 536=1947 A. W.R. (H.C.) 328=48 Cr. L.J. 955=A.I.R. 1948 All. 38 (F.B.).

——Cls. 14 (2) and 15-A—Relative scope—Latter if nullifies former—Proof of existence of orders specified in Cl. 15-A—Proper time for—Proof in appeal—Permissibility.

The provisions of Cl. 15-A of the Cotton Cloth and Yarn (Control) Order practically nullify the provisions of Cl. 14 (2), unless it is shown that there are orders specifying the conditions referred to in the former clause. The fact that there were such orders in existence at the time of the search must be proved in the trial Court itself and cannot be allowed to be proved at the stage of appeal. 230 Ind. Cas. 426 =A.I.R. 1948 Cal. 40=48 Cr. L.J. 646.

——Cls. 14 (2) and 15-A—Scope and effect of.

Cl. 15-A of the Cotton Cloth and Yarn Control Order overrides Cl. 14 (2). Its effect is that until the Textile Commissioner chooses to make conditions, cloth and yarn can be kept or sold by the dealer. 228 Ind. Cas. 619=A.I.R. 1948 Cal. 39=48 Cr. L. J. 267.

——Cl. 15-A—Breach of—Offence—Failure of Textile Commissioner to issue directions under Cl. 18-B.

A mere breach of Cl. 15-A of the Cotton Cloth and Yarn (Control) Order, 1943, is not a "contravention" which will be punishable under the Defence of India Rules. Failure to comply with it would be a contravention only if it is without lawful excuse. Where the Textile Commissioner issues no directions or instructions under Cl. 18-B with a view to securing compliance with the various injunctions contained in the Cotton Cloth and Yarn (Control) Order, a dealer in cloth who keeps undisposed cloth manufactured before 1st August, 1943 in loose yardage after 21st January, 1943, cannot be said to contravene Cl. 15-A, because he has a lawful excuse for so keeping the cloth and he commits no offence under R. 81 (4) of the Defence of India Rules, 1939. I.L.R. (1946) Bom. 901=229 Ind. Cas. 105=A.I.R. 1947 Bom. 28=48 Cr. L.J. 233=48 Bom. L.R. 545.

——Cl. 18-A—Order issued by Textile Commissioner directing delivery of yarn to persons of specified categories—Respondent company infringed the order—No contract of sale—Goods seized—If justified—Application under S. 45, Specific Relief Act—If tenable.

The Textile Commissioner of Madras issued an order under Cl. 18-B (1) (*b*) directing the appellant Mills to confine its delivery of yarn to three categories of persons, with a view to secure a proper distribution of cloth and yarn. In spite of the order, the appellant continued to deliver yarn to such weaver. The yarn so delivered was not sold to the weavers. It was delivered to them on certain conditions. The Textile Commissioner considered this course to be an infringement of his order and seized certain quantities of yarn. This led the appellant to file a petition under S. 45 of Specific Relief Act:

Held, that the respondent had not travelled beyond his authority under Cl. 18-B (1) (*b*). He gave appellant the right to supply yarn to specified persons, but these persons did not include outside handloom weavers. Admittedly that the contracts

entered into with those weavers were not contracts for sale, but were contracts of bailment. Anyway it was a delivery against the order under Cl. 18-B (1) (*b*); so the action of respondent was quite justified. And hence an application under S. 45 of the Specific Relief Act did not lie. (1946) 2 M.L.J. 188=59 L.W. 461=1946 M.W.N. 569=230 Ind. Cas. 69=A.I.R. 1947 Mad. 82.

——Cl. 23—Construction—"Previous sanction" of the Provincial Government—Meaning of.

The words "previous sanction" in Cl. (23) of the Cotton Cloth and Yarn Control Order (1943) must relate to a prosecution for a contravention, and it is incumbent on Government in each case to show that such a sanction had been given. The clause being one for the public benefit has to be strictly construed in favour of the subject or accused, and the sanction must specify the particular act of contravention in respect of which a breach of the order is alleged. Mere production of a Government Resolution granting sanction for prosecution for breach of the Cotton Cloth and Yarn (Control) Order without specifying the particular act of contravention is not sufficient compliance with Cl. (23). I.L.R. (1946) Bom. 1111=230 Ind. Cas. 272=48 Cr. L. J. 588=48 Bom. L.R. 754=A.I.R. 1947 Bom. 151.

——Cls. 23 and 14—Delegation of power to sanction prosecution relating to "disposal" of cloth—Whether covers buying, selling and having in possession time-expired cloth.

Where the Provincial Government delegated to the District Magistrate its power to sanction prosecutions relating to the "disposal" of cloth:

Held, that though the term "disposal" was not appropriate, it was used to cover the buying or selling of or the having in possession of time-expired cloth referred to in Cl. (14), Cotton Cloth and Yarn (Control) Order. I.L.R. (1947) Kar. 131=231 Ind. Cas. 80=48 Cr. L.J. 674=A.I.R. 1947 Sind 79.

——Cl. 23—Magistrate issuing warrant before sanction — Charge-sheet subsequently submitted after sanction—Proceedings, if valid.

If a Magistrate issues a warrant of arrest against a person before the sanction of the Provincial Government is obtained, the submission of a charge-sheet subsequently after obtaining such sanction will not have the effect of altering the date of the initiation of the prosecution of such person. The prosecution of a person commences as soon as the Court takes cognizance of the offence alleged against him and a Magistrate cannot issue a warrant of arrest unless he has taken cognizance. The prosecution having commenced without sanction the entire proceedings are in contravention of Cl. 23, Cotton Cloth and Yarn Control Order and must be regarded as null and void *ab initio*. A.I.R. 1947 Cal. 420.

——Cl. 23—Notification, dated 9th December, 1944, authorising District Magistrate to sanction prosecution—Validity.

The notification, dated 9th December, 1944, issued by the Provincial Government in pursuance of Cl. 23 of the Cotton Cloth and Yarn (Control) Order, 1943, authorises all District Magistrates in the Central Provinces and Berar within their respective jurisdiction to sanction prosecution for an offence punishable under the said order. The words "for an offence punishable under the said orders sued at the end of the notification are meaningless for the reason that the Cotton Cloth and Yarn (Control) Order does not provide for the punishment of the contravention of any of the provisions of that Order. The contravention of any of the provisions of that order is punishable under R. 81 (4) of the Defence of India Rules. The proper wording in the notification should have been "for the contravention of any of the provisions of this Order punishable under R. 81 (4) of the Defence of India Rules". The inartistic expression which occurs in the notification does not invalidate it. It is open to the Court to read the notification leaving out the last clause which is meaningless and add to it words which would invest it with meaning in view of the intention clearly conveyed by the earlier part of the notification. I.L.R. (1946) Nag. 930=A.I.R. 1947 Nag. 45=226 Ind. Cas. 178=47 Cr. L.J. 840=1946 N.L.J. 487.

——Cl. 23—Sanction for prosecution—Form and contents of—Specification of particular offence charged—Necessity.

A sanction under Cl. 23 of the Cotton Cloth and Yarn (Control) Order, to be valid, must specify the particular offence with which the accused is to be charged. The sanction though it need not be in any particular form, must contain a reference to the nature of the offence alleged to have been committed or the act of the accused which is alleged to be an offence, or at least a copy of the letter addressed to the Provincial Government requesting sanction, which would relate the sanction to the offence alleged. Unless these requisites are present a sanction is defective and invalid and a prosecution instituted on such invalid sanction is bad in law, as the Court trying the case has no jurisdiction in the absence of a legal sanction. A.I.R. 1948 Lah. 92=49 Cr.L.J. 170.

——Cl. 23—Sanction for prosecution in respect of each accused—Necessity for.

Under R. 23 of the Cotton Cloth and Yarn Control Order, 1943, it is clearly the duty of the sanctioning authority to consider in the case of each accused whether a prosecution should be instituted or not. It follows therefore that prosecution must be sanctioned in respect of each accused person. I.L.R. (1946) 1 Cal. 539=223 Ind. Cas. 322=47 Cr. L.J. 510=50 C.W.N. 371=A.I.R. 1946 Cal. 330.

——Cl. 23—Sanction not legally proved—Prosecution, if can be entertained.

No prosecution under the Cotton Cloth and Yarn Control Order can be entertained unless the sanction required under Cl. 23 of that order has been legally proved, although it has been obtained at the proper stage. If the prosecution merely relies upon a piece of paper, which purports to contain the sanction granted by the District Magistrate and does not let in evidence of any kind to prove the sanction, it is bound to fail. 48 Cr.L.J. 815=231 Ind. Cas. 468=A.I.R. 1947 Cal. 318.

——Cl. 23—Saction for prosecution not brought on record—Point not raised in lower Court—Interference in revision.

It is desirable as a matter of routine, that a certified copy of the sanction necessary for a prosecution under the Cotton Cloth and Yarn (Control) Order should always be brought on record at the beginning of a case as the basis of the Court's jurisdiction;

but that does not mean that where it has not been done, if the sanction has not been challenged in the proceedings before the lower Court, where ample opportunity existed for doing so, the High Court should interfere in revision. I. L. R. (1947) Kar. 131=231 Ind. Cas. 80=48 Cr.L.J. 674=A.I.R. 1947 Sind 79.

——Cl. 23—Sanction for prosecution — Order granting signed "for Additional Under-Secretary" —Validity of—Government of India Act (1935), S. 59.

Where an order sanctioning a prosecution, for contravention of the Cotton Cloth and Yarn (Control) Order, is signed by some official "for Additional Under-Secretary to the Government" is not a valid and proper sanction, when there is no notification under S. 59, Government of India Act, authenticating an Additional Under-Secretary to authenticate orders of the Governor. Hence the prosecution initiated on such an order is bad. 3 A.I.Cr.D. 303=A.I.R. 1950 Pat. 95=51 Cr. L. J. 584.

——Cl. 23—Sanction — Requirements — Merely setting out the provisions of law—If sufficient.

A sanction granted without any reference to the facts that constitute the offence for which the accused is to be prosecuted would not be a compliance with the provisions of Cl. 23 of the Cotton Cloth and Yarn Control Order and therefore not valid. The facts constituting the charge should be shown on the face of the sanction and merely setting out the provisions of law which have been contravened would not be enough. (1948) 1 M.L.J. 243; L.R. 75 I.A. 30 (P.C.), followed. 51 Cr. L.J. 1061=A.I.R. 1950 Mad. 450=(1950) 1 M. L.J. 341.

——Cl. 23—Sanction obtained subsequent to proceedings—If validates prior proceedings.

Under Cl. 23 of the Cotton Cloth and Yarn Control Order, sanction of the Provincial Government must be obtained before and not after the proceedings are started. A sanction subsequently obtained cannot validate proceedings already taken. Fresh proceedings must be instituted after the sanction has been granted. 228 Ind. Cas. 35=48 Cr. L. J. 72 =48 P.L.R. 321=A.I.R. 1947 Lah. 243.

——Cl. 23—Sanction—Requisites of validity—Sanction granted to prosecution for contravention of Order of 1943—Prosecution for contravention of order of 1945—Legality.

The sanction required for a prosecution in respect of a contravention of the Cotton Cloth and Yarn Control Order must be given with respect to the particular contravention for which the accused is being prosecuted. Where a person is being prosecuted for a contravention of Cl. 18 (2) of the Cotton Cloth and Yarn Control Order. 1945, the sanction to be valid must be a sanction for the prosecution. A sanction given for a prosecution for contravention of the Cotton Cloth and Yarn Control Order, 1943 is not and cannot amount to a sanction for prosecution for a contravention of the Cotton Cloth and Yarn Control Order of 1945. Such a sanction is not valid and cannot validate the prosecution, simply because the terms of the relevant corresponding paragraphs of both Orders are identical. 3 A.I. Cr. D. 182=A.I.R. 1950 Cal. 108=51 Cr. L.J. 556.

——Cl. 23—Sanction—Order granting—Contents of.

A sanction for the prosecution of a contravention of the Cotton Cloth and Yarn Control Order must be specific and must show the particular offence to which it relates. Where an order simply says, "prosecution sanctioned". it is of no value in the absence of anything to show for what offence the prosecution was sanctioned or of any evidence given to show what the sanction was about. 3 A.I. Cr. D. 182=A.I.R. 1950 Cal. 108=51 Cr.L.J. 556.

——Cl. 23—Sanction under—Validity — Essentials—Matters to be considered in giving sanction —Scope and effect of sanction—Sanction under Cr. P. Code (5 of 1898), Ss. 195 to 199—Difference—Absence of valid sanction—Defect, if curable under S. 537, Cr. P. Code.

In order to comply with the provisions of Cl. 23 of the Cotton Cloth and Yarn (Control) Order, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction but this is not essential, since Cl. 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove extraneous evidence that those facts were placed before the sanctioning authority.

The sanction to prosecute constitute a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. The Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case.

A sanction given without reference to the facts constituting the offence is not a compliance with the actual terms of Cl. 23. The sanction required is for a prosecution of a person for having done acts which constitute a breach of the Order.

The giving of the sanction confers jurisdiction on the Court to try the case and the Court must try the case in the ordinary way under the Cr. P. Code. The charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.

Sanctions under Ss. 195 to 199 of the Cr. P. Code are directed to different objects. Even under the Code sanction would be given in respect of the facts constituting the offence charged.

Where there is no valid sanction there is a defect in the jurisdiction of the Court which can never be cured under S. 537 of the Cr. P. Code. 75 I. A. 30=I.L.R. (1948) Bom. 316=52 C.W.N. 325 =61 L.W. 257=A.I.R. 1948 P.C. 82=1948 M. W.N. 292=1948 A.L.J. 170=49 Cr.L.J. 261=50 Bom.L.R. 399=(1948) 1 M.L.J. 243 (P.C.).

——Cl. 23—Sanction—What is—Letter of Cloth Controller prior to amendment of 1944—If amounts to.

A letter of the Cloth Controller sanctioning a prosecution under Cl. 23 of the Cotton Cloth and Yarn (Control) Order, prior to the amendment of 1944, does not amount to a sanction by the Provin-

cial Government as required by Cl. 23 as it stood before the notification of 1944, by which the power of sanction was delegated by the Provincial Government. 49 Cr.L.J. 375=A.I.R. 1948 Pat. 290.

——Cl. 23—Sanction to prosecute — Sanction should be obtained against each individual a cused.

It is the duty of the sanctioning authority to consider in the case of each accused whether a prosecution should be instituted or not. Prosecution must be sanctioned in respect of each accused person.

One **A** was the licensed owner of a cloth shop and **B** was the manager. A search was made of the shop and an application was made by police to the District Magistrate for sanction for prosecution of **B**. The District Magistrate san tioned the prosecution. Before the case was taken up for hearing, an application was made to the District Magistrate for sanction of prosecution of **A** also. The District Magistrate did not decide that **A** ought to be prose uted but directed that the prosecution should apply to the trying Magistrate for **A's** prosecution on the strength of the previous prosecution of B:

Held, that there was no sanction for prosecution of **A** as required by R. 23 and **A's** prosecution and conviction under R. 14 (2) were, therefore, without jurisdiction. A.I.R. 1946 Cal. 330. =I.L.R. (1946) 1 Cal. 539=50 C.W.N. 371= 223 Ind. Cas. 322=47 Cr.L.J. 510.

——Cl. 23—Notification under dated 9th December, 1944—If valid.

In pursuance of Cl. 23, the Provincial Government authorized all District Magistrates in Central Provinces and Berar within their respective ju isdiction to sanction prosecution for an offence punishable under the said Order. The wo-ds "for an offence punishable under the said Order" found in the end of the notification are meaningless for the reason that the Cotton Cloth and Yarn (Control) O-der 1943 does not provide for the punishment of the contravention of any of the provisions of that order. The contravention of any of the provisions of that Order is punishable under R. 81 (4) of the Defence of India Rules. The proper wording should have been "for the contravention of any of the provisions or this O-der punishable under R. 81 (4) of the Defence of India Rules." The inartistic expression which occurs in the Provincial Government's Notification does not invalidate the whole thing. It is open to the Court to read the Notification leaving out the last meaningless clause, or to add to it certain words which would invest it with meaning, in view of the intention clearly conveyed by the earlier part of the Notification. 1946 N.L.J. 487=I.L.R. (1946) Nag. 930=A.I.R. 1947 Nag. 45=226 Ind. Cas. 178=47 Cr.L.J. 840.

——Cl. 23—Institution of prosecution—Sanction obtained subsequently—Effect.

Where the sanction is obtained after the institution of the prosecution and it is not for the particular offence with which the accused was charged, the sanction cannot validate the trial. It is not open to the Courts to say that it is a mere irregularity which does not vitiate the proceedings. A.I.R. 1045 All. 214=1945 A.L.J. 180=1945 A.W.R. (H.C.) 174=1945 O.W.N. (H.C.) 192=46 Cr.L.J. 678=I.L.R. (1945) All. 617= 220 Ind. Cas. 324.

——Cl. 23—Previous sanction, necessity of.

Clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943, must be strictly complied with and before a Magistrate can have any jurisdiction to entertain a case for the contravention of the Control Order, there must be previous sanction for the prosecution obtained from the Provincial Government. Conviction and sentence obtained without such sanction are illegal.

A carbon copy of a Government order is proof of the sanction is not admissible. I.L.R. (1945) All. 644=1945 A.W.R. (H.C.) 175=1945 A.L.J. 203=1945 O.W.N. (H.C.) 165.

——Cl. 23—Sanction — Conviction under Cls. 8 and 3 of Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944.

Clause 8 of the Bihar Order does not create an offence. It has to be read along with and as supplemental to the Control Order. A prosecution under Cl. 8, therefore, without the previous sanction of the Provincial Government is illegal.

But a conviction under Cl. 3 is not bad for want of a sanction of the Provincial Government for such conviction is not covered by the Control Order. A.I.R. 1945 Pat. 477=24 Pat. 487=27 P.L.T. 46.

——Cl. 23—Scope — Absence of sanction—Effect of.

Absence of sanction to prosecute, as required by Cl. 23 of the Cotton Cloth and Yarn (Control) Order, 1943, is fatal to the institution of criminal proceedings for breach of the provisions of the order. 49 Cr.L.J. 375=A.I.R. 1948 Pat. 290.

COTTON CLOTH AND YARN (CONTROL) ORDER, 1945.

——Cls. 2 (2) and 23—Applicability—Sanction applied for and granted under Cotton Cloth and Yarn (Control) Order (1943), after repeal of that order —Prosecution based on—Conviction—Legality.

Where after the coming into force of the Cotton Cloth and Yarn (Control) Order, 1945, sanction for prosecution of an offence is applied for and granted under the repealed Cotton Cloth and Yarn Control Order, 1943, it cannot be said to be something done under the repealed order, and therefore cannot be deemed to be done under Cl. 23 of the Order passed in 1945, which repealed the earlier Order, within the meaning of the first proviso to Cl. 2 (2) of the Cotton Cloth and Yarn (Control) Order, 1945. Nor can such grant of sanction be regarded as a reference contained in any order (or notification) issued under the Defence of India Rules to the repealed Order, within the meaning of the second proviso to Cl. 2 (2) of the Cotton Cloth and Yarn (Control) Order, 1945.

A prosecution launched on such sanction is illegal; **the proceedings are therefore void *ab initio*** and liable to be quashed with the result that a conviction had in a trial arising out of such proceed-

ings must be set aside. 231 Ind. Cas. 350=48 Cr.L.J. 770.

——Cl. 18 (2)—Applicability—Servant taking yarn to railway station for despatch under orders of master—Offence.

A servant of a dealer who merely takes yarn to the railway station for being despatched under the orders of his master cannot be held to be 'holding' the yarn so as to render him liable for contravention of Cl. 18 (2) of the Cotton Cloth and Yarn Control Order, 1945. The person holding the yarn is the owner and not his servant who merely takes it to the railway station. 3 A.I.Cr.D. 303 =A.I.R. 1950 Pat. 95=51 Cr.L.J. 584.

——Cl. 18 (2)—Construction—"Other persons"—To be interpreted ejusdem generis.

The words "other persons" in sub-Cl. (2) of Cl. 18 of the Cotton Cloth and Yarn Control Order were not intended to be wide enough to include every private citizen whether he is, in any way connected or not with the trade or manufacture of cloth or yarn. Those words must be interpreted ejusdem generis with what has proceeded and followed them and mean a person who is connected with the cloth trade and is in possession of the cloth in connection with his business. 1949 A. W. R. 432.

——Cl. 18 (2)—Applicability — "Normal requirements"—If confined to five yards—Possession of more than five yards—Offence.

It may be that a person is not entitled to get more than five yards of cloth for a particular period, but the "normal requirements" of a person cannot be said to be five yards only. There is no rule, order, ordinance or other law which forbids a man accumulating cloth which he has purchased over a long period of time or receiving as presents cloth legitimately purchased by his friends or relations. Possession of a large quantity of cloth by itself cannot therefore be held to be a contravention of Cl. 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1945. 49 Cr.L.J. 31 (2)=A.I.R. 1948 Cal. 78 (1).

——Cl. 18 (2)—"Normal requirements"—Meaning and import of—Factors to be taken into account in considering.

The expression "normal requirements" in Cl. 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1945, would include the business requirements of a dealer or the personal requirements of a person other than a dealer, such as a private individual. The word "normal" restricts his requirements to something that is regular or usual as opposed to his requirement for an unusual occasion. The Court is required to judge from the facts of each case whether the quantity found is in excess of the normal requirements. Various factors have to be taken into consideration in deciding what the personal or busines requirements of a person are. One of those factors to be taken into consideration in deciding about the normal requirements of a dealer is the place where the stock of cloth is found. 113 pieces of handloom cloth cannot by any stretch of imagination be said to be within the "normal requirements" of a person whatever be the size of his family and his social status. 16 Cut.L.T. 37=A.I.R. 1950 Orissa 121=4 A.I. Cr.D. 324=51 Cr.L.J. 986.

——Cl. 18 (2)—"Normal requirements"—Meaning of—Possession of large quantity of cloth—Offence.

It cannot be said that a person is in possession of cloth in excess of his normal requirements, in contravention of Cl. 18 (2) of the Cotton Cloth and Yarn Control Order, 1945, unless some kind of standard is fixed by the order or the rules thereunder. The term "normal requirements" without further specification, is a vague term. What may appear normal to one may seem abnormal to another. Merely because a man has in his possession a large quantity of cloth, a Court cannot hold him guilty of the offence of contravention of the order. 3 A.I.R.Cr.D. 182=A.I.R. 1950 Cal. 108=51 Cr.L.J. 556.

——Cls. 18-A and 18-B—Order issued by Textile Commissioner directing delivery of yarn to persons of particular categories—Respondent company contravening order by delivery of yarn to outside weavers—No contract of sale—Seizure of goods by Textile Commissioner for contravention—Application under S. 45, Specific Relief Act—If lies.

The Textile Commissioner of Madras issued an order under Cl. 18-B (1) (b) of the Cotton Cloth and Yarn Control Order, 1945, directing the appellant company to confine its delivery of yarn to three specified categories of persons with a view to securing a proper distribution of cloth or yarn. But the appellant company delivered yarn to weavers outside the mill premises on certain conditions, though the yarn delivered was not sold to them. The Textile Commissioner considered this course to be an infringement of his order and seized certain quantities delivered by the appellant to outside weavers. The appellant thereupon filed a petition under S. 45 of Specific Relief Act.

Held, that the respondent had not travelled beyond his authority under Cl. 18-B (1) (b). He gave appellant the right to supply yarn to persons of specified category; but these categories did not include outside handloom weavers. In spite of the fact that the contracts entered into with them by the appellant company were not for the sale of yarn but only delivery of yarn under certain arrangements made with them, still there having been delivery and as the delivery had been in contravention of the order issued by the Textile Commissioner, the action of seizure of goods by the respondent was right. In fact the appellant was guilty of an offence which justified the respondent in seizing the yarn delivered in contravention of his order. The application under S. 45 of the Specific Relief Act did not lie. 59 L.W. 461=1946 M. W.N. 569=230 Ind. Cas. 69=A.I.R. 1947 Mad. 82=(1946) 2 M.L.J. 188.

——Cl. 18-B (1) (b)—Delivery—Includes bailment of yarn for conversion into cloth and return—Power of Textile Commissioner to prohibit "delivery" of yarn and seize such yarn delivered in contravention of prohibition—Seizure of such yarn outside Madras—Jurisdiction of High Court to grant relief under S. 45 of Specific Relief Act.

The scope of Cotton Cloth and Yarn Control Order, 1945, is very wide. It relates to both

dealers and manufacturers in their dealings with themselves or with outside persons the object of directions issued under Clause 18-B being the proper distribution of cloth or yarn of a specified description. The operation of that clause is not limited to dealings with the outside public only. The object of Cl. 18-B is to prohibit delivery of cloth or yarn to any person including delivery to a bailee. Accordingly delivery of yarn by a mill to outside handloom weavers for being woven into cloth and returned to the mill will fall within Cl. 18-B (1) (b) of the Control Order.

Where the yarn so delivered in contravention of the Textile Commissioner's order has been seized by the Provincial Textile Commissioner outside its Original Civil Juridisdiction the High Court has no jurisdiction to give relief under S. 45 of the Specific Relief Act in respect of such seizures though the Textile Commissioner may have his office within the limits of the Ordinary Original Civil Jurisdiction of the High Court. 76 I.A. 191=I. L. R. (1950) Mad. 679=1949 M. W.N. 805=84 C.L.J. 266=52 Bom.L.R. 12= 62 L.W. 724=54 C.W.N. 27=A.I.R. 1949 P. C. 307=(1949) 2 M.L.J. 495 (P.C.).

——Cl. 24—Sanction for prosecution—Order signed by Additional Under-Secretary or by another for him—Legality of—Government of India Act, S. 59—Bihar Notification No. 2094-A, dated 1st May, 1937.

A sanction for prosecution under S. 24, Cotton Cloth and Yarn Control Order (1945), which is signed by some person for an Additional Under-Secretary to Government is not a valid sanction, in view of S. 59 of the Government of India Act (1935) and Bihar Government Notification No. 2094-A, dated 1st May, 1937; under the notification, the Additional Under-Secretary is not a person who can authenticate an order on behalf of the Governor or to sign it. 3 A.I.Cr.D. 301= A.I.R. 1950 Pat. 75=51 Cr.L.J. 549=30 P.L. T. 330.

COTTON DUTIES ACT (II OF 1896).

——Ss. 8, 9, 11, 25—Cotton duty—Failure to make return—Collector's power to levy duty—Right to recover arrears of duty—Penalty for failure to make return—Transfer of factory before assessment—Tansferor's liability.

The power of the Collector to make an assessment under S. 9 of the Cotton Duties Act, 2 of 1896, cannot be limited by any defect in the return or even by the total failure of the assessee to make a return. The return, in fact, is only intended to facilitate assessment and cannot be described as an indispensable pre-requisite of it.

The fact that a penalty is prescribed for omitting to make a return does not deprive the Collector of the power to realise the duty.

If it be granted that the power to assess independently of any return is given by the Act, the method and result of such assessment may be the subject of departmental appeal, but so long as it conforms to ordinary notions of fairness, it cannot be questioned in a suit.

A person who has become liable to pay duty and who fails to submit the return required by S. 8 of the Act cannot plead lapse of time between the production of his goods and the initiation of steps to assess them as a defence to the claim.

A person who had made profits from the goods liable to duty and who had been called upon to pay duty cannot escape his liability by pleading that at the time, the assessment was made, the owner of the factory was his vendee. A.I.R. 1933 Mad. 748=38 L.W. 455=65 M.L.J. 518= 1933 M.W.N. 989=57 Mad. 237=145 Ind. Cas. 917.

——S. 16—Wilful obstruction—Free access to godown is covered by the section.

Where the accused had notice to remove the lock and to give the complainant free access and he declined to do so.

Held, there was wilful obstruction on the part of the accused. 82 Ind. Cas. 353=25 Cr.L.J. 1281=26 Bom.L.R. 721=A.I.R. 1924 Bom. 492.

——S. 25 (9)—Wilful obstruction—Wilful obstruction does not require any overt act.

The Inspector of Cotton Excise wanted access to the godown of the accused's mill for inspection of the goods or account books. The godown was locked. The requisition of the complainant to have it opened was not complied with. It was not suggested in the case that the accused had not the necessary control over the key and that he was not in a position to open the godown if he was minded to do so.

Held, under these circumstances, if the accused refused to open the godown he undoubtedly caused an obstruction to the free access to this godown to which the complainant was entitled. It does not matter as to what the object of the complainant was in asking the accused to open the godown. Obstruction is caused no less because the purpose for which it was wanted is not established as alleged by the complainant. 82 Ind. Cas. 353=25 Cr.L.J. 1281=26 Bom.L. R. 721=A.I.R. 1924 Bom. 492.

COTTON GINNING AND PRESSING FACTORIES ACT (12 OF 1925).

——S. 9—Factory, what is.

A building constructed for the purpose of being used as a factory does not become a factory under S. 9 (3), Cotton Ginning and Pressing Factories Act, until it is actually so used. 1937 M.W.N. 1335.

COTTON TEXTILES (CONTROL OF MOVEMENT) ORDER (1946).

——S. 3—Applicability—Transport of cloth by passenger in train.

S. 3 of the Cotton Textiles (Control of Movement) Order (1946) applies only to cases where the transport of cloth by rail is through an agency other than the railway passenger himself; it does not apply to the transport of cloth by rail by the passenger

himself. I.L.R. (1949) Cut. 787=A.I.R. 1950 Orissa 114=51 Cr.L.J. 914 (S.B.).

——S. 3—Orissa Government Notification No. 16100, S.T., dated 3rd June, 1946—Relative scope and effect of—If repugnant to or in conflict with each other. *See* DEFENCE OF INDIA RULES (1939), Rr. 81 (4) AND 121. I.L.R. (1949) Cut. 787=A.I.R. 1950 Orissa 114=51 Cr. L.J. 914 (S. B.).

——S. 10—Applicability—Orissa Notification No. 16100, S.T., dated 3rd June, 1946—Prosecution for contravention of—Sanction for—Necessity. *See* DEFENCE OF INDIA RULES (1939), Rr. 81 (4) AND 121. I.L.R. (1949) Cut. 787=A.I.R. 1950 Orissa 114=51 Cr.L.J. 914 (S.B.).

———S. 10—Sanction for prosecution under—Contents—Facts on which sanction was obtained not disclosed—Validity of such sanction.

Where a sanction for prosecution under S. 10 of the Cotton Textiles (Control of Movement) Order, 1946, does not show as to what facts had been placed before the sanctioning authority for obtaining the sanction, it cannot be held to be a valid sanction. The sanction must be shown to have been given in respect of facts onstituting the offence in question. 4 A.I.Cr.D. 164=A.I.R. 1950 Ajmer 20=51 Cr. L.J. 890.

——(1948)—General Permit No. 1, Para. 3—Transport of cloth—Conditions.

Under General Permit No. 1, Para. 3, persons could transport "cloth" without any restriction of weight from any place in one zone to any other place in that zone by a passenger train provided the "cloth" had been booked as a railway parcel. A.I. I.R. 1950 Ajmer 24=51 Cr. L.J. 1075.

——S. 3—General permit under Cls. (2) and (3)—Relative scope and distinction—Personal luggage of railway passenger—If excluded by R. 3—Limit of quantity.

It is clear from a comparison of Cls. (2) and (3) of the General permit specified in S. 3 of the Cotton Textile (Control of Movement) Order, 1948, that a distinction is intended to be drawn between the personal luggage of a passenger and a railway parcel. Clause (3), though it is not intended to exclude from its operation the luggage of passengers travelling by trains, does not permit a passenger travelling by a train to carry an unlimited quantity of textiles, but only permits an unlimited quantity of textiles, but passenger train, if it does not constitute the personal luggage of a passenger travelling by train. Personal luggage is governed by Cl. (2) of the permit and the total quantity or amount is limited to ten pounds in weight. 4 A.I.Cr.D. 121.

COUNCILS (INDIAN) ACT (24 AND 25 Vict. 1861, Ch. 67).

——S. 47—Re-distribution of territories.

Re-distribution of territories does not by itself make an Act inaplicable in a place in which it was already in force. 114 Ind. Cas. 666=48 C.L.J. 523=A. I.R. 1929 Cal. 145.

COUNCILS ACT (1861).

See INDIAN COUNCILS ACT.

COUNSEL.

See (1) LEGAL PRACTITIONER.
(2) PRACTICE.

COUNSEL'S FEES

See LEGAL PRACTITIONER.

COUNTER-CLAIM.

See C. P. CODE, O. 8.

COUNTERFEITING COIN.

See PENAL CODE, S. 232.

——Trade Mark.

See PENAL CODE, S. 482.

COUNTER-PART.

See (1) LEASE.
(2) EVIDENCE ACT, S. 65.

CO-URALANS.

See MALABAR LAW.

COURT.

See (1) C. P. CODE, SS. 9 AND
(2) PRACTICE.
(3) JURISDICTION.

COUNTER-CLAIM.

See C. P. CODE, O. 8, R. 6.

——Jurisdiction—Limits of defendant's rights—Madras High Court (O.S.) Rules, O. 5, R. 3.

A counter-claim may be set up only in respect of claim as to which the party could bring an independent action in the Court in which the counter-claim is brought. In a suit on the Original Side of the High Court for repayment of certain moneys entrusted by the plaintiff to the defendant, for the purpose of being handed over to the plaintiff's son, the defendant, the son-in-law of the plaintiff, raised a counter-claim in the written statement that the plaintiff had owed him a greater amount owing to his acting on defendant's behalf in certain other transactions, which took place hundreds of miles away from Madras and that accounts should be taken and or that the plaintiff should pay him a further sum of money. On a preliminary point as to the jurisdiction of the High Court to entertain such a counter-claim:

Held: The plaintiff's preliminary point of jurisdiction should be upheld and the counter-claim should be excluded, because it is only when the defendant had any claim arising against the plantiff within the jurisdiction of the High Court that the plaintiff would have laid himself open to a counter-claim in respect of it and the High Court would have been entitled to entertain such a claim. But it does not follow that because the plaintiff has done something which he was entitled to do, the defendant's rights will become limitless. 1949 M.W.N. 2=A.I.R. 1949 Mad. 630=62 L.W. 161=(1949) 1 M.L.J. 110.

COUNTER PART.

See (1) EVIDENCE ACT, S. 65.
(2) LESSOR AND LESSEE.

COURT—DUTY OF.

See JURISPRUDENCE.

COURT-FEES.

See (1) Court-Fees Act.
(2) High Courts (Indian) Act. S. 15.

—Appeal not from decree or order having force or a decree to a Civil Court.
See Court-Fees Act, Sch. II, Art. 11.

—Appeal where subject-matter does not exceed Rs. 5, 100, 1000, etc., and where subject-matter exceeds Rs. 50,000.
See Court-Fees Act, Sch. I, Art. 1.

—Application to sue or appeal as pauper.
See Court-Fees Act, Sch. II. Arts. 1, 2 and 3.

—Application for review.
See Court-Fees Act, Sch. 1. Arts. 4 and 5.

—Attachment, to set aside.
See Court-Fees Act, S. 7 (vii)

—Bail bonds—Exemption.
See Court-Fees Act, S. 19 (xv).

—Collection by stamp.
See Court-Fees Act, S. 25.

—Computation of.

——Mortgage suit.
See Court-Fees Act, S. 7 (ix).

——Suit between landlord and tenant.
See Court-fees Act, S. 7 (xi)

——Suit for accounts.
See Court-fees Act, S. 7 (iv) (f).

——Suit for declaratory decree and consequential relief.
See Court-Fees Act, S. 7 (iv) (c).

——Suit for Easement.
See Court-Fees Act, S. 7 (iv) (l).

——Suit for Injunction.
See Court-Fees Act, S. 7 (iv) (d).

——Suit for maintenance and annuities.
See Court-Fees Act, S. 7 (ii).

——Suit for money.
See Court-Fees Act, S. 7 (i).

——Suit for movable property having market value.
See Court-Fees Act, S. 7 (iii).

——Suit for movable property of no market value.
See Court-Fees Act, S. 7 (iv). (a).

——Suit for possession.
See Court-Fees Act, S. 7 (v).

——Suit for pre-emption.
See Court-Fees Act, S 7 (vi).

——Suit for specific performance.
See Court-Fees Act, S. 7 (x).

——Suit to enforce right to share in joint family property.
See Court-Fees Act, S. 7 (iv) (b).

—Copies.
See Court-Fees Act, Sch. I, Arts. 6, 7, 8 and 9.

—Counter-claims.
See Court-Fees Act, Sch. I. Art 1.

—Cross-objections.
See Court-Fees Act, Sch. I, Art. 1.

—Deficiency of.
See Court-Fees Act, Ss. 12 and 28.

—Exemption.
See Court-Fees Act, S. 19.

—Levying fees, mode of.
See Court-Fees Act, Ss. 25-30.

—Multifarious suits.
See Court-Fees Act, S. 17.

—Non-payment of additional fees.
See Court-Fees Act, S. 10 (ii).

—On documents filed in High Courts.
See Court-Fees Act, S. 4.

—On documents filed in Mofussil Courts or public offices.
See Court-Fees Act, S. 6.

—Petitions.
See Court-Fees Act, Sch. II. Art. 1.

—Plaint.
See Court-Fees Act, Sch. I. Art. 1.

—Pleadings.
See Court-Fees Act, Sch. I. Art. 1.

—Power to ascertain market value and net profits.
See Court-Fees Act, S. 9.

—Power to reduce or remit.
See Court-Fees Act, S. 35.

—Probate, letters and certificates of administration.
See Court-Fees Act, Ss. 19-A to 19-K.

—Process fees.
See Court-Fees Act, Ss. 20, 23.

—Refund of.
See (1) Civil P. C., S. 151—Refund.
(2) Court-Fees Act, Ss. 13, 14 and 15.

—Sale of stamps.
See Court-Fees Act, S. 34.

—Set-off.
See Court-Fees Act. Sch. I. Art 1.

—Suit for compensation or damages.
See Court-Fees Act, S. 7 (i).

—Taxing officer.
See Court-Fees Act, S. 5.

—Translations of judgment or order.
See Court-Fees Act, Sch. I. Art. 6.

—Valuation.
See Court-Fees Act, S. 12.

—Wakalatnama.
See Court-Fees Act, Sch. II. Art. 10.

—Written statement.
See Court-Fees Act, Sch. I. Art. 1.

——Conditional decree.
See also (1) Court-Fees Act, S. 7 (iv) (c).
(2) Do. Sch. I, Art. 1.
(3) Do. Sch. II, Art. 17 (vi).
(4) Do. S. 7 (ix).

——Conditional relief.
A claim for being given a smaller share on payment of proportionately lesser amount cannot be valued. 69 Ind. Cas. 653=A.I.R. 1923 Lah. 129.

——Devolution of interest pending suit.
—The devolution of interest pending the suit can make no difference in the Court-fee to be paid. 82 Ind. Cas. 813=3 Pat. 654=A.I.R. 1925 Pat. 47.

———Enquiry.
To decide if a suit has been valued properly for purposes of Court-fees, evidence should be recorded on the point. An application for the appointment of a curator under Act XIX of 1841, which contains a description of the value of the property does not impose a corresponding obligation as to the stamp duties leviable on it, and hence is not a safe criterion as to the value of the property. A decision as to valuation based on it cannot be sustained. 63 Ind. Cas. 685=14 S.L.R. 137.

——Execution orders.
See also (1) Sch. I. Art. 1.
(2) Sch. II. Art. 11.

——Execution orders — Recovery of interest.
A party is required to pay a Court-fee upon the sum for the recovery of which he seeks the assis-

tance of the Court in proceedings under S. 47 of the C. P. Code which are of the nature of a suit. Where a decree-holder sues to recover a sum as interest in addition to the sum named in the decree he must pay Court-fees on the amount he claims. 17 Bom. 41, Not foll. 5 P.L.J. 235=52 Ind. Cas. 802.

—— **Execution orders — Appeal against order under S. 144, C. P. C.**

A two rupee Court-fee is sufficient for an appeal to the High Court against an order passed by the lower Court under S. 144, C. P. C., it being an order deciding a question falling under S. 47 (1) C.P.C. 21 C.W.N. 544=39 Ind. Cas. 640.

——**Insufficient Court-fee.**

See Court-Fees Act, S. 12.

——**Pauper.**

See C.P. Code. O. 33, R. 7.

——**Priority.**

——**Precedence as crown debt.**

Court-fees form a crown debt and the crown is entitled to precedence in payment of his debt over other creditors. 80 Ind. Cas. 935=A.I.R. 1925. Mad. 433.

——Private purchaser from party to suit—Obstruction to delivery of possession—Dismissal of application under O. 21, R. 97, C. P. Code — suit for recovery of possession—Court-fee payable. See Court-fees Act, Sch. II, Art. 17 (1), (1948) 2 M.L.J. 480=A.I.R. 1949, Mad. 545.

——**Reduction.**

See Court-fees Act, S. 10.

COURT FEES ACT (VII OF 1870).

Statute Index.

Account, procedure in suits for, when the decreed amount exceeds the claimed one. S. 11.

Administration, certificates of, Ss. 19A—19K. (Ch. III-A.)

Administration, Letters of, Ss. 19A—19K (Ch. III-A,)

Administration Probates of, Ss. 19A—19K. (Ch. III-A.)

Administrator not compensating for low payment when discovered, S. 19 G.

Administrator to give proper security before letters are stamped, S. 19F.

Admission of improperly paid documents, in criminal cases, S. 33.

Amended document, S. 29.

Annuities, computation of fees in suits for, S. 7.

Appeal against any municipal tax exempted, S. 19 (xxi).

Appeal against chaukidari assessment exempted, S. 19 (xxi).

Appeal from decree not having the force of decree to a Civil Court, Sch. II Art, 11.

Appeal to a Board of Revenue from a decree not having its force, Sch. II Art 11.

Appeal to a Chief Commissioner from a decree not having its force, Sch. II. Art. 11.

Appeal to a High Court from a decree not having its force, Sch. II. Art. 11.

Appeal to a Revenue Court from a decree not having its force, Sch. II. Art 11.

Appeal where subject-matter is of certain values See. Sch. I, Art. 1.

Application containing a complaint of non-cognisable offence to a criminal court, Sch. II Art 1.

Application for compensation to acquisition of property and for public purposes exempted. S. 19, xxii.

Application for Government irrigation water exempted, S. 19, x.

Application for leave to appeal as a pauper to a Commissioner, Sch. II. Art. 3.

Application for leave to appeal as pauper to a District Court, Sch. II. Art. 3.

Application for leave to appeal as a pauper to a High Court, Sch. II. Art. 1.

Application for leave to extend cultivation to a land revenue exempted S. 19. xi.

Application for leave to relinquish land exempted, S. 19, xi.

Application for leave to sue as pauper, Sch. II, Art. 2.

Application for review after 90th day of decree Sch. I, Art. 4.

Application for review on 90th day of decree, Sch. 1, Art. 4

Application for review presented before 90th day of decree, Sch. I. Art 5.

Application for serving notice of rent enhancement exempted, S. 19. xii.

Application for summons of a witness to produce a document exempted, S. 19. xiv.

Application for summons to produce or file an exhibit exempted, S, 19. xiv.

Application of a witness for summons to give evidence exempted, S. 19 xiv.

Application to any Civil Court to obtain copy, Sch. II. Art 1.

Application to any municipal officer for conservancy, Sch. II, Art 1.

Application to any municipal officer for improvement, Sch. II. Art. 1.

Application to Chief Court of the Punjab where the subject-matter does not exceed Rs. 25, Sch. I. Art. 13.

Application to Civil Court subject-matter not exceeding Rs. 50, Sch. II Art. 1.

Application to Civil Court to call for records involving postal charges, Sch. II. Art. 1-A.

Application to Civil or Revenue Officer, not otherwise provided for, Sch. II. Art. 1.

Application to Criminal Court to obtain copy, Sch. II. Art. 1.

Application to customs officer by person dealing with Government, subject-matter relating to those dealings. Sch. II. Art. 1.

Application to cut timber in Government forest exempted, S. 19. xix.

Application to deposit in Court revenue, Sch. II, Art. 1.

Application to deposit in Court rent, Sch. II, Art. 1.

Application to determine the compensation by landlord to tenant, Sch. II, Art. 1.

Application to Excise-officer by person dealing with Government, subject-matter relating to those dealings, Sch. II, Art. 1.

Application to Judicial Commissioner's Court, Upper Burma, where subject-matter does not exceed Rs. 25 Sch. I, Art. 15.

Application to Judicial Commissioner, Upper Burma, where subject-matter exceeds Rs. 25, Sch. I, Art, 15.

Application to Land Revenue-officer by any landholder dealing with Government, subject-matter relating to those dealings, Sch. II, Art. 1.

Application to Lower Burma Chief Court for revision, where the subject-matter does not exceed Rs. 25, Sch. I, Art. 14.

Application to Lower Burma Chief Court, where the subject-matter exceeds Rs. 25, Sch. I. Art. 14.
Application to Magistrate by person dealing with Government, subject-matter relating to those dealings, Sch. II, Art. 1.
Application to receive money due from Government exempted, S. 19, xx.
Application to Revenue Court to obtain copy, Sch. II, Art. 1.
Application to serve notice of relinquishment of land exempted S. 19, xii.
Application to the Chief Court of the Punjab where the subject-matter exceeds Rs. 25, Sch. I, Art. 13.
Application to the Financial Commissioner of the Punjab for revision, where the subject-matter does not exceed Rs. 25, Sch. I, Art. 13.
Application to the Financial Commissioner of the Punjab for revision where the subject-matter exceeds Rs. 25, Sch. I, Art. 13.
Application under Act X of 1859, Sch. II, Art. 13.
Application under S. 23 of Cr. P. Code, Sch, II, Art. 18.
Application when given to a High Court, Sch. II, Art. 1.
Arrears of maintenance, computation of fees in suits for, S. 7, i.
Attachment, fees to set aside, S. 7, vii.
Award, fees in specific performance of, S. 7, x, d.
Bail bond by a Magistrate, Sch. II, Art. 6.
Bail bonds exempted, S. 19, xv.
Bombay Presidency, value of land in, S. 7 v.
Cancellation of stamps, S. 30.
Caveat, Sch. II. Art. 12.
Certain documents, exemption of, S. 19.
Certificates of administration, Ss. 19 A—19 K (Ch. III-A.)
Certificate of debts where the property value exceeds Rs. 1,000, but does not exceed Rs. 10,000, Sch. I, Art. 12-A.
Certificate of securities, Sch. I, Art. 12-A.
Certificate under Succession Certificate Act, in any case, Sch. I, Art. 12.
Charge to a police officer of Bombay or Madras exempted, S. 19, xvi.
Chief Controlling Revenue authority, defined, S. 2.
Cognizable offence, written examination of the complainant for, S. 18.
Collection of fees by stamps, S. 25.
Commencement of Act, S. 1.
Commission, power to issue to ascertain net profits and market value, S. 9.
Compensation, computation of fees in suits for, S. 7. 1.
Complaint of a municipal-officer exempted, S. 19, xviii.
Complaint of a public servant exempted, S. 19, xviii.
Complaint of a Railway servant exempted, S. 19, xviii.
Computation of fees in certain suits, S. 7.
Computation of fees in suits for damages, compensation, arrears of maintenance, annuities, other periodical sums, S. 7, i.
Confirmation of rules made by High Court, S. 20.
Contract of lease, fees in specific performance of, S. 7, x c.
Contract of mortgage, fees in specific performance of, S. 7, x b.
Contract of sale, fees in specific performance of S. 7, xa.
Copy of account where words do not exceed 360. Sch. I, Art. 9.
Copy of a decree having the force of decree where subject-matter exceeds Rs. 50, Sch. I, Art. 7.
Copy of any other order where words do not exceed 360, Sch. I, Art. 9.
Copy of any revenue order where words do not exceed 360, Sch. I, Art. 9.
Copy of decree having the force of decree where subject-matter does not exceed Rs. 50, Sch. I, Art. 7.
Copy of document liable to stamp duty, the stamp duty exceeding eight annas, Sch. I, Art. 8.
Copy of document liable to stamp duty, the stamp duty not exceeding 8 annas, Sch. I, Art. 8.
Copy of judgment not having force of decree, where subject-matter does not exceed Rs. 50. Sch. I, Art. 6.
Copy of judgment not having the force of decree, where subject-matter exceeds Rs. 50. Sch. I, Art. 6.
Copy of Judicial proceeding where words do not exceed 360, Sch. I, Art. 9.
Copy of order having the force of decree where subject-matter does not exceed Rs. 50, Sch. I. Art. 7.
Copy of order having the force of decree where subject-matter exceeds Rs. 50, Sch. I, Art. 7.
Copy of order not having the force of decree where subject-matter exceeds Rs. 50, Sch. I. Art. 6.
Copy of Report where words do not exceed 360, Sch. I, Art. 9.
Copy of statement where words do not exceed 360, Sch. I, Art. 9.
Counter-claim See Sch. I, Art. 1.
Court-fee, relief for too high, being paid. S. 19-A
Cross-objection Sch. I, Art. 1.
Damages, Computation of fees in suits for, S. 7, i.
Debts of a deceased paid out of his estate, Relief for, S. 19-B.
Decision of question as to valuation, S. 12.
Decision of question of valuation by a court of appeal, S. 12, ii.
Decision of question of valuation by a court of reference, S. 12, ii.
Decision of question of valuation by a court of revision, S. 12, ii.
Dismissal of suit for non-payment of additional fees, S. 10, ii.
Document, amended S. 29.
Documents inadvertently received, stamping of, S. 28.
Estate, defined, S. 7, v.
Executors not paying full for low payments when discovered, S. 19-G.
Exemption of a complaint of a municipal officer, S. 19, xviii.
Exemption of a complaint of a public servant, S. 19, xviii
Exemption of a complaint of Railway servant, S.19 xviii.
Exemption of a petition by a prisoner under restraint of any Court, S. 19, xvii.
Exemption of appeal against any municipal tax, S. 19, xxi.
Exemption of appeal against chaukidari assessment, S. 19, xxi.
Exemption of application for compensation to acquisition of property for public purposes, S. 19, xxii.
Exemption of application for Government irrigation water, S. 19, x.
Exemption of application for leave to extend cultivation to a Land Revenue Officer, S. 19, xi.
Exemption of application for leave to relinquish land to a Land Revenue Officer, S. 19, xi.

Exemption of application for service of notice of relinquishment of land exempted, S. 19, xii.
Exemption of application for summons to produce or file an exhibit, S. 19, xiv.
Exemption of application to cut timber in Government forest, S. 19, xix.
Exemption of application to receive money due from the Government, S. 19. xx.
Exemption of application to serve notice for to enhancement of rent, S. 19, xii.
Exemption of Bail bond, S. 19, xv.
Exemption of certain documents, S. 19.
Exemption of charge to a police officer of Bombay or Madras, S. 19, xvi.
Exemption of first application for summons of a witness to give evidence, S. 19, xiv.
Exemption of first application for summons of a witness to produce a document, S. 19, xiv.
Exemption of Letters of administration, S. 19, viii.
Exemption of petition presented to Special Commissioner under Bengal Act II of 1869. S. 19, xxiii.
Exemption of petition to a Board of Revenue for ascertainment of rights or interests in the land, S. 19, ix.
Exemption of petition to a Board of Revenue for assessment of land, S. 19, ix.
Exemption of petition to a Collector for ascertainment of rights or interests in the land S. 19, ix.
Exemption of petition to a Collector for assessment of land, S. 19, ix.
Exemption of petition to a Commissioner for ascertainment of rights or interests in land, S. 19 ix,
Exemption of petition to a Commissioner for assessment of land, S. 19, ix.
Exemption of petition to a Police Officer of Bombay or Madras, S. 19, xvi.
Exemption of a Petition to a Settlement Officer for ascertainment of rights or interests in land, S. 19, ix.
Exemption of petition to a settlement officer for assessment of land, S. 19, ix.
Exemption of petition under Indian Christian Marriage Act, S. 19, xxiv.
Exemption of plaints in suits before Collectors of Madras Presidency, S. 19, vii.
Exemption of plaints in suits before District Panchayats in Fort St. George, S. 19, vi.
Exemption of plaints in suits by munsiffs in Fort St. George, S. 19, v.
Exemption of power of attorney, when, S. 19, i.
Exemption of processes in suits before District Panchayats in Fort St, George, S. 19, vi.
Exemption of Probate of a Will, S. 19, viii.
Exemption of recognizances, S. 19, xv.
Exemption of written authority to an agent to distrain, S. 19, xiii.
Exemption of written statements wanted by court after first hearing, S. 19, iii.
Fee, refund of, for review of judgment, S. 14.
Fees, computation of, in certain suits S. 7.
Fees for examination by accused to the complainant, S. 31, ii.
Fees for possession of lands paying annual revenue not permanently settled, S. 7, v, b.
Fees for possession of lands paying permanently settled annual revenue, S. 7, v. a.
Fees, for process. Ss. 20—24 (Ch. IV.)
Fees, in High Courts and Presidency Small Causes Courts, Ss. 3—6 (Ch. II).
Fees in other courts and Public offices, Ss. 6—19 (Ch. III.)
Fees in specific performance of an award, S. 7, x, d.
Fees in specific performance of contract of lease, S. 7, x, c.
Fees in specific performance of contract of mortgage, S. 7, x, b.
Fees in specific performance of contract of sale, S. 7, x, a.
Fees in suits for accounts, S. 7, iv, f.
Fees in suits for a declaratory decree and consequential relief, S. 7, iv, c.
Fees in suits for assignee of Land Revenue, S. 7, vii.
Fees in suits for easements, S. 7, iv, e.
Fees in suits for houses and gardens, S. 7, v, e.
Fees in suits for injunction, S. 7, iv, d.
Fees in suits for lands paying a fixed payment in lieu of Revenue, S. 7. v, c.
Fees in suits for lands paying revenue but not separately assessed, S, 7, iv, d.
Fees in suits for maintenance and annuities, S. 7, ii.
Fees in suits for movables of market value, S. 7, ii.
Fees in suits for movables of no market value, S. 7, iv (a).
Fees, in suits for possession of lands, houses and gardens, S. 7, v.
Fees in suits for specific performance, S. 7, x.
Fees in suits to enforce a right of pre-emption, S. 7, vi.
Fees in suits to enforce a share in joint family property S. 7, iv. (b).
Fees in suit to set aside an attachment, S. 7, viii.
Fees leviable in High Courts Original side and Presidency Small Cause Courts, S. 3.
Fees, mode of levying of, Ss. 25—30 (Ch. V.)
Fees on documents in High Court in Appellate jurisdiction, S. 4.
Fees on documents in High Court in Extraordinary jurisdiction, S. 4.
Fees and documents in High Court, in Reference and Revision, S. 4.
Fees on documents in mofussil court. S. 6.
Fees on documents in public offices, S. 6.
Fees on memorandum of appeal against compensation order, S. 8.
Fees paid on applications to Criminal Courts, repay ment of, S. 31 (i).
Fees paid on memorandum of appeal, refund of, S. 13.
Fees, power to reduce, S. 35.
Fees, power to remit, S. 35.
Fees to Accountant General of High Court at Fort William, saving of, S. 36.
Fees to any other officer of High Court, saving of S. 36.
Fees, to be collected by stamps, S. 25.
Fees to foreclosure a mortgage, S. 7. ix.
Fees to redeem a mortgage. S. 7. ix.
Foreclosure, fees in suit for, S. 7. ix.
Garden, power to ascertain market value of, S. 9.
Grants, relief in case of several, S. 19. c.
High Court appellate Jurisdiction, Fees on documents in, S. 4.
High Court Extraordinary Jurisdiction, Fees on documents in, S. 4.
High Court, Reference and Revisional Jurisdiction, Fees on documents in, S. 4.
High Court to make rules for costs of process, S. 20.
House, power to ascertain market value of, S. 9.
Incapacity for refund for the mistake of court, S. 15.
Keeping accounts of stamps, rules for, S. 27.
Landlord and tenant, suits between, S. 7, xi.

Land, power to ascertain market value of. S. 9.
Letters of administration, Ss 19 (A)—19 (K) (Ch. III.-A)
Letters of administration exempted, S. 19, viii.
Letters of administration, notice of application to be given to Revenue authorities for, S. 19 H.
Letters of administration, payment of court fees for S. 19-I.
Letters of administration, provision when low Court fees paid on, S. 19-E.
Letters of administration, Ss 6 and 28 and applicable to S. 19, K.
Levying fees, mode of, Ss. 25—30 (Ch. V.)
Levy of fees in High Courts original side and Presidency Small Cause Courts, S. 3.
Lower Burma Chief Court, application for revision subject-matter exceeding Rs. 25, Sch I, Art. 14
Lower Burma Chief Court, application for revision to, subject-matter not exceeds Rs. 25, Sch. 1, Art 14.
Market value, power to ascertain, S. 9.
Market value wrongly estimated, Procedure on, S. 10.
Memorandum of appeal against compensation order, Fee on S. 3.
Memorandum of appeal, Decision of question as to the valuation of, S. 12. i.
Memorandum of appeal, refund of fee paid on, S. 13.
Memorandum of appeal under S. 55 of Indian Divorce Act, Sch. II, Art. 20.
Memorandum to disprove occupancy right, Sch. II, Art. 5.
Memorandum to establish right of occupancy, Sch. II. Art. 5.
Memorandum to obtain possession, Sch. II. Art. 4.
Mesne profits, procedure in suits for, when the decreed amount exceeds the claimed one, S. 11.
Miscellaneous, Ss, 31—36 (Ch. VI.)
Mode of levying fees. Ss. 25—30 (Ch. V.)
Mofussil Courts, fees on documents in, S. 6.
Mortage, fees to redeem, S. 7, ix.
Muktarnama to a Board of Revenue, Sch. II. Art. 10.
Muktarnama to a Chief Commissioner, Sch. II. Art. 10.
Muktarnama to a High Court, Sch. II. Art. 10.
Muktarnama to a Revenue Court for conduct of a case, Sch. II. Art. 10.
Muktarnama to Civil Court for conduct of case. Sch. II, Art 10.
Muktarnama to Criminal Court of conduct of a case, Sch. II. Art. 10.
Multifarious suits, S. 17.
Necessity and amount of fee in High Court, procedure in difference of, S. 5.
Necessity and amount of fee in Small Causes, procedure on difference of, S. 5.
Nett profits, power to ascertain, S. 9.
Nett profits wrongly estimated, procedure on. S. 10
Non-payment of additional fees, dismissal of suit for S. 10. ii.
Notice of applications for Letters of Administration to be given to Revenue authorities, S.19-H.
Notice of applications for probate to be given to Revenue authorities. S. 19-H.
Number of peons in District Courts, S. 22.
Number of peons in mofussil Small Causes, S. 22.
Number of peons in Revenue Courts, S. 23.
Number of peons in Subordinate Courts, S. 22.
Number of Stamps, Rules for, S. 27.
Order relating to Compensation, Fee on memorandum of appeal against, S. 8.
Other Courts, fees in, Ss. 6—19 (Ch. III.)
Other instrument of obligation by a Magistrate, Sch. II, Art. 6.
Other periodical sums, computation of fees in suits for S. 7. i.
Pauper, application for leave to sue as a, Sch. II. Art 2.
Payment of Court fees for Letters of Administration, S. 19, I.
Payment of Court-fees for probates, S. 19.
Penalties, recovery of, from administrator, S. 19-J.
Penalties, recovery of, from executor, S. 19-J.
Peons in mofussil Small Causes, number of, S. 22.
Peons in Revenue Courts, number of, S. 23.
Peons in subordinate Courts, number of, S. 22.
Peons, number of, in District Courts, S. 22.
Petition by a prisoner under distraint of any Court exempted, S. 19. xvii.
Petition in suit under Native Christians Marriage Dissolution Act, Sch. II. Art. 14.
Petitions presented to Special Commissioner under Bengal Act II of 1869 exempted, S.19, xxiii.
Petition to a Board of Revenue exempted, S. 19, ix.
Petition to a Civil Court to call for records involving postal charges, Sch, II. Art 1.
Petition to a Collector exempted, S. 19 ix.
Petition to a Land Revenue Officer by any land-holder dealing with Government, subject-matter being of those dealings, Sch. II Art. 1.
Petition to a Magistrate by a person dealing with Government, subject-matter relating to those dealings, Sch, II, Art. 1.
Petition to any Civil Court subject matter not exceeding Rs. 50. Sch. II. Art. 1.
Petition to any Criminal Court, to obtain copy Sch. II, Art. 1.
Petition to any Municipal Officer for conservancy, Sch. II. Art. 1.
Petition to any Municipal officer for improvements, Sch. II, Art. 1.
Petition to a Police officer of Bombay or Madras, exempted, S. 19, xvi.
Petition to civil court to obtain copy, Sch. II, Art. 1.
Petition to Commissioner exempted, S. 19. ix.
Petition to Customs officer by person dealing with Government, subject-matter relating to those dealings, Sch. II. Art. 1.
Petition to deposit in rent, Sch. II, Art. 1
Petition to deposit in revenue, Sch. II, Art. I.
Petition to Excise Officer by person dealing with Govt. relating to those dealings, Sch, II, Art. 1.
Petition to Revenue Court to obtain copy, Sch. II Art. 1
Petition under Indian Christian Marriage Act exempted, S. 19, xxvi.
Petition under Indian Divorce Act, Sch. II. Art. 20.
Plaint in a suit for possession under S. 9 of Specific Relief Act. Sch. I. Art. 2.
Plaints, in suits before Collectors of Madras Presidency when exempted, S. 19. vii.
Plaint of appeal, Decision of question as to its valuation, S. 12, i.
Plaint of appeal for a declaratory decree, Sch. II. Art. 17, iii.
Plaint of appeal in suit where no money value is not otherwise provided for, Sch. II. Art. 17, vi.
Plaint of appeal to alter entry in proprietors' registers Sch. II, Art, 17. ii,

Plaint of appeal to alter order of Civil Courts, Sch. II. Art. 17. i.
Plaint of appeal to alter order of revenue court, Sch. II. Art. 17, i.
Plaint of appeal to cancel entry in proprietors' registers, Sch II, Art. 17. ii.
Plaint of appeal to set aside an adoption, Sch. II, Art, 17, v.
Plaint of appeal to set aside a reward, Sch, II. Art. 17. iv.
Plaint of appeal to set aside decision of Civil Court, Sch. II. Art. 17. i.
Plaint of appeal to set aside decision of Revenue Court, Sch. II, Art, 17, i.
Plaint of appeal under Parsi Marriage and Divorce Act, Sch. II, Art. 21
Plaints, exemption of, in suits before District Panchayats in Fort St. George, S. 19, vi.
Plaints, exemption of, in suits by munsiffs in Fort St. George. S. 19, v.
Plaint to disprove occupancy right, Sch. II, Art. 5.
Plaint to establish a right of occupancy, Sch. II, Art. 5.
Plaint to obtain possession, Sch. II, Art. 4.
Plaint Sch. I, Art. 1
Pleading Sch. I, Art. 1.
Pleading where subject-matter does not exceed Rs. 100, Sch. I, Art. 1.
Pleading where subject-matter does not exceed Rs. 1,000, Sch, I. Art. 1.
Pleading where subject-matter does not exceed Rs. 5000, Sch. I, Art. 1.
Pleading where subject-matter does not exceed Rs. 10,000 Sch. I. Art. 1.
Pleading where subject-matter does not exceed Rs. 20, 000 Sch. I, Art.1.
Pleading where subject-matter does not exceed Rs. 30, 000, Sch. I. Art. 1.
Pleading where subject-matter does not exceed Rs. 50,000, Sch. I. Art. 1.
Pleading where subject-matter exceeds Rs. 50,000, Sch. I, Art. 1.
Power of attorney, when exempted. S. 19, i.
Power to ascertain market value, S. 9.
Power to ascertain market value of garden, S. 9.
Power to ascertain market value of house, S. 9.
Power to ascertain market value of land, S. 9.
Power to ascertain net-profits, S. 9.
Power to issue commission to ascertain net profits and market value, S. 9.
Power to reduce fees, S. 35.
Power to remit fees, S. 35.
Pre-emption, Fees in suits to enforce a right of, S. 7. vi.
Probate, Notice of application to Revenue authorities for, S. 19-H.
Probate of a will exempted, S. 19, viii
Probate of a will, Sch. I. Art. 11.
Probate of Letters of Administration, Sch. I, Art. 11.
Probate, payment of court-fees for, S. 19, I.
Probate of Letters of administration, Ss. 19-A 19-K. (Ch. III-A.)
Probates, provision when too low fees paid on S. 19-E.
Probates, Ss. 6 and 28 not applicable to, S. 19 K,
Probates valid as to trust property, without court fees, S. 19-D.
Procedure in difference as to amount in High Court S. 5.
Procedure in difference as to necessity of fee in High Court, S. 5.
Procedure in difference as to necessity of fee in small causes, S. 5.
Procedure in difference as to necessity or amount of fee in small causes, S. 5.
Procedure in suits for account, when the decreed amount exceeds the claimed one, S. 11.
Procedure in suits for mesne profits when decreed amount exceeds the claimed one, S. 11.
Procedure on administrator not compensating for low payment on discovery, S. 19. G.
Procedure on difference as to amount in Small Causes, S. 5.
Procedure on difference as to necessity or amount of fee in High Court, S. 5.
Procedure on executors not compensating for low payment when discovered, S. 19-G.
Procedure on market value, wrongly estimated, S. 10.
Procedure on nett profits wrongly estimated. S. 10.
Procedure on notice of application for probate to revenue authorities, S. 19-H.
Procedure on notice of Letters of administration to revenue authorities, S. 19-H.
Processes, exemption of, in suits before District Panchayats in Fort St. George, S. 19-vi.
Process fees, Ss. 20, 24 (Ch. IV.)
Process fees, Tables of, S. 21.
Process Rules, for costs of, S. 20.
Proper security, administrator to give, before letters are stamped, S. 19. F.
Provision when low court-fee paid on letters of administration, S. 19, E.
Provision when low court-fee paid on probate, S. 19, E.
Publication of rules made by High Courts, S. 20.
Public offices fees in, Ss. 6—19 (Ch. III).
Public offices, fees on documents in, S. 6.
Punjab Chief Court, application to, subject-matter not exceeding Rs. 25, Sch, I, Art. 13.
Recognizances exempted, S. 19.
Recovery of penalties from administrator, S. 19-J.
Recovery of penalties from executor. S. 19-J.
Refund of fee for review of judgment, S. 14.
Refund of fee paid on memorandum of appeal, S. 13.
Refund, when court reverses its former judgment for mistake, S. 15.
Relief for debts of a deceased paid out of his estate, S. 19-B.
Relief for too high a court fee being paid, S. 19-A.
Relief in case of several grants, S. 19-C.
Renewal of stamps, rules for, S. 27.
Repayment of fees paid on applications to criminal courts, S. 31 (i).
Repeal of, S. 16.
Revenue courts, number of peons in, S. 23.
Reversal of former judgment by court for mistake, refund on, S. 15.
Review of judgment, Refund of fee on, S. 14.
Rules for costs of process, S. 20.
Rules for keeping accounts of, S. 27.
Rules for number for stamps, S. 27.
Rules for renewal of stamps, S. 27.
Rules for supply of stamps, S. 27.
Rules made by High Courts, confirmation of, S. 20.
Rules made by High Courts, publication of, S. 20.
Sale of stamps, S. 34.
Saving of fees to Accountant-General of High Court at Fort William, S. 36.
Saving of fees to any other officer of High Court, S. 36.
Set Off, Sch. I Art. 1.
Specific performance, fees in suits for, S. 7, x.
Stamping documents inadvertently received, S. 28.
Stamps, cancellation of, S. 30.
Stamps, Collection of fees by, S. 25.

Stamps, Sale of, S. 34,
Stamps to be adhesive, S. 26.
Stamps to be impressed, S. 26.
Stamps to be partly impressed and partly adhesive, S. 26.
Stay of further execution of decree, if the decreed amount exceeds the claimed one, S. 11.
Suit for abatement of rent, S. 7, xi. f.
Suit for contesting a notice of ejectment, S. 7. xi.d.
Suit for delivery by a landlord of lease, S. 7, xi, c.
Suit for delivery by a tenant of the counterpart of a lease, S. 7. xi, a.
Suit for enhancing a tenant's rent, S. 7, xi. b.
Suit for recovering occupancy of immovable property, S. 7, xi, e.
Suit for recovery of immovable property from a tenant, S. 7. xi. c.
Suits between landlord and tenant, S. 7, xi.
Suits for annuities, computation of fees in, S. 7, i.
Suits for compensation, computation of fees in, S. 7. i.
Suits for damages, computation of fees in, S. 7, i.
Suits for maintenance arrears, computation of fees in, S. 7, i.
Suits for other periodical sums, computation of fees in, S. 7, i.
Suits, multifarious, S. 17.
Supply of stamps, rules for, S. 27.
Tables of process fees, S. 21.
Taxing officer, defined S. 5.
Timber, application to cost in Government forest exempted, S. 19, xix.
Title of the Act, S 1.
Translation of judgment not having the force of decree where subject-matter does not exceed Rs. 50, Sch. I, Art, 6.
Translation of judgment not having the force of decree where subject-matter exceeds Rs. 50, Sch. I, Art. 6.
Translation of order not having the force of decree where subject-matter does not exceed Rs. 50, Sch. I, Art. 6.
Translation of order not having the force of decree where subject-matter exceeds Rs. 50, Sch. I, Art. 6.
Trust property, without Court-fees probates declared valid, S. 19-D.
Undertaking under S. 49 of Indian Divorce Act, Sch. II, Art. 7.
Upper Burma Judicial Commissioner's Court application to, where subject-matter does not exceed Rs. 75, Sch. I, Art. 15.
Upper Burma Judicial Commissioner's Court Subject-matter exceeding Rs. 25, Sch. I, Art. 15.
Vakalatnama to a Board of Revenue, Sch. II, Art. 10.
Vakalatnama to a Chief Commissioner for case, Sch. II, Art. 10.
Vakalatnama to a Civil Court for conduct of case, Sch. II. Art. 10.
Vakalatnama to a Criminal Court for conduct of case, Sch. II, Art. 10.
Vakalatnama to a High Court, Sch. II, Art. 10
Vakalatnama to a Revenue Court for conduct of a case, Sch. II, Art. 10.
Valid, Probates declared as to trust property without Court-fees, S. 19-D.
Value of land in Bombay Presidency, S. 7, v, (1)
Written agreement showing question for court's opinion under C. P. C., Sch. II, Art. 19.
Written authority to an agent to distrain exempted, S. 19. xiii.
Written examination of a complainant for a cognizable offence, S. 18.
Written examination of a complainant for wrongful confinement, S. 18.
Written examination of complainant for wrongful restraint, S. 18.
Written examinations of complainants, S. 18.
Written statement after first hearing, when exempted, S. 19 (m).
Written statement Sch. I, Art. 1.
Wrongful confinement, written examination of complainant on, S. 18.
Wrongful restraint, written examination of a complainant for, S. 18.

Court - fees Act (VII of 1870) S. 1.

—Amendment of Act—Effect.

——Fee on the date of representation.

When the plaint which has been returned is presented in a Court of competent jurisdiction the suit, even for purposes of Court-fee, must be taken to be instituted on the date of such representation and therefore on such plaint the Court-fee should be leviable under the law which was in force at the time when the plaint was represented. If the Act is amended in the meantime increasing the amount of fee payable thereunder the plaintiff should be credited with fee originally paid. 15 C. L. J. 241 Ref. 91 Ind. Cas. 862=30 C. W. N. 90=A. I. R. 1926 Cal. 355.

S. 1. Appeal — Appeal presented to District Judge — Appeal transferred to High Court on application by party — Court-fee payable.

Where the presentation of the appeal to the Court of the District Judge was in accordance with law, but by act of the party concerned sanctioned by the High Court, it was transferred to the High Court:

Held, that the appeal must in the circumstances by operation of law be taken to have been presented to the High Court and the court-fee payable was the fee prescribed for a memorandum of appeal presented to the High Court, and not the fee prescribed for a memorandum of appeal presented in the Court of the District Judge. In such a case, there was no question of a strict or a liberal interpretation of a fiscal statute. A. I. R. 1937 Cal. 514=65 C.L.J. 499=41 CWN 1083=172 Ind. Cas. 518.

——**S. 1.** — Appeal — Award, private — Decree in terms of: — See Court Fees Act. Sch. I art. 1.

33 C. 11.

—Appeal.

——Camouflage of law — Form of suit — Condition precedent to plaintiff's decree.

Especially in the case of an enactment for revenue purposes, such as the Court-Fees Act, it is open to parties to avail themselves of any camouflage that the law allows or does not forbid. It is not open to a Court in such circumstances to neglect the actual form of the claim and determine the question of Court-fees having regard to what may be said to be the substance of the claim.

The defendants, against whom a decree for ejectment had been made, appealed to the High Court against the refusal of the lower appellate Court to grant to them the value of certain improvements consisting of the construction of a pucca building on the site in question. The appellants paid the same Court-fee in the second appeal as was paid in respect of the plaint by the plaintiff-respondent. The contention had been advanced that, though in a suit for possession the Court-fee payable on a plaint may be as prescribed in a particular manner by the Court Fees Act, still in the memorandum of appeal to the High Court there were grounds taken as regards the title of the plaintiff.

Held, that it cannot be regarded as a memorandum merely confined to the amount of compensation. Even if it were so, if it was sought to be enforced merely as a condition precedent to a right to possession, the subject-matter in dispute would still be only the claim for possession and the fee paid was enough. 23 Mad. 84 and 20 M. L. J. 121 Rel. on; Second Appeal 1266 of 24, Diss. 110 Ind. Cas. 752=A.I.R. 1928 Mad. 929.

——S. 1—Appeal.—Grounds of appeal.

The appellant is not entitled to value his appeal on the assumption that a ground which he proposes to take in argument, which he has not even in his memorandum of appeal, is on the face of it likely to be successful. 11 Pat. L. T. 629=128 Ind. Cas. 795=A.I.R. 1930 Pat. 605.

——S. 1—Court-fees.

——Appeal filed against dead respondent—Substitution of his legal representatives—Appellant, if liable to pay additional court-fees. See I.L.R. (1948) 1 Cal. 25.

——S. 1—Appeal—Order rejecting memorandum of appeal for non-payment of—Court-fee.

Appellate Court's order rejecting a memo of appeal for non-payment of deficit court-fees is appealable to High Court if the order proceeds on a wrong calculation of court-fees payable. 51 Ind. Cas. 114 (Pat.)

——S. 1—Appeal—Valuation.

——Relief granted by decree is the basis.

The principle of the Court Fees Act is that the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks. The value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which the party wishes to get rid of. 22 M.L.W. 691=92 Ind. Cas. 624=1926 M.W.N. 169=A.I.R. 1926 Mad. 225.

——S. 1—Applicability.

The amending Act, (VI of 1905), has withdrawn a class of suits falling under S. 14 of Madras Civil Courts Act and included them under S. of Suits Valuation Act. 25 Ind. Cas. 975; 11 M.L.T. 155, Foll. 39 Mad. 873=18 M.L.T. 398=2. L. W 1031=29 M.L.J. 572=31 Ind. Cas. 104.

——S. 1—Construction of Act.

(i) The Court-fees Act is a fiscal enactment and has to be construed strictly and any ambiguity or doubt arising out of its interpretation has to be resolved in favour of the subject.

(ii) The court-fee is payable on the claim as framed in the plaint and not on the claim as it ought to be framed. The question of court-fee is distinct and separate from the question of the maintainability of the suit as framed. A.I.R. 1946 Nag. 30 = I. L. R. (1945) Nag. 975 = 1945 N. L. J. 431.

——S .1—Construction of Act.

The Court-fees Act is a fiscal statute and must be construed strictly. A.I.R. 1946 Oudh 254 = 21 Luck. 444.=1946 O. W. N. (C. C.) 132=223 Ind. Cas. 596.

——S. 1. Construction of Act.

In a fiscal enactment like the Court-fees Act the Court must confine its attention to the words of the Act. A.I.R. 1946 Oudh 61 = 1945 O.W.N. (C. C.) 404=1945 A.W.R. (C. C.) 128 & 261 = 21 Luck. 245,

——S. I. Construction of Act..

Per Chatterji J.—In enactments like Court-fees Act and Stamp Act, artificial methods are adopted for fixing the court-fee or stamp duty payable. The provisions of the Court-fees Act, therefore cannot be made use of by way of analogy in construing the provisions of other statutes relating to rights in property, and much less in construing the documents executed by parties. (A.I.R 1943 Pat. 433=11 B.R. 149=217 Ind. Cas.49.

——S. 1. Construction of Act.

The Act is a fiscal enactment and must be construed in favour of the subject and must not be extended by analogy. A.I.R. 1938 Cal. 785= 68 C.L.J. 345=43 C.W.N. 52 = I. L. R. (1939) 1 Cal. 152=180 Ind. Cas. 248.

——S 1. Construction of Act.

In case of doubt, in the matter of Court-fees, the Court ought to lean towards an interpretation favourable to the litigant. A. I. R. 1938 Nag. 537 =1938 N.L.J. 357=180 Ind. Cas. 958.

——S. 1. Construction of Act.

The Court-fees Act, being a fiscal enactment must, in cases of ambiguity, be construed in favour of public. A. I. R. 1937 Sind 93 =168 Ind. Cas. 471.

——S. 1. Construction of Act.

The court-fees Act is really a taxing statute and it is a principle, to be applied as regards any charging section in such a statute, that the subject is not to be made liable except upon the plain words of the enactment. A.I.R. 1932 Cal. 346=59 Cal. 528=35 C.W.N. 1103=137 Ind. Cas. 469.

——S. 1—Construction of Act.

The court-fees Act is a taxing statute. Not only has it to be construed with strictness but as pointed out in 43 Bom. 507, the Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. 32 C.W.N. 781, P.C. referred to. 34 C.W.N. 1129. =130 Ind. Cas. 369=53 C.L.J. 91=A.I.R. 1930 Cal.787.

——S. 1—Construction of Act.

Per **Kinkhede, A.J.C.** —It is a rule of construction peculiar to fiscal enactments that they must be very strictly construed so as not to impose an unnecessarily heavy burden on the subject. Such an Act being a taxing statute must use very clear and unambiguous language. A.I.R. 1918 P.C. 188; (1869) 4 H.L. 122; (1902) 1 K.B. 388, Rel. on. 123 Ind. Cas. 417=12 N.L.J. 185=A.I.R. 1930 Nag. 73.

——S. 1—Construction of Act—Liberal Construction.

The Court-fees Act being a fiscal Act must be construed liberally in favour of the subject. 8 Lah. 730 =29 P.L.R. 97=110 Ind. Cas. 264=A.I.R. 1928 Lah. 113.

——S. 1—Construction of Act—Liberal construction.

The Court-fees Act, being a fiscal enactment, ought to be liaberally construed. 105 Ind. Cas. 881=A.I.R. 1927 Mad. 1002=54 M.L.J. 67.

——S. 1—Construction of Act.

The drafting of the Act si unscientific and its interpretation gives rise to considerable difficulty. 87 Ind. Cas. 137=4 Pat. 336=6 P.L.T. 262=1925 P.H.C.C. 65=A.I.R. 1925 Pat. 392 (F.B.)

——S. 1—Construction of Act.

The object of the Court-fees Act is not to arm a litigant with a weapon of technicality, but to secure revenue to the State and its provisions are to be so construed. 43 Bom. 507=46 I.A. 24=17 A.L.J. 418= 25 M.L.T. 298=36 M.L.J. 437=29 C L.J. 452=21 Bom. L.R. 489=10 L.W. 274=24 C.W.N. 33=50 Ind. Cas. 280 (P. C.). (On appeal from 36 Bom. 628=14 Bom. L.R. 757=16 Ind. Cas. 1005).

——**S. 1.—Evasion of payment** of Court Fee—Remedy:—If a plaintiff can evade the Act, he may. The remedy lies in procuring an amendment of the Act and not in refusing the relief to which the plaintiff is entitled as of right. 6 Bom. L.R. 475=28 Bom.567.

——**S. 2.**—Ss. 2, 7 (vi-A)(as amended by U.P. Court-fees Act of 1938)—Appeal—S. 7 (vi-A) should be read with definition of suit in S. 2.

S. 2 of the Court-fees Act, as amended by U. P. Court-fees Act, defines 'suit' as including appeal. In the case of appeal, therefore, in a partition suit, S. 7 (vi-A), Court-fees Act, should be read in the light of this definition that the court-fee payable in appeal should be on the value of that share of the appellant which is in dispute in the appeal. A. I. R. 1943 All. 281=1943 A. W. R. 118=1943 A. L. J. 247=I. L. R. (1943) All. 507=209 Ind. Cas. 411.

——**S. 3**—Insolvency Rules (Cal.) under S. 112, Presidency Towns Insolvency Act, R. 204—Fees prescribed are covered by S. 3 Court-fees Act.

Rule 204 of the Insolvency Rules (Cal.) could have been made by the High Court under the powers conferred on it by S. 15, High Courts (Indian) Act and the fees prescribed thereby are accordingly covered by S. 3, Court-fees Act. A. I. R. 1938 Cal. 755=42 C. W. N. 1146=I. L. R. (1939) 1 Cal. 56=178 Ind. Cas. 797.

——**S. 3**—Before S. 5 Court-fees Act, can be applied, it must be shown that subject-matter of reference is a fee covered by S. 3. On the other hand, it is right to give a reasonably wide construction to S. 3. A. I. R. 1938 Cal. 755=42 C. W. N. 1146=I. L. R. (1939) 1 Cal. 56=178 Ind. Cas. 797.

——Ss. 3, 4—Letters Patent (Madras) Cl. 13—Madras City Civil Court Act (VII of 1892), S. 14—Suit transferred to High Court from City Civil Court—Court-fee—Law applicable—Court-fees Act or High Court Rules.

When a suit is tranferred to the High Court under Cl. 13 of the Letters Patent of the Madras High Court the court-fees leviable are governed by the Court-fees Act and not by the High Court fees Rules. The Fees Rules which the High Court has framed in respect of its extraordinary original civil jurisdiction are inconsistent with the provisions of the Court-fees Act, and to that extent, they are **ultra vires** of the High Court.

But under S. 14, Madras City Civil Courts Act, when a suit filed in the Madras City Civil Court is so transferred, the court-fees payable are those in force in the High Court as a Court of ordinary original civil jurisdiction. A.I.R. =1931 Mad. 457=60 M. L. J. 435=33 M. L. W. 318=132 Ind. Cas. 647.

——**S. 4 See also. (1) C. P. Code. S. 149**
(2) Court fees Act S. 28.

—**S. 4—Applicability**—Having regard to the provisions of S. 4, the Court cannot admit an application for review on behalf of a respondent **in forma pauperis** in the absence of anything in the Civil P. C. A. I. R. 1943 Mad. 177 = (1942) 2 M.L.J. 707=1942 M.W.N. 742=207 Ind. Cas. 307.

——**S. 4—Applicability**—S. 4 Court-fees Act, does not apply nor does Art, 1 of Sch. I to appeal to High Court from the decision under S. 14, C. P. Local Funds Audit Act. No **ad valorem** fee can therefore be demanded in such appeals.A .I.R. 1941 Nag. 129.= 1941 N.L.J. 42=194 Ind. Cas. 731.

——**S. 4—Case transferred to High Court.**

The Fees Rules which the High Court has framed in respect of its extraordinary original civil jurisdiction are inconsistent with the provisions of Court-fees Act and to that extent they are **ultra vires** of the High Court. A.I.R. 1931 Mad. 457=60 M.L.J. 435=33 M.L.W. 318=132 Ind. Cas, 647.

——**S. 4—Case transferred to High Court—Letters Patent appeal and suits.**

—Suits below Rs. 1,000 in value do not come within Ss. 39 and 40 of the Presidency Small Cause Courts Act. The transfer of such suits to the High Court will be under powers vested in it under S. 13 of the Letters Patent, and the jurisdiction of the High Court to try such suits would be Extraordinary Original Jurisdiction conferred by the Letters Patent. (22 M. L. J. 187, Foll.). The High Court (Mad.) has framed no rules in respect of suits transferred under the Extraordinary Original Jurisdiction of the Court conferred either by S. 13 of the Letters Patent or S. 24 of the C. P. Code. In such cases the Court-fees Act would apply. The fees payable are the fees prescribed in the First and Second Schedules to the Act. Any deficiency, if payable, must be paid by the plaintiff. 91 Ind. Cas. 751=22 M.L.W. 15=A.I.R. 1925 Mad. 1216.

——Ss. 4, 19-H—Certificate under S. 4—Whether precludes Collector from applying under S. 19-H.

The certificate of the Registrar under S. 4, Court-fees Act, though conclusive for certain purposes, does not preclude the Collector from applying under S. 19-H. Under S. 19-H, the Collector can challenge the validity of a claim of this kind. The valuation of the estate is under-estimated if part of it is wrongly exmpted on the ground that it was held in trust. The valuation is for the purpose of assessing the duty payable, and the estimate of such valuation is under-estimated if assets, which should not have been excluded from that valuation, are excluded. A.I.R. 1935 Cal. 509=62 Cal. 114=157 Ind. Cas. 975.

——**S. 4—Plaint without Stamp.**

——O. 7, R. 11 does not refer to a plaint which bears no stamp. Such a plaint must be rejected in accordance with the provisions of Ss. 4 and 6, Court-Fees Act. 26 N.L.R. 183=A.I.R. 1930 Nag. 224.

——**S. 4—Reference under Income-tax Act.**

No court-fee is payable on a reference under S. 66. Income-tax Act. A.I.R. 1933 Sind 148=27 Sind L.R. 243=145 Ind. Cas. 254.

——**Ss. 4 and 6—Scope.**

Art. 1. Sch. I, Court-fees Act is not merely auxiliary to S. 7 because schedules to the Act when read with Ss.4 and 6 of the Act do impose a liability. S. 7 refers only to suits and in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case my be. A.I.R. 1939 Rang. 375=1939 Rang. L.R. 474=185 Ind. Cas. 623.

——**S. 4. Scope—Affidavit in High Court**

——Where an application on a court-fee stamp of Rs. 2 alone bore a verification in these words "I do hereby verify that the statements made above are true to my knowledge" :

Held, that the verification was one on solemn affirmation under Chap. IV, R. 1 (5), Appellate Side Rules, (Cal.), and had to be stamped with a further court-fee of Rs. 2. A.I.R. 1932 Cal. 160=58 Cal. 1389=135 Ind. Cas. 798.

——**S. 4—Scope**—Appeal—Insufficient Court-fee.

Where a pleader a few days before the expiry of the period of limitation files the memo. of appeal on a court-fee of eight annas though it should have been written on court-fee of Rs. 90, as his client had not come to make any arrangements for court-fees, the Court is justified in rejecting the appeal. 1 Lah. 234

and 38 Bom. 41, not App.; 27 M.L.J. 677, Rel. on. 26 N.L.R. 183=A.I.R. 1930 Nag. 224.

——**S. 4—Scope—Appeal.**

——S. 4 is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which the proper amount of court-fee has not been paid. Filing of appeal on insufficient court-fee stamp with the knowledge that it is insufficient, with a view to save limitation cannot be allowed. 119 Ind. Cas. 700=A.I.R. 1929 Nag. 294.

——**S. 4**—Scope—Appeal with insufficient Court-fee.

S. 4 of the Court-fees Act forbids a High Court to receive a memorandum of appeal unless the proper Court-fee is paid. 3 P.L.J. 74=5 P.L.W. 18=42 Ind. Cas. 675.

——**S. 4**—Scope—Appeal with insufficient Court-fee.

A memorandum of appeal could not be considered to have been properly filed, till the deficit Court-fee is paid up. 5 P.L.W. 136=3 P.L.J. 484=46 Ind. Cas. 509.

——**S. 4**—Scope—Appeal — Endorsement of Stamp Reporter.

High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter, that the amount of the Court-fees paid is insufficient, otherwise the provisions of S. 4, Court-fees Act, would be evaded indirectly. 38 Bom. 41, Diss. from.; 1 Lah. 234; 3 Pat. L. J. 74; 27 M.L.J. 677, Rel. on; A.I.R. 1923 All. 349, Ref. 118 Ind. Cas. 228=26 A.L.J. 1199=50 All. 980=A.I.R. 1929 A. 75.

——**S. 4**—Scope—Appeal not to be entertained without payment of Court-fee on original valuation.

An Appellate Court should not entertain an appeal against the entire decree without its being stamped with a Court-fee on the original valuation. 30 Ind. Cas. 379 (Cal.)

——**S. 4—Scope**—Enclosures.

Having regard to Ss. 4 and 28 of the Court Fees Act there is no legal appeal filed if the order appealed against is not properly stamped. 41 Mad. 412, Dist. 71 Ind. Cas. 736=A.I.R. 1924 Lah. 401.

——**S. 4—Scope—Appeal.**

——Decision of a single Judge.

S. 4 of the Court Fees Act does not include within its purview an appeal from the judgment of a single Judge and no Court-fee is leviable on such a memorandum of appeal. A.I.R. 1922 All. 164 and A.I.R. 1922 Pat. 13 Foll. 69 Ind. Cas. 428=3 Lah. 420=A.I.R. 1923 Lah. 275.

——**S. 4**—Scope—Appeal—Decision of single Judge

Under S. 10 of Letters Patent (All.) no Court-fee can be levied on an appeal from the judgment of a single Judge of the High Court. 63 Ind. Cas. 318=44 All. 13=19 A.L.J. 677=A.I.R. 1922 All. 164.

——**S. 4—Scope.**

S. 4 of the Court-fees Act does not entitle the High Court to levy Court-fees on Letters Patent Appeals and there being no other law under which they can be levied, such appeals must be accepted without Court-fees. 65 Ind. Cas. 675=3 Pat. L. T. 194=1922 P.H.C.C. 88=1 Pat. 384=A.I.R. 1922 Pat. 13.

——**Ss. 4, 16—Scope-Stamp duty on memorandum of objections—payable at the time of hearing:**—Stamp duty on a memorandum of objections, under S. 561 of the Civil Procedure Code, need not be paid till the time of hearing of the memorandum. 25 M. 24.

——**S. 4—Suit for injunction.**

——In a suit for injunction the plaintiff is entitled under clause (iv) of S. 7 of the Court-Fees Act to value his claim at Rs. 10 and it is wholly unnecessary for him to fix any value for the purposes of jurisdiction as by S. 8 of the Suits Valuation Act, the value determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same. 45 Bom. 567=59 Ind. Cas. 777=A.I.R. 1921 Bom. 65.

S. 5. Synopsis.

1. **All. High Court rules Ch. III. R. 11.**
2. **Chief Inspector of stamps - Duties of.**
3. **Decision by Court—no reference under S. 5.**
4. **Dispute - Meaning**
5. **Finality**
6. **Jurisdiction of Taxing officer.**
7. **Object.**
8. **Powers of Registrar.**
9. **Reference under - Jurisdiction to refer to Bench.**
10. **Reference under - Subject - matter not covered by S. 3.**
11. **Taxing judge's jurisdiction.**
12. **Taxing officer if has Judicial powers.**
13. **Taxing officer - Finality of decision.**
14. **Taxing officer - Procedure.**
15. **Taxing officer of High Court is Registrar Appallate side.**

Allahabad High Court Rules Ch. III. R. 11.

—S. 5. Art. 1 — Allahabad High Court Rules, Chap. III, R 11 — Applicability of R. 11 where alleged deficiency is in court-fee payable on document filed in Court other than High Court.

Rule 11, Chap. III of the rules of the Allahabad High Court is intended to apply to cases in which the stamp reporter finds that a document, which ought to bear a stamp under the Court-fees Act, has been received, filed or used in the High Court without being properly stamped. In such cases, the consequences laid down in R. 11 would follow the stamp reporter's finding. That rule has no application where the alleged deficiency is in the court-fee payable on a document received, filed or used in the court of first instance or in the lower Appellate Court. A.I.R. 1934 All. 805 = 1934 A.L.J. 957 = 4 A. W. R. 922 = 57 All. 71 = 150 Ind. Cas. 653.

2. Chief Inspector of Stamps—Duties of.

— S. 5.—Chief Inspector of Stamps — Duties of—Difference of opinion — Taxing officer's decision — Finality of.

The Chief Inspector of stamps is an officer whose duty it is to see that the fee is paid under Chap. III. of the Court-fees Act and the decision of the Taxing Officer on a difference of opinion between the Chief Inspector of Stamps and the suitor is final. A.I.R. 1932 All. 319 = 1932 A. L. J. 244 = 140 Ind. Cas. 68 (1).

3. Decision by Court.

—S. 5. — Decision by Court.

——No reference under S. 5.

Where there has been no decision by the taxing officer under S. 5 as to the sufficiency of the Court-fee stamp, the Court is not precluded from taking notice of the deficiency in stamp duty at the hearing, nor is the respondent precluded from raising an objection of this character. 20 Mad. 398; A. I. R. 1925 Cal. 1201 and A. I. R. 1927 Mad. 940, Dist; 21 Mad. 269, Rel. on. 1930 M. W. N. 291 = 31 M. L. W. 826 = A. I. R. 1930 Mad. 597= 58 M. L. J. 497.

—S. 5. Decision by Court.

——No reference under S. 5.

Where there has been a reference to the Taxing Officer or the Taxing Judge the question of insufficiency of the Court-fees as paid on the memorandum of appeal cannot be raised again at the time of the

hearing of the appeal; for S. 5. of the Court-fees Act would clearly be a bar to any such re-consideration. But where no reference under S. 5. has been made at all, the Court hearing the appeal must decide it. 37 Cal. 914 and 39 Mad. 725. Foll. 89 Ind. Cas. 122 = 47 All. 756 = 23 A. L. J. 725=6 L.R.A. Civ. 362 = A. I. R. 1925 All. 787.

4. Dispute — Meaning.

——S. 5 — **Dispute.**

—Meaning of.

A question as to whether the amount of the duty on a probate has to be calculated at the rate in force under the law as it stood at the date of the petition for probate, or whether it should be calculated at the higher rate of duty which came into operation before any grant of probate was made, is a dispute as to the amount of fee within S. 5. 29 Bom. L. R. 1511=106 Ind. Cas. 66 = A. I. R. 1927 Bom. 643.

5. Finality.

—S. 5.—Finality—Decision as to Court-fee in appeal —practice.

As a general rule it is desirable that where the appellate Court has to deal with the question of recovering a deficit fee payable by the appellant in the lower Court or Courts, the matter should be dealt with at the earliest possible moment after the deficit is discovered so that the parties may not be kept in suspense upon the question. But that rule must be subject to the discretion of the Court to postpone the determination of the point in exceptional cases and it is also desirable that the expense of printing the paper book should not be incurred until this preliminary question has been determined. 62 Ind. Cas. 43 = 2 P. L. T. 383 = 6. P.L.J. 293 = 1921 P.H.C.C.161=A.I.R 1921. Pat. 88 (F. B.)

6. Jurisdiction of Taxing Officer.

—Ss. 5. 12(ii)—Jurisdiction of Taxing Officer—— Appellant, if concluded by finding of Stamp Reporter.

The jurisdiction of the Taxing Officer is limited to cases in which it is alleged that a document filed, exhibited or received in the High Court is not sufficiently stamped and it does not extend to cases in which it is alleged that a party paid insufficient court-fee on his plaint or memorandum of appeal in the lower Appellate Court. To this class of cases S. 12 (ii) of the Court-fees Act is clearly applicable and in this class of cases, the question of deficiency in the court-fee paid on the memorandum of appeal in the lower Appellate Court is a question arising in the appeal preferred in the High Court and should be judicially determined. The stamp reporter or the Taxing Officer may raise the question; but their special jurisdiction arising from the provisions of Chap. III. R. 11 of the Rules of the Allahabad High Court, or S. 5 of the Court fees Act does not exist.

Consequently, the appellant in such a case is not concluded either by the stamp reporter's finding or by his failure to pay the court-fee within thh time granted by the Taxing Officer, and it is open to him to show that the court-fee paid by him on his memorandum of appeal to the lower Appellate Court was sufficient. A.I.R. 1934 All. 805=57 All. 71=1934 A.L.J. 957=4 A.W.R. 922=150 Ind. Cas. 653.

——**S. 5—Jurisdiction of taxing master.**

——By S. 5 the power of the Court to decide disputed questions of Court-fee is vested in the Taxing Officer subject to his power to refer the matter to the Taxing Judge when a question of general importance arises. This authority extends to all such questions arising in the High Court, whether the deficiency alleged is on the memorandum of appeal in the High Court or on a plaint or memorandum of appeal filed in the Court below. 22 A. L. J. 1038=6 L.R.A. Civ. 33=84 Ind. Cas. 822= A.I.R. 1925 All. 184.

——S. 5. **Jurisdiction of Taxing master.**

——The jurisdiction of the Taxing Officer does not arise like the jurisdiction of an arbitrator upon a difference of opinion between a Court Clerk and a suitor and upon some sort of formal reference to decide that dispute. The intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer that he should bring his mind to bear on the question and that he should decide it. 95 Ind. Cas. 529=29 C. W. N. 879=52 Cal. 871=A. I. R. 1925 Cal. 1201.

7. Object.

——S. 5—Object—One of the main objects of S. 5 and of other provisions of the Court-Fees Act is to obviate the necessity of an appearance by the revenue authorities prior to the issue of a grant. 95 Ind. Cas. 529=29. C. W. N. 879=52 Cal. 871=A. I. R. 1925 Cal. 1201.

8. Powers of Registrar.

—— . 5—**Powers of Registrar.**

The Registrar has no power to direct a party to deposit any sum of money in Court as a condition precedent to having his case tried. 105 Ind. Cas. 742=6 Pat. 602=9 P. L. T. 337= A. I. R. 1928 Pat. 29.

9. Reference under—jurisdiction to refer to Bench.

——S. 5. Reference under-Jurisdiction of taxing officer or taxing Judge to refer question to Bench.

Under S. 5 of the Court Fees Act, the Taxing officer of the High Court may, in a proper case, refer the matter to the taxing Judge. There is no provision in the Act enabling a Bench of the High Court to determine the question. The juxtaposition of the words "such Judge" with the words "Chief Justice" clearly indicates that a single judge alone is meant and that it can have no reference to a Bench of Judges. Neither the taxing officer nor the taxing Judge has the power or jurisdiction to refer a matter arising under S. 5 to a Bench of the Court. On a proper reference such a matter has to be decided only by the taxing Judge. A.I.R. 1935 Pat. 396, diss.; 33 All. 20; A.I.R. 1924 Pat. 161; A.I.R 1925 Pat. 392; A.I.R. 1933 Pat. 81; A.I R. 1927 Bom. 643, rel. on. 16 Cut. L.T. 158.

——**Reference under.**

——**S.** 5—Powers of Chief Justice to recall general order appointing particular Judge to hear reference, and constitute another Judge or Bench of Judges.

Per **Munir, Teja Singh and Shariff JJ.**—Under S. 5 of the Court-Fees Act, there is no bar to the Chief Justice appointing a judge or judges for hearing a reference from the taxing officer, in a special case. A general order appointing a particular judge to hear such references can always be recalled by the Chief Justice in a particular case and he can constitute another judge or judges to hear the reference in that case. The Chief Justice has Jurisdiction to constitute a Bench of more Judges than one to hear a reference not withstanding the use of the words "such judge" in S. 5 of the Act, as the singular includes the plural. I.L.R.(1947) Lah. 47=226 Ind.Cas. 5=48 P.L.R. 250=A.I.R. 1946 Lah. 280 (F.B.).

——**S. 5. Reference under.**

——Administration Judge appointed to hear references instead of determining question himself requesting Chief Justice to constitute another Bench—Chief Justice has jurisdiction to constitute Bench of more judges than one to hear such question. A.I.R. 1946 Lah 280=48 Pun. L.R. 250 (F. B).

——S. 5—

——Reference to Bench, if can be made under S. 5.

Although the singular is used in S. 5, Court-fees Act, when reference is made to the judge of the High Court, there is nothing in the section to prevent a reference in any particular case, that is, to use the words of the section: "specially in this behalf," to more than one judge, in other words, to a Bench. A.I.R. 1935 Pat. 396=16 P.L.T. 433=14 Pat. 658=2 B. R. 57=159 Ind. Cas. 4.

——S. 5—Reference to taxing Judge.

A Taxing Judge is bound to decide a question referred to him as he cannot refer to a Division Bench. A.I.R. 1933=Pat. 81=13 P.L.T. 810=12 Pat. 188=142 Ind. Cas. 617.

——S. 5—Reference to larger Bench.

Taxing Judge is not competent to refer the point for decision to a larger bench. 7 A.L.J. 842, Foll. 75 Ind. Cas. 871=3 Pat. 146=4 P.L.T. 638=A.I.R. 1924 Pat. 161.

——S. 5—Reference by Taxing Officer to Taxing Judge—Reference by Taxing Judge to a Bench of Two Judges—Jurisdiction of Bench to dispose of the stamp reference.

A Division Bench has no jurisdiction to decide a stamp reference sent to them by a Taxing Judge to whom the reference was made by the Taxing Officer. 33 All. 20=7 A.L.J. 842=7 Ind. Cas. 315.

10. Reference under—subject matter not Covered by S. 3.

—S. 5—Reference under—Subject-matter must be covered by S. 3—Fees payable either under Government of India Act, 1915, (5 and 6 Geo. V, Ch. 61), or High Courts (Indian) Act, 1861, (24 and 25 Vic, Ch. 104)—Construction of S. 3.

Before S. 5, Court-fees Act, can be applied, it must be shown that the subject-matter of the reference is a fee covered by S. 3. On the other hand, it is right to give a reasonably wide construction to S. 3 and if a particular fee could have been imposed under the High Courts (Indian) Act or the Government of India Act, it is payable by virtue of the power conferred by that Act within the meaning of the section, even though the High Court purported to impose the fee under a power derived from some other source. A.I.R. 1938 Cal. 755=42 C. W. N. 1146=I.L.R. (1939) 1 Cal. 56=178 Ind. Cas. 797.

11. Taxing Judges Jurisdiction.

—S. 5—Taxing Judges jurisdiction.

The Taxing Judge has jurisdiction only with regard to the fee payable in the High Court, that is to say, on the memorandum of appeal in that Court and on this point his decision is final. The question of any deficit in respect of plaint or memorandum of appeal in the lower Appellate Court has to be decided by the Bench hearing the appeal.

So far as the finality of the Taxing Judge's decision is concerned, it relates only to the question of amount actually payable and does not in any way better the decision of the Bench regarded as a decision laying down principles of general application. Taxing Judge's decision is that of the Judge sitting in Single Bench and as such cannot be binding on a Division Bench. A.I.R. 1945 Pat. 81=23 Pat. 749.

——S. 5—Taxing Judge's Jurisdiction.

Under S. 5, Court-fees Act, the High Court Judge appointed under the section has no jurisdiction to decide questions as to sufficiency of court-fees in Subordinate Courts although he has jurisdiction to decide questions relating to court-fees in the High Court. A.I.R. 1934 Rang. 268=12 Rang. 335=153 Ind. Cas. 1037.

12. Taxing officer if has judicial Powers.

S. 5—Taxing Officer, if has Judicial powers—Where appellant insists that he wants declaration only and nothing more, Taxing Authority cannot decide whether such a suit will lie—Amendment of prayer can be insisted on to remove doubt.

The Taxing Authority must look to the whole plaint and not merely to the form of the prayer. A plaintiff cannot evade payment of Court-fees by clothing his relief in a form which would appear to seek no consequential relief, if in fact consequential relief is actually involved and would ensue if the prayer were to be granted.

In the matter of court-fees, a High Court is not in the same position as a Lower Court. The taxing department of the High Court is quite separate from its judicial side. The Taxing Officer has no judicial powers except as regards the one matter of court-fees, nor has the Taxing Judge. If, therefore, in an appeal to the High Court, the appellant insists that he wants a declaration only and nothing more, the Taxing Authorities cannot decide whether such a suit will lie. All they can say is that the court-fees payable on a relief for a declaration simpliciter is a certain figure and they must leave the wider question of consequential relief to the Judge deciding the appeal on the judicial side. But even there, the Taxing Authority can decide whether the relief sought is in fact a declaration simpliciter or whether consequential relief is implicit in it. If there is any doubt, the Taxing Officer, or the Taxing Judge when the matter is referred to him, can insist on amendment of the prayer and the memorandum of appeal so as to leave no doubt as to what is being agitated in appeal. Once that is done, then the Judge hearing the appeal decides whether the suit so framed can lie. A.I.R. (1943) Nag. 70=1942 N.L.J. 466=I.L.R. (1943) Nag. 440=202 Ind. Cas. 643.

13. Taxing officer—Finality of decision.

——S. 5—Taxing officer—Decision of—Finality.

Where in respect of an appeal sought to be filed a nominal Court-fee is paid and it is prayed that the Registrar as taxing officer decide the amount payable as Court-fee and the Registrar gives a decision thereon, his decision is final by virtue of the provisions of S. 5 of the Court-Fees Act. 52 C.W.N. 374=A. I. R. 1948 Cal. 309.

——S. 5. — Taxing Officer — Finality of order of—Order directing payment of deficit court-fee—Finality of order—Revision petition by a pauper plaintiff—Court-fee, if should be paid.

As a revision petition did not bear the necessary court-fees, it was returned for the payment of necessary court-fee. But the petitioner contended that no court-fee was payable as he was recognized as a pauper in the suit and refused to pay the court-fee demanded. The matter was posted before the Master who, on the petitioner not appearing when called, directed the payment of the deficit court-fee within two weeks. In a petition for directing refund of the court-fees paid under such circumstances,

Held, that the taxing officer's order was final as the petitioner was absent in spite of notice to him.

Held, further, that the scheme of the code clearly showed that O. 33 was intended to relate only to proceedings in the Court in which the suit was filed and the Revision Petition cannot be said to be a proceeding connected with the suit in the same Court. Moreover there is no provision separately made enabling parties to file applications without paying court-fees in the High Court except when proceedings are taken by way of appeal. 225 Ind. Cas. 427=1946 M. W. N. 206=59 L. W. 85=A. I. R. 1946 Mad. 257=(1946) 2 M. L. J. 103.

—S .5.—Taxing officer—Decision—of—If can be reviewed by him or by Court—Remedy of party.

The scheme of the Court-fees Act is that if there is a difference of opinion, between the offiecr of the Court whose duty it is it to accept the memorandum of appeal, and the party presenting it, that difference has to be referred to the Taxing Officer, whose decision is final. The Taxing Officer is an officer nominated by the statute to determine a particular class of questions, and he is not acting as an officer of thc Court, or as a deputy for the Judge or Bench before whom the case is to come. As his decision is made final, it is not open to him, or to any one else to review it. The only remedy to the party is to submit the matter to Government and ask for the remittal of the fee which ought not to have been charged. A.I.R. 1943 Bom. 441=45 Bom. L.R. 880=211 Ind. Cas. 637.

——**Ss. 5, 28**—Taxing Officer—finality of decision—Whether can be questioned under S. 28.

Where the Taxing Officer has given his decision under S. 5, Court-fees Act as regards the fee payable on a memorandum of appeal to the High Court, that decision is final and cannot be questioned even in the exercise of the powers vested in the Court under S. 28. A.I.R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

——**S. 5**—Taxing Officer's jurisdiction, if can be challenged—Referring question of his jurisdiction to Taxing Judge.

When the jurisdiction of the Taxing Officer to determine a question of court-fee is challenged, it is competent for him to refer the question of his jurisdiction to the Taxing Judge if he thinks the question to be one of general importance. A.I.R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

——**S. 5**—Taxing Officer, finality of decision of—Power of High Court to revise such decision.

The decision of the Taxing Officer under S. 5. Court-fees Act, is final and the High Court has no jurisdiction to revise the same even if it is of opinion that the decision is wrong. A.I.R. 1937 Mad. 46=1936 M.W.N. 1081=71 M.L.J. 677=44 M.L.W. 763=I.L.R. (1937) Mad. 284=165 Ind. Cas. 972.

——S. 5—Taxing officer—Order of—When conclusive.

——Where no occasion arose for the Taxing Officer to decide the question of court-fees on merits, there is no "decision therein" and the order cannot be considered to be a decision under S. 5, when he expressly "declined" to enter into the merits of the objection. His order therefore is not conclusive. A.I.R. 1934 All. 56=1933 A.L.J. 1537=149 Ind. Cas. 802.

——S. 5—Taxing officer—Finality of—decision of ——Original Side of High Court.

The Court has no power whatever to interfere with the decision of the taxing officer, as his decision is final under S. 5, Court-fees Act of 1870, even in cases of suits filed on the original side. A.I.R. 1922 Mad. 421; A.I.R. 1925 Cal. 1201; 32 All. 59 and A.I.R. 1923 Pat. 137, Ref. 105 Ind. Cas. 119=26 M.L.W. 378=A.I.R. 1927 Mad. 940=53 M.L.J. 457.

——S. 5—Taxing Officer—Finality of decision.

——Decision under S. 5, Court Fees Act, of the Taxing Officer of the High Court, or of the Chief Justice or the Judge appointed under S. 5, is final, and is not challengeable either by way of appeal or revision. 12 All. 129 (F. B.) and A. I. R. 1925 Cal. 1201, Foll.; A. I. R. 1924 Cal. 987, Expl. ; A. I. R. 1923 Pat. 137 and A. I. R. 1925 Pat. 392 (F. B.) Relied on. 29 Bom. L. R. 1511=106 Ind. Cas. 66=A. I. R. 1927 Bom. 643.

——S. 5—Taxing officer — Finality of order—Remedy.

The High Court has no power to interfere with the order passed by the Taxing Officer regarding the amount of Court-fees. His order though wrong, is final and there is no power of appeal, review or revision against it. [A. I. R. 1923 Patna 137 and A. I. R. 1924 Patna 310, Ref.] The appellants may, however, apply, to the Board of Revenue to grant a refund or some alleviation in the matter. 7 P.L.T. 392=1925 P.H.C.C. 359=92 Ind. Cas. 626=A.I.R. 1926 Pat. 147.

——S. 5—Taxing officer—Finality of decision.

——In a proceeding for the grant of Letters of Administration the applicants sought exemption of the fee under Art. 11 of Schedule I of the Act on the ground that the deceased was holding as trustee. The taxing officer agreed and issued a certificate for it.

Held, the Taxing Officer's decision is a final decision under S. 5 and the Court had no authority to review it under S. 19-I. 95 Ind. Cas. 529=29 C.W.N. 879=52 Cal. 871=A.I.R. 1925 Cal. 1201.

——S. 5—Taxing officer—Finality of decision of.

The Taxing Officer has the jurisdiction to fix the amount of fee payable and if he decides that the valuation put by the appellants upon the relief was incorrect, he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no jurisdiction to interfere with his decision as to the amount of the fee. A decision under S. 5 of the Court Fees Act is not open to appeal, revision or review and is final for all purposes and no means have been provided or suggested by Legislature for questioning it. 12 All. 129 (F. B.); 32 All. 59; 3 P. L. J. 92 and 4 P. L. J. 700, Foll. 73 Ind. Cas. 43=1922 P.H.C.C. 337=2 Pat. 198=4 P.L.T. 71=1 P.L.R. 25=68 Ind. Cas. 316=A.I.R. 1923 Pat. 137.

——S. 5.—Taxing officer—Decision of Finality.

The decision of the Taxing Officer as to the proper fee payable upon a memorandum of appeal is final. A Division Bench of the High Court has no jurisdiction to re-open the valuation of the appeal before it is admitted. 4 Pat. L.J. 700=52 Ind. Cas. 508.

——Ss. 5 and 12 — Taxing Officer Decision of —Finality of.

Where there is a difference of opinion between an appellant and the stamp reporter and the matter is referred to the Taxing Officer the decision of the Taxing Officer is final with or without reference to the Taxing Judge. It is not open to appeal, review or revision. 3 Pat. L. J. 92=43 Ind. Cas. 521.

——Taxing officer

——S. 5—Admission of appeal by Deputy Registrar:—When an appeal was admitted by the Deputy Registrar Appellate Side, and the matter never came before the Registrar at all: **Held,** there was no decision of the Taxing-officer so as to give rise to a consideration of the question as to the effect of a decision by him.—37 C. 914=8 Ind. Cas. 1145.

——S. 5—Taxing-officer's decision—Final.

The decision of a taxing-officer, determining the amount of Court-fees, no matter how he arrived at his conclusion is final, and no interference by the Taxing Judge is competent. 15 All. 117; 12 All. 129, Foll. 32 All. 59=6 A.L.J. 972=4 Ind. Cas. 123.

14—Taxing officer—Procedure.

——S. 5—Taxing officer.

——Procedure—Finality.

Per Curiam,(Das, J. dissenting.)-The Taxing Officer or Taxing Judge,as the case may be, is under S.5, the proper person to determine the fee payable on a memo-

randum of appeal presented to the High Court and for this purpose, he may investigate the question of the proper valuation of the subject-matter of the appeal. It is essentially desirable that the Taxing master in determining questions of valuation should not as a rule base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. In order to arrive at a proper decision on such question the parties should be called upon to produce in such manner as may be convenient such documentary or other evidence as they may be prepared to tender to enable the Taxing Officer to decide the question.

Per **Jwala Prasad, J.,** (**Semble.**)—The non-observance by the Taxing Officer of such precautions will detract from the finality of his decision. 87 Ind. Cas. 137=4 Pat. 336=6 P.L.T. 262=1925 P.H.C.C. 65=A.I.R. 1925 Pat. 392 (F.B.).

15—Taxing officer of High Court is Registrar Appellate side

——S. 5—Taxing Officer.

The Taxing Officer of the High Court is the Registrar on the Appellate Side; therefore under S. 5 an order for the registration of an appeal by the Deputy Registrar is no decision by the Taxing-officer and the respondent may raise the objection that the Court-fee on the memorandum of appeal is insufficient, at the hearing of the appeal. 37 Cal. 914=8. Ind. Cas. 1145.

——S. 6—Admission about computation of Court fee—Effect.

——An admission by the plaintiff in respect of computation of Court-fees is not binding on him, the question being one of law and not of fact. 105 Ind. Cas. 80=A.I.R. 1928 Cal. 55.

——S. 6.—Applicability—Suit filed in one Court and held properly stamped—Transfer to another Court—Power of latter Court to demand additional Court-fee if it finds plaint not properly stamped before it.

The terms of S. 6 of the Court-Fees Act are explicit and in whatever manner the document, e. g., a plaint, comes before a Court, if it does not bear the court-fee which the Court-Fees Act says it shall bear, it cannot be filed, exhibited or recorded in a Court of Justice. The circumstance that a plaint was lodged in another Court which according to the provisions governing it treated it as properly stamped and instituted cannot prevent the application of S. 6 of the Act when the plaint is transferred to different Court, and the latter Court can insist on its being properly stamped for purposes of the Court-Fees Act in that Court. 12 C.W.N. 917, dist. A.I.R. 1950 Bom. 234=52 Bom. L.R. 135.

——Ss. 6, 4 and Civil P. C., S. 149.

S. 6 of Court-fees Act does not bar the application of S. 149, Civil P. C. Any conflict arising between Ss. 4 and 6, Court-fees Act and S. 149, Civil P. C., is resolved by S. 28, Court-fees Act. A.I.R. 1941 Nag. 220=1941 N.L.J. 258=I.L.R. (1941) Nag. 467=196 Ind. Cas. 60.

—S. 6—Consolidation of appeals.

—Power of Court.

Court has no inherent jurisdiction to consolidate appeals in cases disposed of by single judgment of the lower Court so as to enable the appellant to pay court-fee on the value of the consolidated appeals and file one vakalat. 109 I. C. 651; A.I.R. 1928 Mad. 468, Overruled, 29 Cal. 140 and 34 M.L.J. 279; Dist. 123 Ind. Cas. 203=31 M.L.W. 282=A.I.R. 1930 Mad. 376=58 M.L.J. 510 (F. B.)

—S.6—Court's duty to see sufficiency of court-fees

The Courts have full power to look into the allegations made in the plaint in order to decide whether in a particular case, the plaintiff is asking for a mere declaration or whether in effect he is asking for a further relief plus declaration. It is always open to the Court to find out by looking into the allegations in the plaint as to whether or not the court-fee paid is sufficient. In fact, it is a duty which is cast upon the Court under S. 6, Court-fees Act. A.I.R. 1937 All. 411=1937A.L.J. 562=1937 A.W.R. 480=I.L.R. (1937) All. 259=170 Ind. Cas. 459.

—S. 6—Determination of Court fee.

—procedure.

Where the plaint alleges that the plaintiff is in joint possession, before the plaintiffi can be required to pay any court-fee in excess of Rs. 10 required for a suit for partition of joint family propery, the Court ought to frame an issue to determine whether the plaintiff has been in joint possession, as alleged by him, on the date of the suit, or proceed which the trial of the suit and demand the requisite court-fee, if it is found that he has been excluded from the joint family property or has not been in joint possession and enjoyment of the property on the date of the suit. 62 Ind. Cas. 853=8 O.L.J. 279=A.I.R. 1921 Oudh 174.

——S. 6. Limitation.—Insufficient Court-fee.

In a case where deficit Court-fee on a memo. of appeal is deliberately paid and limitation goes, the memo. would be barred by limitation notwithstanding the deficit is paid up afterwards. 70 Ind. Cas. 378=3 Pat. L. T. 142= A. I. R. 1922 Pat. 56.

——S. 6— Limitation.—Insufficient Court-fee.

Where the application for review was presented with stamps kmown to be indequate and it was not until long after the 90 days had passed within which the application had to be made and long after the additional period allowable under S. 12 of the Limitation Act had elapsed that the application was properly stamped and there was no mistake or inadvertence within the provisions of S. 28.

Held: the application is not within time. 24. W. R. 258 and A. I. R. 1925 Cal. 924 dist.=96. Ind. Cas. 433 (Cal.)

——Ss 6 and 28 - Limitation - Insufficient Court fee

When a plaint is presented on a paper insufficiently stamped within the prescribad period of limitation and time is given by the court under S. 54 (b), C. P. C., (Act XIV of 1882) to make good the deficiency, the suit is not barred by limitation if the deficiency, is supplied within the time fixed by the court but after the limitation period has expired. 19 M. L. J. 340 = 6 M. L. T. 129.= 1 Ind. Cas. 507=32 M 305 (F. B.)

——S. 6— Mesne Profits.

—Ad valorem court-fee is payable in an appeal against the amount of mesne profits fixed in execution proceedings even though the appellant has already paid **Ad valorem** court-fee in an appeal in the main case which has been decided against him. 79 Ind. Cas. 906 (Pat.).

——S. 6.—Plaint insufficiently stamped. — procedure.

Where a plaint is insufficiently stamped and the Court finds that on payment of the proper Court-fee it will have no jurisdiction to try the case the proper course is to return the plaint under O. 7, R. 10. C. P. Code and not to call on the plaintiff to pay the additional Court-fee. 1930 M. W. N. 656 =129 Ind. Cas. 625 = 33 M. L. W. 68=A.I.R. 1931 Mad. 69 = 59 M. L. J. 899.

——S. 6.—Scope and effect.

All that S. 6, Court-Fees Act, says is that certain documents are to be chargeable with certain fees according to the schedules. It nowhere says that every document filed in a Court is necessarily

chargeable with a fee specified somewhere under the Court-Fees Act, and if it cannot be fitted under one, or if the Article under which it appears to come does not give any amount of fee as chargeable then by some process of reasoning it must somehow or other be fitted under some other Article. 54 C. W. N. 380=A. I. R. 1950 Cal. 296.

——**S. 6—Scope.**

—Court should not force upon the plaintiff a frame of suit which he is not willing to adopt. If the allegations in the plaint are such as to make it possible to hold that the suit is one for declaration, the plaintiff is entitled to have it treated as such. Nor should the Court be influenced by the consideration that the plaintiff is actuated by motives of economy and is evading payment of court-fee by not suing for cancellation but sues only for a declaration. It is legitimate for plaintiff to avoid paying higher court-fee by so framing his suit as to diminish his liability in that respect. S.6 cannot subject the plaintiff to liability to pay court-fee for a relief which he does not ask for. If he claims both the reliefs of declaration and cancellation as he may in certain cases, he must pay for both; but where on the construction of his plaint in the light of his averment, the Court comes to the conclusion that the plaintiff claims a declaratory relief and not cancellation of instrument, there is nothing in S. 6 which justifies demand for two fees. A. I. R. 1935 All. 817=1935 A. L. J. 869=1935 A.W.R. 896=58 All. 146=156 Ind. Cas. 494 (FB).

——**S. 6.— Scope.**

Where a litigant has paid fees which he was bound to pay under the law for his plaint or memorandum of appeal, the Court by ordering refund under inherent power cannot indirectly exempt him from the obligation imposed upon him by the statute and thereby nullify the provisions of S. 6, Court fees Act. A. I. R. 1935 Cal. 707=62 C.L.J. 298=40 C.W.N. 309 =159 Ind. Cas. 443.

——**Ss. 6. (3) and 8-B** (Bengal)— Failure to pay court-fees—proper order.

The Court-Fees Act as amended by the Bengal Third Amendment Act, 1935, clearly contemplates two stages so far as payment of the Court-fees is concerned. S. 6 (3) refers to the first stage when the appellate Court will determine **ex parte** a reasonable sum to be paid as court-fees. If this sum is not paid, the proper order to pass is one for rejection of the memorandum of appeal and not for dismissal of the memorandum of appeal for default. S. 8-B contemplates the second stage when the appellate Court will hear the parties and record its finding as to the amount of Court-fees properly payable on the memorandum of appeal, and if the appellant commits default in furnishing security or paying the court-fees, the Court will dismiss the appeal under S. 8-B (3). I. L. R. (1948) 2 Cal. 149=52 C. W. N. 684=83 C. L. J. 247.

——**Ss. 6 (3) and 6-B (4) (U. P.)**—Combined effect of, stated.

Under sub. s. (4) of S. 6-B read with S. 6 (3), when the Court has fixed the amount of the deficiency in court-fee and the appeal in respect of which the matter is in debate is still pending, the appellant is to be called upon to pay the deficiency within a certain time, and if he does not pay, his memorandum of appeal is to be rejected. Thus, the only penalty that a defaulting appellant suffers in such a case is that his memorandum of appeal is rejected. There is no provision for the actual recovery from him of the amount of the deficiency. A. I. R. 1946 All. 355=1946 O.W.N. (H. C.) 118= 1946 A.L.J. 170 (F B)

——**S. 6.**

—**Ss. 6** (3) and (4), 12 (1) (U. P.)—Decision on question of court-fee when 'final' within meaning of S. 12 (1)—Report of **Munsarim** that court-fee paid on appeal was insufficient—Court hearing appellant and deciding that it was sufficient—Subsequent report of Inspector of Stamps that court-fee was insufficient — Preliminary objection by respondent as to insufficiency of court-fee—Court re-considering decision and upholding preliminary objection—Case, held fell under sub-ss. (3) and (4) of S. 6—Previous order held not 'final' within meaning of S. 12 (1)—Order of Court, held proper.

The decision of the Court on a question of the court-fee payable on a memorandum of appeal which is "final as between the parties to the suit" within the meaning of S. 12 (1), Court Fees Act, must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a mere decision based on the report of a **Munsarim.**

A creditor filed an appeal against an order passed on an application under S. 12, U. P. Agri. Relief Act, which was transferred by the District Judge to Additional Civil Judge. The **Munsarim** reported that the court-fee paid was insufficient. The Additional Civil Judge heard the appellant's counsel and decided that the court-fee was sufficient. Subsequently, the District Judge withdrew the appeal to his own file for hearing. The Inspector of Stamps subsequently reported that **ad valorem** court-fee should have been charged and that there was, therefore, a deficiency. On the date of hearing, a preliminary objection was preferred by the respondent that the court-fee paid was insufficient. This preliminary objection was upheld by the District Judge:

Held, that both sub-ss. (3) and (4) of S. 6, Court-fees Act were applicable to the case. The order of the Additional Civil Judge was not such an order as must be regarded as 'final order' within the meaning of sub.s. (1) of S. 12. The District Judge rightly held that he had power to reconsider the question upon the report of the Inspector of Stamps as well as upon the preliminary objection preferred by the respondent. A.I.R. 1942 Oudh 385=1942 O.W.N. 338=1942 A.W.R.(C C). 226=1942 A.W.R. (Rev.) 90=200 Ind. Cas. 223.

——**Ss. 6 (4) and 6-B (U. P.)** — Proper Court-fee—**Locus standi** of defendant in an enquiry as to —Finality of decision as to Court-fee.

A defendant is not a necessary party to a determination of the question of the sufficiency of a Court-fee. He has no doubt been given by S. 6(4) a right to raise the issue, but he can exercise that right so far as the Court trying the issue is concerned only until such time as any decision on it has not been recorded. Where the Court adjudicates upon it after hearing the Chief Revenue Authority and it is not challenged as provided in S. 6-B (1) of the Act within the time allowed by law, that decision is conclusive so far as that court is concerned and the matter cannot be re-agitated by the defendant before that Court. A.I.R. 1935 Mad. 927; .A I. R. 1941 Mad. 626, Rel. 1950. A. L. J. 372=A. I. R. 1950 All. 520=1950 A. W. R. 413.

——**S. 6 (4) (U. P.)**—Suit for partition—Point as to deficiency in court-fee raised—Court not following procedure under S. 6 (4) but deciding issue with other issues—Court ordering plaintiffs to make good deficiency and preparation of decree to be deferred till dificiency was made good—Deficiency not made good within time allowed—Appeal preferred styling it as under S. 96, Civil P. C. (Act V of 1908), and S. 6-A, Court-fees Act (VII of 1870)—Appeal, held could not be treated as revision under S. 115, Civil P. C. (Act V of 1908), nor as appeal from decree but as appeal from order under S. 6-A.

In a partition suit, one of the points raised in defence was that the plaint was insufficiently stamped. The Judge did not follow the procedure enjoined by S. 6-A (4), Court-fees Act, and decided the issue as regards the court-fee along with the other issues framed in the case. He held that the court-fee paid was insufficient and, by the operative portion of his judgment, directed the plaintiff to make good the deficiency in the court-fee and further ordered that the preparation of the decree be deferred till the deficiency in the court-fee was made good. The plaintiff, however, did not pay the deficiency within the time allowed, and filed an appeal styling the same as a first appeal under S. 96. Civil P. C., and S. 6-A, Court-fees Act:

Held, that as the decision of the Court would be appealable to the High Court as a decree, S. 115, Civil P. C., could have no application to the case and therefore, the memorandum of appeal filed by the plaintiff could not be treated as an application in revision. Nor could the appeal be considered as an appeal against a decree because no decree had been prepared in the case. The plafntiff was, however, entitled to assail by appeal the order of the Court below calling upon him to make good the deficiency in the court-fee and the appeal must, therefore, be regarded as an appeal from order in accordance with the provisions of S. 6-A, Court-fees Act. A.I.R. 1941 All. 55=1940 A.L.J. 891=1940 A.W.R. (H. C.) 577=193 Ind. Cas. 133.

——**S. 6 (2) (3) and (4) (U.P.)**

The necessity of faithfully following the provisions of cls. (2) (3) and (4) of **S.** 6, Court-fees Act is imperative in order to avoid anomalies. A.I.R. (1941 All. 55=1940 A.L.J. 891=1940 A.W.R. (H.C.) 577=193 Ind Cas. 133.

—**S. 6(2) (U. P.)**, Civil P.C. (Act V of 1908), S. 149—Power of High Court to grant time to make up deficiency in Court-fees.

The High Court has power to grant time in its discretion to make up the deficiency in the Court-fee on a plaint or memorandum of appeal under S. 149, Civil P. C., and now also under S. 6, cl. (2) of the Court-fees Act as amended by the Court-fees (Amendment) Act of 1938. 186 Ind. Cas. 161=1940 O.W.N. 172=1940 A.W.R. 89 (1)=15 Luck. 390.

——**Ss. 6-A, 6-B, 6-C and 12 (2) (U. P.)**

—Decision as to sucffiiency of court-fee on objection by Inspector of stamps—Matter if can be re-opened on objection by opposite party—Error, if any how to be corrected.

Where a Court decides as to the sufficiency of court-fee paid on objection raised by the Inspector of Stamps, it is not open to it subsequently to re-open the question on objection by the opposite party. If there is any error in the order as to the sufficiency of the court-fee paid it could only be corrected by the appellate Court under S. 12 (2) of the Court-Fees Act. 1950 A.L.J. 372=1950 A.W.R. 413=A.I.R. 1950 A. 520.

——**S. 6-A (U. P.)**—Order on objection by defendant as to insufficiency of Court-fee—Right of defendant to challenge by way of appeal or revision.

As the provisions of S. 6-A of the Court-Fees Act are specially made for the party who is called upon to pay the Court-fee, it cannot be availed of by his rival. Hence, a defendant whose objection as to the insufficiency of the Court-fee paid by the plaintiff is rejected has no **locus standi** to challenge it by way of appeal against that order. Neither a revision would be competent. I.L.R. (1947) All. 640=1947 A. W.R. (H.C.) 145=1947 A.L.J. 180=1947 A.L.W. 356=A.I.R. 1947 A. 404.

——**S. 6—A (U. P.).**

——When in an appeal under the U. P. Encum. Estates Act, the appellant is ordered to make good a deficiency in court-fee, his remedy is by way of an appeal under S. 6.A and not by an application under S. 46 of the U. P. Encum. Estates Act. A.I.R. 1943 Oudh 213=1943 O.W.N. 87=1943 A.W.R. (C.C.) 19 (2)=205 Ind. Cas. 511.

——**S. 6-A** (1)—Order directing plaintiff to pay deficit court-fee—Defendant if can appeal under S. 6-A (1)—Appeal by plaintiff—Defendant, whether entitled to file cross-objections.

Where the trial Court has ordered the plaintiff to pay a certain amount as the deficit court-fee, the defendant is not entitled to file any appeal against the order under the provisions of S. 6-A (1), Court-fees Act, on the ground that the plaintiff should have been directed to pay a higher amount of court-fee, as he is not a person who has been called upon to make good a deficiency in a court-fee. Nor can the defendant file cross-objections under O. 41, R. 22, Civil P. C., where the plaintiff has filed an appeal against the order, as under that rule a cross-objection can be filed only by a person who is entitled under the law to file an appeal. A.I.R. 1942 Oudh. 391 (1)=1942 O.W.N. 382 =1942 A.W.R. (C. C.) 258=18 Luck. 256=200 Ind. Cas. 860.

——**S. 6-A (U. P.)**

——Incidental orders leading up to order relating to court-fees, if can be set aside.

Obiter—When an appeal lies against an order directing payment of court-fee, incidental orders which lead up to it can be set right. A.I.R. 1941 All. 298=1941 O.W.N. 704=1941 A.W.R. (H. C.) 188=1941 A.L.J. 376=1941 R.D. 394=I.L.R. (1941) All. 558=195 Ind. Cas. 758.

——**S. 6-A (U. p.)** Suit filed before Act of 1938—Order regarding court-fees passed against plaintiff subsequent to Act—Plaintiff has a right of appeal under that Act.

Where, a person files a suit before the Act of 1938, and an order relating to court-fees is passed against him after the Act, he has a right of appeal under the Act of 1938, even if he had no such right before that Act. A.I.R. 1941 All. 298=1941 O.W.N. 704=1941 A.L.J. 376=1941 R.D. 394=I.L.R. (1941) All. 558=1941 A.W.R. (H. C.) 188=195 Ind. Cas. 758.

——**S. 6-B. (U. P.)**—Failure of Chief Inspector of Stamps to take steps under—Effect—Court, if debarred from considering it again.

If the Chief Inspector of Stamps fails to take any action under S. 6-B of the Court-Fees Act (U. P.), he would no doubt be debarred from raising the question again in any Court of appeal or revision, etc., before which it might come at a later stage. But it cannot be said that the matter becomes final and that it could not be considered again by a Court of appeal, revision, etc. If the Court **suo motu** or otherwise finds that there is a wrong decision to the detriment of revenue, it can consider it afresh and direct payment of additional court-fee by the party concerned. I.L.R. (1949) A. 710=1948 A.L.W. 424=A.I.R. 1949 A. 324=1949 A.W.R. (H.C.) 64=1948 O.W.N. 426.

——**S. 6-B (U. P.)**— Revision under — Contents of the petition — Date of receipt of lower Court's order —Necessity to state — Reasons.

It should be the invariable practice of the Chief Inspector of stamps when making a revision application under S. 6-B of the Court-Fees Act (U. P.) to the High Court to state in the body of his application the date on which he first received the order of the Court below, because under S. 6-B (1) a strict period of limitation has been imposed on the Chief Inspector of stamps, and unless he discloses in his own application such date, it would be impossible for the office to find out whether the

revision was in time or not. 226 Ind. Cas. 127=1946 A. L. J. 170=1946 A. W. R. (H. C.) 190=1946 O. W. N. (H.C.) 118=1946 A. L. W. 126= A. I. R. 1946 All. 355 (F.B.)

——S. 6-C (U. P.)

——Ss. 6-C, 6-B—Chief controlling Revenue authority alone can make reference—Chief Inspector of Stamps is not competent—He can only move High Court in revision under S. 6-B.

According to S. 6-C, Court-fees Act, it is only the chief controlling revenue authority that has been given the power to make a reference to the High Court. The Chief Inspector of Stamps is not competent to make a reference in accordance with the provisions of S. 6-C of the Act. He can, within the prescribed period, only move the High Court "by an application in writing" for revision under S. 6-B. A. I. R. 1941 All. 369=1941 R. D. 763=I. L. R. (1941) All. 585= 1941 A.L.J. 487=198 Ind. Cas. 287.

——S. 7, Sch. I, Art. 1 and Sch. II, Art 17 (vi) (U.P.)—Prayer for appointment of receiver—Valuation for Court-fee.

The value of the appointment of a receiver is not really estimable, namely estimable in terms of money value. Hence where a relief for the appointment of a receiver is asked for, a fixed court-fee should be paid on that relief under the provisions of Art. 17 (**vi**) of Sch. II to the Court-Fees Act and the provisions of either S. 7 or Art. 1 of the lst Schedule do not apply. I. L. R. (1946) All. 455=1946 A. L. J. 129=1946 A. L. W. 139=1946 O. W. N. (H. C.) 131=1946 A. W. R. (H.C.) 192=A.I.R. 1946 All. 392=227 Ind. Cas. 574.

——S. 7.—Determination of—Court-fee—Allegation in plaint must be taken as true.

The allegations in the plaint for the purpose of determining court-fee must be taken as true. A.I.R. 1943 Mad. 474=1943 M.W.N. 265=56 M.L.W. 255= (1943) 1 M.L.J. 296=210 Ind. Cas. 477.

——S. 7—and Sch. II, Art. 17—Suit for declaration—Previous decree not binding on plaintiff—He need not get it set aside—If decree binding for any reason prayer for setting aside decree must be insisted upon.

Ordinarily, a decree only binds parties and privies. One who is not a party and who does not claim through the judgment-debtor is not bound, and if he is not bound, it is not necessary for him to get the decree modified or set aside in order to protect his interests. But it for one reason or another he is bound then there is implicit in the declaration a prayer that the former decree be modified so as to exonerate his interests. In such a case it is necessary for the plaintiff to have the decree modified and his prayer for consequential relief should be insisted upon. A.I.R. 1943 Nag. 70 =I. L. R. (1943) Nag. 440=202 Ind. Cas. 643.

——S. 7—Determination of court-fee—Matters to be considered.

The question as to the proper court-fee payable must be decided on an appreciation of what the appellant really sought, without penalising him merely because he may have asked for a declaration which may be unnecessary, but at the same time it must be seen that he does not escape liability by a vague and indefinite statement of facts or by adopting such expedients as for instance, bringing what is essentially a title suit in the guise of a partition suit. A. I. R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

——Ss. 7, 7 (ix)—Suit by co-mortgagee for his share of mortgage amount, maintainability—Value for court-fee and jurisdiction.

One of several co-mortgagees, who are in the position of tenants-in-common can sue to recover his own share of the mortgage, provided that he makes his co-mortgagees defendants if they refuse to join him as plaintiffs.

In such a suit the value of the claim for p rposes of jurisdiction and court-fee is the same under S. 8, Suits Valuation Act. But thc governing section in the matter of court-fee is S. 7, Court-fees Act, and not S. 8. Suits Valuation Act, and in deciding what court-fee is payable under S. 7, court-fees Act, the Court must have regard to the real nature of the claim.

A co-mortgagee suing to recover his individual share in the mortgage must ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety. He must ask for a preliminary mortgage decree in respect of the entire debt. There can be no redemption in part. Therefore, the plaintiff cannot get his share until the mortrgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. In these circumstances, the primary claim can only be taken to be the enforcement of payment of the full mortgage debt and, therefore, the plaintiff must value his suit according to the full amount due under the mortgage and not according to his own share.

Hardship cannot be regarded as a factor in the matter of determination of court-fee payable. To require a co-mortgagee suing alone to pay court-fee on the full amount of the mortgage debt will not result in hardship. If he obtains a mortgage-decree, he will be entitled to recover out of the money paid into Court by the mortgagor or out of the proceeds of the sale of the mortgaged property, the full amount of which he has had to pay in court-fees. A.I.R. 1942 Mad. 205=54 M.L.W. 679= (1941) 2 M.L.J. 986=1941 M.W.N. 1055=I.L.R. (1942) Mad. 438=201 Ind. Cas. 103.

——S. 7—Question of court-fee, determination of.

In determining the question of court-fee, the Courts must see what is the real nature of the plaint shorn of its verbiage. It must see what is its real substance as opposed to its ostensible form. But caution must be observed so as not to import into the plaint anything which it does not really contain either actually, or by necessary implication. In construing the plaint the Court must take it as it is, not as it may think it ought to have been.

A relief not asked for cannot be imported so as to charge court-fee thereon.

It is the plaintiff's own business if he chooses to take the risk of his suit failing on the ground that he has not asked for a necessary relief either declaratory or consequential. Where a plaintiff who is entitled to consequential relief frames his suit as one for a declaration only, the Court is not entitled to insist upon his praying for a consequential relief and paying the court-fee proper for such a suit; or, where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court cannot call upon him to pay court-fees on the consequential relief which he should have claimed, although he has omitted to do so.

The same principle will apply where the plaintiff omits to claim both the declaration and the consequential relief, and contents himself with claiming a mere decree for partition. A.I.R. 1942 Pat. 60=20 Pat. 780=8 B.R.471=23 P.L.T. 218=198 Ind. Cas. 866.

——**S. 7—Land with building thereon, whether comes within definition of "houses" in S. 7—** water-mill assessed to land revenue—Assessment of court-fee on market-value.

The distinction which is drawn in S. 7, Court-fees Act, between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and hence a water-mill assessed to land revenue should be assessed for purposes of court-fee on its market value. A.I.R. 1941 Pesh. 69 =1941 Pesh. L.J. 69=196 Ind. Cas. 301.

——**S. 7—Suit instituted on March 1, 1937, i. e., before amendment of Act in 1938—Co rt-fee payable.**

Suit brought on March 1, 1937, before the amending Court-fees Act of 1938 was passed, will be governed by the provisions of the Act as it stood unamended.

The provisions of the Court-fees Act as it stood before the amending Act was passed and even those of the amending Act clearly show that the Legislature has made a distinction in the amount of court-fee between suits for possession of immovable property and those seeking reliefs other than possession in respect of immovable property, the court-fee required in the case of the latter suits being much less than that required in suits for possession.

Where the plaintiff is herself in possession of the house in suit and all that she requires is cancellation of the sale-deed which she said was obtained from her by fraud and undue influence, in such a suit, she cannot be required to pay **ad valorem** court-fee on the market value of the house which is the court-fee payable on a suit for possession. The plaintiff can, therefore, be allowed to pay court-fees only on declaratory relief. A.I.R. 1940 Oudh 248=1940 O.W.N. 389=1940 A.W.R. 171=15 Luck. 531=187 Ind. Cas. 454.

——**S. 7—Question of court-fees to be decided in first instance upon allegations in plaint.**

The question of court-fees must, in the first instance, be decided upon the allegations contained in the plaint. If the plaintiff alleges in a suit for partition that he is in joint possession of the property and on a plea raised by the defendant, the Court finds that the allegation is untrue, then it would be the duty of the Court to decide whether the relief claimed involves the relief for possession or not. If it does not, then the suit is liable to be thrown out on the ground that a relief for partition cannot be granted without the relief for possession. If the relief for possesssion is involved, then the Court would call upon the plaintiff to make good the deficiency in the court-fee. A.I.R. 1940 Oudh 47=1939 A.W.R. 310=1939 O.W.N. 1055=15 Luck. 76=184 Ind. Cas. 371.

——**S. 7—Question of Court-fee—Determination.**

—The question of the proper court-fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole plaint, and not merely on the language of the relief claimed in the plaint.

The Court-fees Act being a fiscal enactment, its provisions should be strictly construed, but they should not be so construed as to furnish a chance of escape and a means of evasion. Language is meant to be used as a vehicle for expression of one's thoughts. Where, however, it is abused for the purpose of concealing the real thoughts, it is clearly the duty of a Court of Justice to look to the substance of the plaint, and not to allow itself to be deceived by the language used for evading the payment of proper duty by concealing the real purpose of the suit. Even though a consequential relief may not be expressly prayed for, yet, if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included within the declaration prayed for in the suit. A.I.R. 1938 Oudh 1=1937 O.W.N. 1186=13 Luck. 628=172 Ind. Cas. 81 (F.B.)

——**S. 7—Object of suit being avoidance of sale deed—Plaint framed as one for injunction restraining defendant from interfering with possession—Valuation.**

The plaintiff framed the plaint as one for an injunction restraining the defendant from interfering with the plaintiff's possession and kicking up a row that the sale deed bought from the plaintiff by the defendant was in law void **ab initio** and a nullity. The object of the suit was the avoidance of the sale deed:

Held, that the valuation of the suit should be on the basis of a prayer for a declaration and not as if it were for an injunction only. A.I.R. 1939 Mad. 435=1939-1 M.L.J. 425=1939 M.W.N. 1114.

——**S. 7—Scope.**

——S. 7—Court-fees Act, refers only to suits and in certain cases specially mentioned to memoranda of appeals. A.I.R. 1939 Rang. 375=1939 Rang. L.R. 474=185 Ind. Cas. 623.

——**S. 7—Court-fee—How determined.**

The court-fee on the plaint is fixed by the plaint itself, and it has got to be determined on a perusal of the plaint. The proper fee, therefore, has got to be determined as soon as the plaint is presented, and any subsequent defence cannot alter that fee unless a defence is raised which requires the plaint to be amended; then and then only can the value of stamp required be affected. A. I. R. 1938 Rang. 76=1937 Rang. L. R. 447=428=174 Ind. Cas. 794.

——**S. 7—Allegations in plaint must be taken to be** prima facie **correct.**

The fact that there is room for some suspicion that the plaint has been so drafted as to avoid inconvenient facts and make it appear that it is not necessary to pay a higher court-fee than what the plaintiff paid in the first instance, will not justify the departure from the well-established principle that for purposes of the calculation of court-fee, the Court must take the allegations in the plaint to be **prima facie** correct. A.I.R. 1937 Mad. 402=45 M.L.W. 720=1937-1 M.L.J. 572=171 Ind. Cas. 572.

——**S. 7—Principle to determine proper court-fee.**

The principle to be followed in determining the proper court-fee is that the substance of the relief claimed and not the formal language of the plaint must be looked at. A.I.R. 1936 Mad. 470=43 M.L.W. 715 =1936 M.W.N. 566=71 M.L.J. 383=163 Ind. Cas. 203.

——**S. 7—Valuation—Declaratory suit to avoid decree in respect of certain properties—**Valuation of suit—Suit for getting rid of liability to pay maintenance—Value of suit for purposes of jurisdiction.

In a suit for declaration that certain villages were not subject to any charge of the defendants and to avoid a declaratory decree so far as those properties

were concerned, it is the amount of the decree sought to be realised that determines the value of the suit, where the property involved is of larger value than the amount due under the decree; but where the decretal amount is larger and the market value of the property involved is smaller, it is the market value of the property which determines the value of the suit. Where therefore, the value of the property is obviously far larger than the value of the declaratory decree regarding maintenance which the plaintiff in substance seeks to set aside, the valuation of the suit should be taken to be the valuation of the decree which the plaintiff seeks to set aside.

No principles have been laid down in the Suits Valuation Act or in the Court-fees Act assessing the value of a suit which is substantially to set aside a decree which declares Rs. 200 per annum to be a charge upon certain property. If the suit were for establishment of a right to receive maintenance amounting to Rs. 200 per annum, then under S. 7, cl. 2 of the Court-fees Act, the value of the subject-matter of the suit would be deemed to be ten times the amount claimed as payable for one year. In the absence of any provision to the contrary, a simillar principle may be adopted for assessing the valuation when the suit is for getting rid of a liability to pay maintenance at the rate of Rs. 200 per annum. A.I.R. 1936 Oudh 317=1936 O.W.N. 522=162 Ind. Cas. 750.

——S. 7—Court-fee—Plaint must be looked into.

For purposes of the court-fee, the Court must look to the plaint only. Court-fee cannot be demanded from a plaintiff on the ground that question of possession will arise in the suit. Though it is open to the Court to say that the plaintiff has really asked for a consequential relief though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper fee as in such suit. A.I.R. 1936 Pat. 171=17 P.L.T. 115=2 B.R. 366=15 Pat. 386=161 Ind. Cas. 706.

——S. 7—Form of plaint is no test—Real Substance must be looked into.

The mere form and language of a plaint is not the final test, and to arrive at a sound conclusion, the Court has to look beyond the mere form and verbiage of the plaint and to arrive at what is the real substance. A.I.R. 1935 Cal. 338=60 C.L.J. 201=39 C.W.N. 131=157 Ind. Cas. 356.

——S. 7.—Question of court-fees—Depends on allegations in plaint.

The question as to what the proper court-fees ought to be levied on the plaint depends on the allegations which are contained in the plaint. A.I.R. 1935 Cal. 273=60 C.L.J. 377=155 Ind. Cas. 815.

——S. 7—Jurisdiction, how to be determined—Valuation of suit—Method of assessment—Value of benefit to plaintiffs.

The decision on the question of court-fee cannot conclude the question of jurisdiction. In cases where the court-fee valuation must be adopted for the purpose of jurisdiction also, the two questions need not be separately considered. Though the Act for court-fee purposes provides an artificial valuation, the plaintiffs for the purpose of jurisdiction are bound to assess the relief they claim, on the basis of the value of the benefit they seek to obtain by the filing of the suit. A.I.R. 1935 Mad. 655=1935 M.W.N. 707=42 M.L.W. 42=69 M.L.J 202=59 Mad. 159=157 Ind. Cas. 1033.

——S. 7—Character of suit.

The character of a suit depends upon the allegations contained in the plaint and the nature of the relief claimed by the plaintiff and not upon the defence raised by the defendant. A.I.R. 1935 Pesh. 30.

——S. 7—Determination—Allegations in plaint alone should be considered.

In determining the court-fee payable, the allegations in the plaint alone should be considered and not the defendant's denial thereon. A.I.R. 1934 Lah. 563=36 P.L.R. 48=15 Lah. 531=150 Ind. Cas. 994. (F.B.)

——S. 7, Sch. II, Art. 17 (iii)—Declaratory suit with no consequential relief—Cross-objection, court-fee—Ad valorem fee, if necessary.

A cross-objection and an appeal are very intimately connected and there is no essential difference from the point of view in court-fee between the one and the other, and there is no reason whatever why a person who files a cross-objection should have to pay ad valorem court-fee, whereas if an appeal is filed instead of a cross-objection, court-fee will not have to be paid. Consequently, a cross-objection in a declaratory suit where no other consequential relief is asked for does not require ad valorem court-fee. The omission of the word 'cross-objection' from Sch. II, Art. 17 (iii) in the Court-fees Act is a mere clerical error and by a memorandum of appeal, a cross-objection is also intended to be included. A.I.R. 1935 All. 728=1934 A.L.J. 743=3 A.W.R. 803=57 All. 151=152 Ind. Cas. 196.

——S. 7—Suit for declaratory decree—Prayer for consequential relief—Power of Court to require plaintiff to correct valuation made by him.

In suits to obtain a declaratory decree or order where consequential relief is prayed for and in suits to obtain an injunction where the Court finds the relief claimed as undervalued, it is entitled under O. 7, R. 11 (b), Civil P. C., to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7 of the Court-fees Act. A.I.R. 1934 Cal. 448=59 C.L.J. 233=38 C.W.N. 589=61 Cal. 796=149 Ind. Cas. 3 (F.B.)

——S. 7—Courts must look to substance of claim and not only form.

Courts of Justice have not to look at the mere form of the suit but should try to find out what the real substance of the claim is. Although it is open to a party to save the amount of the court-fee by framing the plaint in a manner permitted by the law, still the litigants should not be permitted, to deprive the Revenue Authorities of what is due to them by adopting methods of pleading which cannot be supported by the language of the relevant statute. A.I.R. 1934 Lah. 235=35 P.L.R. 136=155 Ind. Cas. 209.

——S. 7—Suit against son of lessee holding over—When a lessee held over after the expiry of the term of lease and after his death, his son remained in possession as lessee on payment of rent:

Held, defedant could not be held as a trespasser and for evicting him a suit on payment of **ad valorem** court-fees was not necessary. A.I.R. 1933 Cal. 822=59 C.L.J. 5=147 Ind. Cas. 209.

——S. 7—**Court-fee—Regard to be had to allegations in plaint**—Prayer for declaration that decree against plaintiff was not binding on plaintiff—Court-fee payable.

To ascertain the court-fee payable in a case, regard must be had to the allegations in the plaint. It is not the function of the Court to ask itself whether those allegations are true or probable. A.I.R. 1933 Mad. 430=64 M.L.J. 24=1933 M.W.N 144=37 M.L.W. 806=141 Ind. Cas. 80.

——S. 7—**Constancy of valuation of suits and appeals—Necessity of.**

Under S. 7, Court-fees Act, valuation for suits and appeals is to be constant and the valuation of a particular relief in appeal remains unchanged whether that appeal be against the grant or refusal of the relief in the lower Court. A.I.R. 1933 Nag. 362=147 Ind. Cas. 1113.

—S. 7, Sch. II, Art. 17 (iii)—Suit for declaration that property belonged jointly to plaintiff and defendant—Prayer to declare certain documents do not affect jointness of family—Court-fee payable.

For the purpose of determination of the court-fee, the actual relief asked for should be looked into and it is entirely beside the consideration of the Court whether the suit was likely or not to fail because the plaint did not ask for a consequential relief.

Where a suit was instituted to obtain a declaration that the entire family property, in the hands of the plaintiff, as the head of a joint family, belonged equally to the plaintiff and the male defendant, and that certain documents executed by certain deceased members of the family did not affect the jointness of the family:

Held, that a court-fee of Rs. 10 was sufficient for the plaint. A.I.R. 1932 All. 560=1932 A.L.J. 466 =141 Ind. Cas. 112.

——S. 7—The question of court-fees must be determined with reference to the plaint as it is and not as it ought to have been. A.I.R. 1932 All. 316=1932 A.L.J. 165=140 Ind. Cas. 191.

——S. 7.— The question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under S. 42. Specific Relief Act, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint. A.I.R. 1931 All. 369=1931 A.L.J. 235=53 All. 552=131 Ind. Cas. 604.

——S. 7—Suit for accounts—Valuation—Larger sum found due—Additional duty demanded—Dismissal for non-payment—Relinquishment:—In a suit for accounts, the valuation which the plaintiff puts upon his claim determines the jurisdiction of the court and the amount of court-fees. In such suit a decree may be passed for a larger amount, though the decree cannot be executed until the fee is paid for the additional amount. In a suit for accounts, on finding that a larger sum might be due than was claimed in the plaint the court insisted on the payment of additional duty in the course of the suit. The plaintiff offered to relinquish the claim and dismissed the suit for default in paying the fee:—Held, that the order was erroneous and that the relinquishment made in consequence of such erroneous order was not binding on the plaintiff, especially as he had not been permitted to relinquish his claim. 12 M.L.J. 66.

——S. 7—Appeal—Ground as to costs—Special ground as regards costs in the memorandum of appeal—Value of such relief part of subject-matter in dispute.—Where in a memorandum of appeal the disallowance of costs by the lower court is made the ground of a claim for separate and distinct relief, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court-Fees Act. 1901 A.W.N. 21=1. A.L.J. 5=26 A. 291.

——S. 7—Appeal.—Mesne profits not decreed.

Where in a suit for recovery of possession of land and antecedent mesne profits the suit is valued for court-fee at the total amount of the value of land and mesne profits and the claim being decreed, the defendant prefers an appeal, it is incumbent upon him to value the appeal at the same amount as in the original suit, even though the Court may order that the amount of mesne profits should be determined in separate proceedings. 13 C.W.N. 815 and 49 Ind. Cas. 962 Foll., A.I.R. 1922 All. 228. Dist. 8 Pat. 906=10 P.L.T. 622=120 Ind. Cas. 313 = A. I. R. 1929 Pat. 731.

——S. 7.—Suit.

—The word "suits" in S. 7 does not include appeals. 22 M. L. W. 691=92 Ind. Cas. 624= 1926 M. W. N. 169=A.I.R. 1926 Mad. 225.

——S. 7—Appeal—Plaint determines forum.

In order to determine the proper appellate Court what has to be looked at is the value of the original suit. i,e., the amount or value of the subject-matter of the suit. The word "'value" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court unless it appears that, either purposely or through gross negligence, the true value has been altogether misrepresented by the plaintiff. 32 All. 222; 34 Cal. 954, Dissented from. 86 Ind. Cas. 1055=47 All. 534=23 A. L. J. 216=A. I. R. 1925 All. 376.

——S. 7—Application of clauses.

—The application of any particular clause of S. 7 must depend on the substance of the claim and not on the mere words used in the plaint. 91 Ind. Cas. 709=22 M. L. W. 515= 1925 M.W.N. 777=A.I.R. 1925 Mad. 1248= 50 M.L.J. 406.

——Ss. 7,9,10—Court Fee—Net profits or market value wrongly estimated—Limitation.

On a question as to whether the plaint in a suit for pre-emption had been properly stamped with reference to the net profits of the property in suit for "the year next before the date of presenting the plaint," an issue was remitted to the lower appellate court. The finding of that court was that the amount of profits had been slightly under-estimated. The plaintiff-appellant, while contesting the principle upon which the court below had arrived at its finding, was ready to pay the small deficiency in the court fee. Held, following, 27 A. 197, that the suit should be remanded to the court of first instance t

be heard on the merits, subject to the payment by the plaintiff of the deficiency in the Court fee. 1906 A.W.N. 18.

——S. 7—Court fee—Suit to obtain possession of property leased to plaintiff—Suit for specific performance—Appeal.

Held that a suit by a lessee to obtain possession of land comprised in his lease, but of which possession has not been given, is not a suit for specific performance, to which S. 7, Cl. (10), of the Court-Fees Act, 1870, is applicable but is governed as to payment of stamp duty by S. 7, Cl. (5) of the Act. (1908) AW.N. 201=5 A.L.J. 534.

——S. 7—Cross-objection—Court-fee on sum objected to.

The value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which a party wishes to get rid of. Where the court finds that the plaintiff has to pay a particular sum before he gets the relief claimed and the plaintiff appeals therefrom or prefers cross-objections thereto the value of the subject-matter is the amount which the plaintiff calls in question in his memo. of appeal or objection. 68 Ind. Cas. 444=45 Mad. 246=30 M.L.T. 88=14 M.L.W. 624=1921 M.W.N. 854= A.I.R. 1922 Mad. 211=41 M.L.J. 587. See also, 85 Ind. Cas. 405=48 Mad. 652=21 M.L.W. 15= A.I.R. 1925 Mad. 323=47 M.L.J. 919.

——S. 7—Partnership suit—Subject matter of suit—Valuation of.

The subject-matter of a partnership suit would be the severance of the jural relationship and determination of the relative shares of the partners. The aggregate of the specific amounts will represent the value of the subject-matter of the suit even though the tentative value fixed by the plaintiff be less or more. A. I. R. 1928 Lah. 157 and A. I. R. 1927 Lah. 485, Ref. 122 Ind. Cas. 730=31 P.L.R. 258=A.I.R. 1930 Lah. 725.

——S. 7—Pauper suit—Continuatiqn of suit in forma pauperis.

The plaint already filed with a stamp duty was found to be inadequate. A written statement was put in and issues settled and the Court at trial of an issue as to the court-fee wanted additional court-fee which in amount was so large that the plaintiff could not pay it. An application for permission to continue the suit in forma pauperis was preferred.

Held, in such cases the Court should see whether the plaint disclosed a cause of action and should issue notice to the opposite side and to the Government to see if the plaintiff was really a pauper unable to pay the additional stamp and if so found he should be allowed to continue the suit in forma pauperis. 20 Cal. 319; 8 Bom. 615 and 38 M.L.J. 146, Ref. 121 Ind. Cas. 857=30 M.L.W. 637=53. Mad. 43=A.I.R. 1929 Mad. 828=57 M.L.J. 677.

——S. 7—Valuation.

The appellant is not entitled to value his appeal on the assumption that a ground which he proposes to take in argument, which he has not even taken in his memorandum of appeal is on the face of it likely to be successful. A.I.R. 1930 Pat. 605=128 Ind. Cas. 795=11 P.L.T. 629.

——S. 7—Saving of Court-fee—Right of plaintiff.

It is always open to plaintiff or an appellant to reduce his claim and effect a saving of court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. 116 Ind. Cas. 82=1929 A.L.J. 547=A.I.R. 1929 All. 308.

——S. 7 and Sch. 1—Scope of.

Schedule 1 of the Act is supplementary and not alternative to S. 7 and other sections of the Act. S. 7 states the various processes by which the values in different suits are to be ascertained and the schedule then applies the proper Court-fee to these values. S. 7 prescribes the value that shall remain unchanged in all stages of a case. Once the value of a relief is ascertained for the purposes of the plaint, the first schedule rates the relief at the same value for the purposes of appeal. The value of the same relief remains unchanged all through the succeeding stages though the appeal is made against its grant or its refusal by the lower Court. 6 N.L.R. 164=8 Ind. Cas. 1125.

——S. 7. Schedule II Cls. (3), (4)—Suit for dissolution of partnership—Preliminary decree—Appeal against—Ad valorem fee.

In an appeal from a decree passed in a suit for the dissolution of partnership, whether the appeal be from the preliminary or the final decree, the amount of fee payable is to be computed according to the amount at which the relief sought is valued in the memorandum of appeal. The change in the present Civil Procedure Code making an appeal against a preliminary decree compulsory, does not in any way affect the matter of Court-fees. (1910) 7 A.L.J. 546= 32 A. 517=6 Ind. Cas. 832.

——S. 7.—Suit for sale partly decreed—Certain share exempted—Objections by mortgagees asking for sale of exempted share—Ad valorem fee—Reference to question of Court-fee—Jurisdiction—Division Bench:-Held by Knox, Karamat Hussain JJ. that the division bench had no jurisdiction to hear a stamp reference even when it is referred to them by the taxing judge. A suit was brought for the recovery of the money by sale of $11\frac{1}{4}$ share of a mortgagor's rights. The court passed a decree for sale of only $7\frac{1}{2}$ shares. The defendant appealed and the defendant accepting the correctness of the amount found due, preferred objections and asked for a declaration for the remaining $3\frac{3}{4}$ sharess were also liable. He valued the appeal at Rs. 800—the value of the property. Held that there was a consequential relief in his demand, viz., a prayer for sale of property and the plaintiff was liable to pay ad valorem fee on the amount at which he valued the property. 30 M. 96 foll. 7 A.L.J. 842=33 A. 20=7 Ind. Cas. 315.

——S. 7, Art. 17 (iv)—Suit with Advocate General's sanction in respect of public charities —Court-fee:—See C.P.C., S. 92. 14 C.W.N. 932 =12 C.L.J. 211=7 Ind. Cas. 92.

——S. 7—Trees—Separate Valuation.

In so far as the trees standing on specific item claimed in the plaint are concerned, it is not necessary to value them separately. They are included

in the valuation of the items themselves. 40 Mad. 824, Rel. on. Where the plaintiff made it clear that in respect of all porambokes, the only rights he sought for were rights accessory to ownership of plots in the village and not rights of actual ownership.

Held, that the trees standing on the porambokes need not be valued. 105 Ind. Cas. 881=A.I.R, 1927 Mad. 1002=54 M.L.J. 67.

——S. 7—Valuation—Method provided by the Act.

When there is in the Act itself a special rule, as to valuing property in suits, for Court-fees, it is proper to take that method of valuation, in preference to any other method, to get the value where there is no indication that any other method should be adopted. 26 M.L.W. 159=39 M.L.T. 193=105 Ind. Cas 171=1928 M.W.N. 120=A.I.R. 1927 Mad. 825=53 M.L.J. 267.

——S. 7—Value of land—Instructions by District Judge.

Charts issued by District Judge setting out minimum values of lands in different parts of the district must not be put upon the parties as though they were evidence in themselves and any judicial officer acting in judicial matters upon such charts is acting without evidence before him. 122 Ind. Cas. 630=50 C.L.J. 164=33 C.W.N. 952=A.I.R. 1930 Cal. 65.

——S. 7—Valuation.

—The plaintiff's estimate of the value of the land in dispute if contrary to the provisions of the Act cannot be allowed to operate to the prejudice of the defendant and the defendant can object to the valuation when it is in his interest to do so. 49 All. 398=25 A.L.J. 258=100 Ind. Cas.35=A.I.R. 1927 All.308.

S. 7 (i) Synopsis.

1. Accounts
2. Appeal against final decree
3. Appeal
4. Appeal—Future interest
5. Applicability
6. Ascertained sum of cesses
7. Commission
8. Commutation of grain rent
9. Damages
10. Declaration
11. Maintenance
12. Mesne profits
13. Money suit
14. Mortgage

1. Accounts.

——S. 7. (i)—Accounts

——Suit for—Allegation in plaint that certain sum was stated as due in account sent by defendant—Valuation of suit under S. 7 (i) held incorrect. A.I,R. 1936 Mad. 525=163 Ind. Cas. 822.

——S. 7 (i)—Accounts

——Suit for taking acccunts of assets and income of family for partition of outstandings—Suit, if governed by S. 7 (i).

A suit for accounts of the assets and income of the joint family property for the purposes of partition of the share of the outstandings after taking accounts, is not a claim for money governed by S. 7 (i), Court-fees Act, so far as the assets of the family or even such funds as may be found to be in the possession of the defendants on the taking of the accounts are concerned. In such a case, the Court cannot refuse to accept the plaintiff's valuation even on the ground that it is arbitrary. The release deed executed by the father, no doubt, stands in the way of the plaintiff claiming partition in the ordinary course. But if and when that release deed is set aside, it must follow as a matter of law that the plaintiff must be regarded as a member of a joint Hindu family entitled to all the legal rights of such a member. But the prayer for the setting aside of that release deed must be separately valued and court-fee paid thereon. A.I.R. 1936 Mad. 562=1936 M.W.N. 401=165 Ind. Cas. 412 (2).

2. Appeal against Final decree.

——S. 7 (i)—Appeal against final decree—Pendency of appeal against preliminary decree—Court-fee payable—Credit for court-fee already paid.

When the same party who has filed an appeal against a preliminary decree for accounts and paid court-fee on the value as fixed by the plaintiff in his plaint, files along with or pending that appeal an appeal to the same court against the final decree ascertaining the amount due according to the preliminary decree, he may get credit in the appeal attacking that amount for the court-fee already paid on the appeal against the preliminary decree.

[Difficulties in extending the doctrine to cases where the appeal against the final decree is filed after the decision in the appeal on the preliminary decree discussed.] A. I. R. 1932 Mad. 453=35 M.L.W. 621=1932 M.W.N. 438=62 M.L.J. 624=55 Mad. 664=138 Ind. Cas. 218.

3—Appeal.

——S. 7 (i), Sch. I, Art. 1—Appeal.

Property sought to be exonerated from liability of the mortgage-decree—Ad valorem court-fees is payable on value of the property or on decretal amount whichever is less. A.I.R. 1927 Pat. 46; A.I.R. 1926 Lah.408; 30 Mad. 96 (F.B.) and 4 Mad. 339, Rel. on. 111 Ind. Cas. 650=24 N.L.R. 142=11 N.L.J. 192=A.I.R. 1928 Nag. 316.

——S. 7 (i), Sch. 1, Art. 1—Appeal.

Property sought to be exonerated from liability of final decree—Ad valorem court-fee on value of property is payable if it is less than decretal amout—If it exceeds, then on decretal amount. 5 Pat. 721=98 Ind. Cas. 807=8 P.L.T. 284=A.I.R. 1927 Pat. 46.

——S. 7 (i)—Appeal from decree on mortgage—Interest accrued subsequent to decree—Court-fee on—If payable.

In an appeal by an unsuccessful plaintiff from the decree in a suit to recover money due under a mortgage, the court-fee payable is the same as that on the original plaint. No higher court-fee is leviable on account of the fact that the amount which would be payable at the appellate stage would be more than that claimed in the suit by reason of

subsequent interest accrued after the date of the decree in the suit. I.L.R. (1946) Lah. 805=228 Ind. Cas. 326=48 P.L.R. 400=A.I.R. 1947 Lah. 40 (F.B.)

4. Appeal—Future interest.

——S. 7 (i)—Appeal—future interest from date of decree to date of filing appeal—Court-fee on if payable.

The plaintiff claimed Rs. 1,360 for principal and interest due up to the date of suit. The suit was decreed by the Lower Appellate Court and the defendants went in second appeal. They paid a court-fee on the amount of Rs. 1,360 as was paid on the plaint in the trial Court. It was reported by the office that the interest which had accrued due from the date of suit till the day of the filing of the appeal amounted approximately to Rs. 85 and that adding this amount to Rs. 1,360 there was a deficiency of Rs. 5 in the court-fees which should have been made good:

Held, that the appeal did not challenge the order for future interest and that the court-fee paid on the memorandum of appeal was correct. A.I.R. 1937 Oudh 3=1936 O.W.N. 916=12 Luck. 466= 165 Ind. Cas. 279.

——S. 7 (i)—Appeal asking for future interest—Court fee payable.

A suit on a money bond was decreed for Rs. 4,602 and Rs. 388 costs, making a total of Rs. 4,990. This sum was made payable in four equal annual instalments. No future interest was allowed, but the decree contained a provision for interest at 8 annas per cent; per month in the event of a default of any kind on the balance then due. The decree-holder appealed asking for future interest and stamped his appeal with court-fee of Rs. 10 only:

Held, that the decree awarded interest on default and hence the amount which the decree holder could recover could not be ascertained at the time of appealing. The difference between that amount and the ascertainable sum now claimed was not capable of exact computation, and this difference was the real subject-matter of the appeal. Consequently, in so far as it could not be computed, it was incapable of valuation. But so far as the period between the date of the decree and the date fixed for payment of the first instalment was concerned, the decree-holder would not get interest on it what ever happened and he claimed it in the appeal. Therefore, he must pay ad valorem court-fees on that. As regards the rest, a stamp of Rs. 10 would suffice. The decree was separable into these two parts, and the reliefs claimed as against these two portions must be regarded as separate and distinct reliefs. A.I.R. 1937 Nag. 95=171 Ind. Cas. 79.

5. Applicability.

——S. 7 (i)—Applicability—Defendant pleading adjustment—If should pay court-fee.

Where a defendant's claim is in the nature of an adjustment and not a set-off, no court-fee need be paid. 1948 A.M.L.J. 52.

——S. 7 (i)—Applicability.

——Set-off and adjustment—Plea of.

Suit by director against company for fees due to him—Company cannot adjust the claim against interest due from plaintiff on account of late payment of calls without the consent of the plaintiff—The claim of the company is not in the nature of a set-off but a claim that the amount due to the plaintiff had already been adjusted—Hence no question of payment of court-fee by the defendant arises. A.I.R. 1937 Lah. 62=38 P.L.R. 941=164 Ind. Cas. 586.

——S. 7 (i)—Applicability of.

The plaint in a suit by a mortgagee or a person entitled to a charge on immovable property to recover what is due to him, falls to be stamped under S. 7 (i), Court-fees Act. A.I.R. 1942 Mad. 205=1941-2 M.L.J. 986=54 M.L.W. 679=I.L.R. (1942) Mad. 438=1941 M.W.N. 1055=201 Ind. Cas 103.

6. Ascertained sum of Cesses.

—S. 7. (i)—Ascertained sum of cesses.

——Where the claim is for an ascertained sum of cesses the suit will be governed by cl. (1) and not cl. (iv) (f) of S. 7 of the Court Fees Act. 11 Pat. L.T. 629=128 Ind. Cas. 795=A.I.R. 1930 Pat. 605.

7. Commission.

——S. 7 (i)—Commission.

—Suit for—Not a suit for accounts.

Per **Fawcett and Baker, JJ.**—(**Mirza J. contra**). Where a commission agent does not ask for any accounts to be taken, and sues for a definite sum of money to be paid by the defendant the suit is a suit for money; and the fact that the record of the suit transactions in the form of a written account which is not a settled or stated account, may have to be gone into, does not turn it into a suit for an account. 33 Cal. 1047 (P.C.,) Expl; A.I.R. 1927 Bom. 278 (F.B), Cons.; A.I.R. 1922 Bom. 376 (F.B.), Rel. on. 115 Ind. Cas. 391=30 Bom. L.R. 1284=52 Bom. 904=A.I.R. 1928 Bom. 476.

——S. 7. (i) — Commission—suit for.

—Suit for money due on commission agency comes under S. 7 (i) of the Act, It is not one for an account so as to fall under S. 7. (iv) (f) of the Act because it is not one against an accounting party. The court-fee on the memorandum of appeal is regulated by Schedule I, item 1 of the Act, i. e., stamp must be paid on the subject-matter in dispute, i. e., in dispute in the appeal. (27 A. 447 and 29 M. 367, Ref.) 64 Ind. Cas. 626 = 15 S. L. R. 82 = A. I. R. 1921 Sind 100.

8. Commutation of grain rent.

——S. 7. (i)—Commutation of grain rent into money.

A memo. of appeal from a decree in a suit by the landlord for commutation of grain rents into money rents on the ground that the rate fixed by the lower Court was too low falls either under Sch. II, Art. 17, cl. (iii) or cl. (vi). Neither S. 7. Cl. (1) nor cl. (iv) (c) has any application. 78 Ind. Cas. 968=19 M. L. W. 629=34 M.L.T. 216=A.I.R. 1924 Mad. 623=46 M.L.J. 450.

9. Damages.

——S. 7. (i)—Damages for breach of Contract suit for—Application to amend plaint claiming higher amount rejected — Suit decreed — Plaintiff appealing on ground that amendment application was wrongly rejected—Court-fee on decretal amount in appeal held valid—Court-fee on amended plaint could be paid only if plaintiff succeeded in appeal.

In a suit for damages for a breach of a contract, the plaintiff sought an amendment of the plaint by claiming a higher amount, but the application was rejected. After the decree in the suit in favour of the plaintiff, the plaintiff went in appeal on the ground that his application for amendment was wrongly rejected:

Held, that the plaintiff was entitled, for the purposes of the appeal, to pay court-fee on the amount of the decree appealed against and could be called upon to pay court-fee on the amended plaint only if he succeeded in appeal. A.I.R. 1940 Bom. 369=42 Bom. L.R. 750=I.L.R. (1941) Bom. 71=191 Ind. Cas. 806.

——S. 7 (i)—Damages.

——The words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages. Therefore when plaintiff sues for redemption of Kanom and also prays for a deduction of certain amount claimed as damages, he is entitled to pay the court-fee after the amount recoverable, by way of damages, has been ascertained and set off against the amount payable by way of improvements. (94 Ind. Cas. 557=50 M.L.J. 213=A.I.R. 1926 Mad. 542, Reversed.) 1926 M.W.N. 442=A.I.R. 1926 Mad. 764=50 M.L.J. 493.

——S. 7 (i) Declaration and damages.

Suit for declaration that the plaintiff was not effectively dismissed from office and a decree for damages or alternatively claim for arrears of pay—Court-fee payable is only a fixed fee for the declaratory relief and ad valorem fee on the higher of the alternative reliefs A.I.R. 1942 F.C. 47=9 B.R. 94=1942-2 M.L.J. 794=I.L.R. (1942) Kar (F.C.) 116 Sup=56 M.L.W. 205=1943 M.W.N. 164=47 C. W. N. F. C. 23=1942 F.C.R. 113=I.L.R. (1944) Lah. 553=203 Ind. Cas. 389 (F.C.)

10. Declaration.

——S. 7 (i)—Declaration of title to G. P. Notes not yet mature does not fall under S. 7 (i).

Where the suit is clearly one to obtain a declaration where the plaintiff is the sole and exclusive owner of the G. P. Notes which are not mature for payment, the suit cannot be called one for recovery of money falling within S. 7 (i), Court-fees Act. A.I.R. 1940 Lah. 26=188 Ind Cas. 461.

——S. 7 (i)—Declaration as to amount of periodical payments.

A suit for a declaration that plaintiff is liable to pay Achu palisha (a kind of royalty payable to a hill owner) at a rate lower than that claimed by the defendant does not fall within S. 7. Cl. (1) or Cl. (1) (e) or Cl. (11) (f). It is a pure suit for a declaratory decree without any consequential relief and plaintiff cannot be allowed to put for jurisdictional value anything more than the value of the subject-matter in dispute which is the Capitalised value of the difference between plaintiff and defendant's claim. 70. Ind. Cas. 343=19 M.L.W. 668=34. M.L.T. 271=A.I.R. 1924 Mad. 621=46 M.L.J. 377.

11. Maintenance.

—S. 7 (i)—Maintenance—Suit for arrears of—Claim framed in the guise of declaration—Court-fee payable, whether on declaration or under S. 7 (i).

A suit comprised two claims: (1) a declaration that the plaintiff was entitled to recover Rs. 23 per mensem as Maintenance allowance from certain properties, and (2) a declaration that she had a charge on the same properties for Rs. 3,500 which she had to borrow as her monthly expenses amounted to Rs. 30 while the income from the estate was Rs. 7 only, and she had to spend money on certain litigation:

Held, that this was really a claim for arrears of maintenance and, therefore, court-fee ad valorem on Rs. 3,500 was payable under S. 7 (i). A.I.R. 1934 Lah. 150 (1)=149 Ind. Cas. 982 (2).

—S. 7 (i)—Maintenance——Arrears of.

When the plaintiff's case as laid in the plaint leads to no other relief than the arrears of maintenance, the court-fee payable would be according to the amount claimed. A suit for arrears of maintenance is not a suit for maintenance and therefore, S. 7 (2) does not apply. 1.L.C. 648=A.I.R. 1927 Oudh 623.

12. Mesne profits.

——S. 7 (i)—Mense profits—No ascertainment by decree—Valuation of appeal.

In a suit for recovery of possession of land and mesne profits the latter was valued at the value of the amount of antecedent mesne profits. The suit was decreed but the Court did not ascertain the amount of mesne profits. On an appeal held, that the appeal must be valued at the same valuation as the suit and must bear the same Court-fee-stamp. 49. Ind. Cas. 962 (Pat.)

——S. 7 (i) and Sch. II, Art 17, (3) and (6).

Suits for possession and mesne profits is governed by S. 7 (i) and not by Cl. (3) or Cl. (6) of Art 17 of Sch. II. The Court-fee for memorandum of appeal in a suit for mesne profits is the fee on the amount of mesne profits claimed antecedent and not subsequent to the suit. 13 C.W.M. 815=1 Ind. Cas. 670.

13. Money suit.

—S. 7 (i) Money suit.

The valuation of a plaint in which a money decree is claimed is based on the actual sum claimed after allowing for deductions, such as sums expressly set off in the plaint. 84 Ind. Cas. 971=2 Rang. 462=A.I.R. 1925 Rang. 65.

14. Mortgage.

—S. 7 (1)—Mortgage decree — Decree-holder paying court-fee on amount due on date of institution of suit—Whether entitled to execute decree for higher amount on account of interest without payment of additional court-fee—Costs —Additional court-fee paid, if can be recovered as costs.

The holder of a mortgage decree who had paid court-fee on the amount due at the date of the institution of the suit, can execute a decree for a higher amount on account of interest pendente lite without being liable to pay additional court-fee calculated on the higher sum. This amount of additional court-fee, if paid, cannot properly be regarded as costs in the case to be recovered from the judgment-debtors. A. I. R. 1934 Pat. 571=15 P. L. T. 548=1 B. R. 16=14 Pat. 4=152 Ind. Cas. 244 (S.B).

——S. 7 (i) and (ix) — Mortgage — Personal decree—Ad valorem fee on appeals.

An **Ad valorem** fee is payable in appeals against decrees passed under O. 34. R. 6, of the C. P. C. 18. O. C. 121=30. Ind. Cas. 497.

——S. 7 (i) — Mortgage—Sub-mortgagee asking for sale of property mortgaged to original mortgagees.

The Court-fee payable by a sub-mortgagee asking for a sale of the property mortgaged to the original mortgagee is on the amount due and payable in respect of the original mortgage under S. 7 (i) of the court-fees Act and not on the amount due and payable is respect of the sub-mortgage. A. I. R. 1938 Mad. 30=1937 M.W.N 1040=1938-1 M.L.J. 171=173 Ind. Cas. 781.

——S. 7 (ii)—Applicability.

—In appeal from decision under S. 105-A, Ben. Ten. Act. the principle laid down under S. 7 (ii) should be adopted. A. I. R. 1936 Cal. 804 =40 C.W.N. 1149=I.L R. (1937) 1 Cal. 103=168 Ind. Cas. 203.

——S. 7 (ii) Declaration of right to get certain sum per month out of settlement.

Where a plaintiff sues for a declaration that he is entitled to payment of certain amount per month on account of certain settlement, the court-fees should be calculated ad valorem on ten times the annual amount under S. 7 (ii) Court-fees Act. A.I.R. 1936 Mad. 388=70 M.L.J. 128=43 M.L.W. 742=1936 M.W.N. 600=163 Ind. Cas. 471.

——S. 7 (ii)—Declaration of right to receive periodical payment and for arrears.

The Court-fee for the declaration of a right to receive the periodical payment would be 10 times the amount payable for one year and usual fees for the amount of arrear claimed. 42 All. 353=18 A.L.J. 328=2 U.P.L.R. (All) 149=55 Ind. Cas. 809.

——S. 7 (ii)—Family arrangement—Properties in lieu of maintenance.

Where by a family arrangement provision was made for the residence and maintenance of a female member of the family and by virtue of the same arrangement she was residing on the plot and recovering the maintenance and she subsequently brought a suit for a declaration that she has a right to do so and an injunction restraining the defendant from bringing the property to sale in execution of his decree, held, that S. 7 (iv)(c) of the Court Fees Act and not S. 7 (ii) was applicable. 123 Ind. Cas. 240=A.I.R. 1930 Sind 198.

——S. 7 (ii)—Maintenance.

—Suit for reduction of maintenance awarded by decree is not governed by S. 7 (ii). A.I.R. 1935 Mad. 655=1935 M.W.N. 707=42 M.L.W. 42=69 M.L.J. 202=59 Mad. 159=157 Ind. Cas 1033.

——S. 7 (ii)—Maintenance.

Suit for declaration as to the plaintiff's right to maintenance together with a claim for arrears should be valued under S. 7 (ii), Court-fees Act. It makes no difference that no figure is set out in the plaint when it is not so valued within the meaning of S. 11. Suits Valuation Act, and if objection is not taken at an early stage of the proceedings, an objection under S. 47, Civil P. C. in execution must fail. A.I.R. 1934 Pat. 240=13 Pat. 290=150 Ind. Cas. 378.

——S. 7 (ii) and (iv) (c)—Periodically recurring sums of—Meaning of.

In construing S. 7. cl. II the expression: "The sums payable periodically" must be limited by the specific words that precede it. Court fee on a suit for assessment of rent and recovery of a specific sum of money as damages for use an occupation should be computed under cl. (iv) (c) of S. 7. 4 Pat. L.J. 561=51 Ind. Cas. 15.

——S. 7 (ii).

S. 7 (ii) Sch. II, Art. 17 (iv)—Suit based on alleged waqf deed executed between waqif father of plaintiffs Nos. 8, 9 and 10 and defendants Nos. 1 and 2—Plaintiffs asking for removal of mutawalli defendant No. 1 and claiming material benefits under last clause of waqf deed namely that on disagreement between parties income should be divided and enjoyed in proportions set out—Total property valued at Rs. 20,200—Annual receipts claimed by plaintiffs capable of valuation at least on average basis—Case held fell under S. 7 (ii) and not under Sch. II, Art. 17 (vi). A.I.R. 1942 Sind 160=I.L R. (1942) Kar. 424=204 Ind. Cas. 469.

——S. 7—(ii) (a) Proviso (U. P.)—Applicability —Appeal by husband against decree for maintenance.

Where an appeal is filed by the husband against the decree in suit for maintenance brought by his wife, the court-fee is payable on the amount payable for one year to the plaintiff according to the proviso to S 7 (ii) (a) of the Court-Fees Act. 1949 A.L.J. 483=1949 A.W.R. 549 (2)=A.I.R. 1950 A. 55.

——S. 7 (ii) (a) Proviso and Sch. II. Art. 17 (vi) (U P.)—Applicability — Prayer for future maintenance—Relief if incapable of Valuation.

The husband agreed at the time of marriage to pay his wife a maintenance allowance of half his salary for the time being if he married another wife during her lifetime. The husband remarried. The wife brought a suit on the agreement for a particular sum calculated on the basis of the agreement and paid Court-fee thereon. But she also prayed for a decree for realisation till her

death of half the husband's salary. On a question whether plaintiff should pay a Court-fee on this part of the relief under S. 7 (ii) (a) of the Court-Fees Act.

Held, that as the salary was an ascertainable amount, the relief for future maintenance allowance was quite capable of valuation and the case would be governed by S. 7 (ii) (a) of the Court-Fees Act and not by Art. 17 (vi) of the Second Schedule. 1949 A.L.J. 449=A.I.R. 1950 A. 56=1949 A.W.R. 469.

——S. 7 (iii) and (ix)—Applicability—Redemption of pledge—Suit for—Court-fee.

A pledge of ornaments, which are made over by the borrower to the lender for the purpose of being held by him as security for repayment of the loan is not a mortgage of immoveable property since in such a transaction possession alone is delivered to the pledgee without passing the ownership in the ornaments pledged as security.

A suit to redeem the pledge cannot therefore be regarded as a suit to redeem a mortgage falling under S. 7 (ix) of the Court-Fees Act. The suit properly falls under S. 7 (iii) of the Court Fees Act; and must therefore be valued for purposes of Court-fee, according to that clause at the market-value of the subject-matter, i.e., of the ornaments which are sought to be redeemed and recovered. 7 N.L.R. 72; 21 Cal. 241; 63 Cal. 657; 1925 Mad. 1254; 1940 Mad. 929, referred to and distinguished, I.L.R. (1949) Nag. 243=A.I.R. 1949 Nag. 368=1949 N.L.J. 147.

——S. 7 (iii)—Suit to enforce decision and recover property.

Ad valorem fee must be paid on a suit to enforce a decision of the 'Sayadaw' given under the authority of the That hanabainq and his Council, ejecting deft. from the occupation of a certain monastery, and the fee is calculated on the value of the property sought to be recovered from the deft. 4. Ind. Cas. 815 (U. B.)

——S. 7 (iv)—Appeal—

——Valuation of relief by appellant—Court is bound to accept.

The Court is bound to accept the valuation put upon his relief by the appellant however arbitrary it may be. A.I.R. 1946 Lah. 94=47 Pun. L.R. 436 (F.B.)

——S. 7 (iv)—Appeal—

—Plaintiff-appellant foun-prima facie liable to pay ad valorem court-fees on portion of his claim—Ad valorem court-fees on memorandum of appeal must be paid before admission of appeal.

Where it is found by the Court that the plaintiff-appellant ought prima facie to pay ad valorem court-fee on a portion of his claim, he has to pay the ad valorem court-fee on his memorandum of appeal before admission of the appeal in the High Court. A.I.R. 1937 Pat. 514=18 P.L.T. 438=3 B.R. 780=16 Pat. 491=170 Ind. Cas. 959.

——S. 7 (iv)—Appeal.

——Valuation.

Although valuation placed by the plaintiff is not expected to be exact it must be a reasonable valuation and not merely arbitrary or fanciful and the valuation in a plaint binds a plaintiff in a memorandum of appeal therefrom in the same manner and to the same extent as it binds the defendant. Where there is no basis of cash valuation, the plaintiff can make an imaginary valuation subject to his paying an additional court-fee on what may be ultimately found due. It is possible that not only in the plaint, but also in the memo. of appeal, the condition of the plaintiff's case might be such as it may be impossible for him to estimate what would come to him if his appeal were successful. But where there is a finding against plaintiff-appellant by which he is declared not entitled to recover certain sum from the respondents and that judgment he is attempting to set aside, he cannot actually assert that his claim and appeal is not capable of being estimated at a cash value. 39 M. 725; 23 M. 490; 7 P.R. 1915, Foll. 79 Ind. Cas. 582=16 S.L.R. 273=A.I.R. 1921 Sind 149.

——(as amended in Bombay), S. 7 (iv) and (v) and Sch. II, Art. 17 (vii)—Applicability—Hindu joint family—Suit for partition by coparcener constructively in joint possession—Court-fee leviable.

A suit by a Hindu coparcener for partition of joint family property, the plaintiff claiming to be in joint constructive possession with the defendants, falls for purposes of court-fee, under neither cl. (iv) nor cl. (v) of S. 7 of the Court-Fees Act, but Art. 17 (vii) of Sch. II to the Court-Fees Act (as amended in Bombay) and the proper court-fee is a fixed fee of Rs. 15. 49 Bom.L.R 72=A.I.R. 1947 Bom. 259 (F.B.)

——S. 7 (iv) and Sch. I, Art. 1—Applicability—Ex-minor—Suit against guardian for accounts and recovery of sums misapplied and misappropriated—Valuation for Court-fee. See 224 Ind. Cas. 353=A.I.R. 1946 Mad. 136=(1945) 2 M.L.J. 460.

——S. 7 (iv)—Court fees—Determination—Relief—Valuation—Construction of plaint—Duty of Court to look at substance of relief.

Per Harish Chandra, J.—For the purpose of valuing reliefs claimed in a suit, the plaint has to be read as a whole, and the court is not to be guided entirely by the actual language used by the plaintiff; the Court must look at the substance of the relief claimed. I.L.R. (1949) A. 3=A.I.R. 1949 A. 63.

——S. 7 (iv) Court-fees. — Determination of—Allegations in plaint—Duty of Court.

The questions of court-fees and jurisdiction must be decided on the plaint as it stands. It is not for the Court to decide whether the relief has been properly claimed. It is for the plaintiff to decide for himself whether the trial should proceed on the plaint as it stands or whether he should amend the plaint. I. L. R. (1949) Nag. 195=A.I.R. 1949 Nag. 347=1949 N. L. J. 389.

——S. 7 (iv) — Court-fees. — Determination — Test—Plaint as framed or as it ought to be framed.

The court-fee leviable on a plaint has to be decided on the plaint as framed and not on the plaint as it ought to framed. The plaint as framed may or may not be well-founded in law; but that is no test for exacting court-fees under a fiscal statute. 28 Pat. 313=A. I. R. 1949 Pat. 520.

——S. 7 (iv) — Court-fees. — Determination—Basis for—Defence set up—Relevancy of.

In determining the nature of a suit for the purpose of fixation of court-fees, the allegations made and the relief sought in the plaint are the only relevant material. The defence set up by the defendant does not come into the picture at all in ascertaining the nature of the suit. 27 Pat. 494.

——S. 7. (iv) — Court - fees — Determination ——Practice—Patna High Court—Court, if should depend on averments of plaintiff.

It has not ordinarily been the practice it the Patna High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper court-fee payable, to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unneeessary. From the institution of the Patna High Court, the Stamp Reporter and the Taxing Officer, acting under the directions from time to time given by the Taxing Judge, have followed the correct procedure in this matter; that is determining the proper court-fee payable on an appreciation of what the plaintiff-appellant really sought, not requring payment of ad valoram court-fee merely because a suit for partition was defended by a claim of adverse possession; but astute to see that plaintiff should not avoid liability to pay court-fee under S. 7 (iv) (c) or S. 7 (v) of the Court-fees Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit. A. I. R. 1937 Pat. 514=18 P.L.T. 438=3 B.R. 780=16 Pat. 491=170 Ind. Cas. 959.

——S. 7 (iv)—Court-fees—Determination.

Per Kinkhede, A.J.C.—In order to determine the amount of court-fee payable in a suit, the Court has to see in each particular case what the nature of relief claimed is and for that purpose it must look at and see to the allegations contained in the plaint. The substance and not the mere language of the plaint must be looked to in order to determine the amount of court-fee payable. 21 C.W.N. 375; 38 Mad. 922 and 40 Cal. 615, Foll. 123 Ind. Cas. 417=12 N.L.J. 185=A.I.R. 1930 Nag. 73.

——S. 7 (iv)—Court-fees — Determination—Substance and not form.

In deciding a question of Court-fee the Court should look into the substance of the plaint and not the mere form. The presence or absence of a prayer in a particular form is immaterial. Where the allegation contained in a plaint is futile on the face of it the Court is entitled to ignore it. 1930 M.W.N. 358=129 Ind. Cas. 824=A.I.R. 1931 Mad. 94.

——S. 7. (iv) Court fee—Determination — Relief sought is to be valued by plaintiff.

S. 7 (iv) of the Court-fees Act must be read with O. 7, R. 11 (b), Civil P.C. The words of S. 7, (iv) of the Act, when fead as a whole mean that the relief sought is to be valued in the plaint or memorandum of appeal by the plaintiff. The test is what is the value of the relief granted which is sought to be got rid of. A.I.R. 1936 Sind 25=161 Ind. Cas. 384.

——S. 7 (iv)—Court fees—Determination — Substance of the plaint.

In deciding what the proper Court-fee payable is the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for. The plaintiff in his suit alleged that a will put forward by the defendant was a forgery, and prayed in his plaint (1) that the will may be declared to be forgery, (2) that it may be cancelled, and (3) that the order of the Sub-Registrar registering the will may also be cancelled.

Held, that in regard to Court-fee payable the provisions applicable to the case is not S. 7 (iv) (a) or S. 7 (iv) (c) but Sch. II, 17-A (1) because the suit must be treated as one for declaration without consequential relief. 30 Mad. 18 and A.I.R. 1925 Mad. 713, Foll. 119 Ind. Cas. 35=29 M.L.W. 584=1929 M.W.N. 286= A.I.R. 1929 Mad. 396=56 M.L.J. 394.

——S. 7. (vi) Court fees — Determination — Plaint is the basis.

Court-fee is leviable upon the construction of the plaint alone. 106 Ind. Cas. 620= 6 Pat. 506= 8 P. L. T. 34=A. I. R. 1927 Pat. 145.

——S. 7 (iv)—Court-fees — Determination — Plaint is the basis.

For the purpose of ascertaining the Court-fee payable, Coust must have regard to the allegations in the plaint. Whether they have or have not been denied in the written statement is immaterial. 96 Ind. Cas. 129=23 M. L. W. 581= A. I. R. 1926 Mad. 678=51 M. L. J. 67.

——S. 7. (iv) Court - fees — Determinanion—Apparent claim.

The question of Court-fees has to be decided with reference to the claim. The Court cannot insist on Court-fee on consequential relief not actually asked on the ground that the plaintiff has cast reliefs in such a form as to conceal the real nature of the relief, though if consequential relief is not asked when it could have been asked, the suit may be dismissed. 80 Ind. Cas. 544=3 Pat. 915=6 P. L. T. 191= A. I. R. 1925 Pat. 210.

——S. 7 (iv) — Court-fees — Determination—Plaint is the basis.

While valuing a suit attention is to be confined to the plaint alone and should not be paid to other circumstances subsequently influencing the judgment of the Court as to the value of the relief. 79 Ind. Cas. 982=40 C.L.J. 150= A. I. R. 1924 Cal. 969.

——S. 7 (iv)—Court-fee—Determination.

——Where the question is one of Court-fee payable on the plaint the object and nature of suit has to be ascertained and the cause of action stated by the plaintiff affords the test for the determination of the nature and scope of the suit. 70 Ind. Cas. 332=3 Pat. L. T. 832= 1 P. L. R. 51=A. I. R. 1923 Pat. 152.

——S. 7 (iv) Court-fees—Determination.

—Per Coutts, J.—The Court Fees Act is a purely fiscal Act and in deciding what Court-fee is payable on a plaint, the question, whether any relief asked for is necessary or not, does not arise. 68 Ind. Cas. 700=2 Pat. 125=1 Pat. L.R. 1=3 Pat. L. T. 704=1922 Pat. H. C. C. 291 =A. I. R. 1922 Pat. 615 (F.B.),

—S. 7 (iv)—Revision.

——Determination as to valuation.

The Court is empowered under the law to revise the valuation put by the plaintiff and if on such revision, it is of opinion that the valuation is insufficient or arbitrarily low, it has jurisdiction to fix the proper value. But where a Court determines the valuation according to its judgment or holds that plaintiff's valuation is correct it does not commit such an error of law as to entitle the High Court to interfere under S. 115, C.P. Code. 86 Ind. Cas. 853=29 C.W.N. 627=A.I.R. 1925 Cal. 814.

—S. 7 (iv)—Scope.

——Page, C.J.—The intention of the Leglislature in enacting S. 7 (iv) was that in cases where it is impossible a priori to ascertain with accuracy the value of the relief that is sought, the plaintiff in the trial Court and the appellant in the Court of Appeal should be the persona designata to make an estimate of the value of the relief that is claimed. A.I.R. 1931 Rang. 146=9 Rang. 165=133 Ind. Cas. 91 (F.B.)

—S. 7. (iv) (v) and Sch. II Art. 17 (vi)

——Suit to establish title and for possession of property not joint—Court-fee payable.

Where the plaintiff sues for getting possession of a certain share in separate part belonging to a deceased and the defendant contests the claim saying that the plaintiff was not the reversionary heir of the deceased and the plaintiff has never been in possession of the property, he has to pay ad valorem Court-fee on the market-value of the interest claimed by him. Partition and possession is only incidental after the title is established. A.I.R. 1950 Kut. 60.

——S. 7 cl. (iv)—Suits Valuation Act, S. 8—Declaration and consequential relief.

Where a suit for a declaration and consequential relief was valued differently for different reliefs and the plaint was returned for amendment whereupon the plaintiff chose the higher valuation, he cannot afterwards go back upon it. 16 M.L.T. 516=(1914) M.W.N. 767=25 Ind. Cas. 375.

——S. 7. (iv) Value of relief sought not according with value placed on suit for jurisdiction.

It is not necessary for a plaintiff in a suit falling under S. 7, (iv), of the Court-fees Act to fix any value for the purposes of jurisdiction as under S. 8 of the Suits Valuation Act the value determinable for the computation of court-fees governs the value for the purposes of jurisdiction. In the Case of a suit for an injunction, the trial Court should insist on a valuation of the relief sought, and that valuation will then determine the question of the Court's jurisdiction.

The fact that the value of the relief sought did not accord with the value placed on the suit for the purposes of jurisdiction, does not provide a valid reason for ordering the plaintiffs to pay court-fee based on the valuation for jurisdiction, even though the case had been tried in a Court of superior grade. A.I.R. 1934 Rang. 268=12 Rang. 335=153 Ind. Cas. 1037.

——S. 7. (iv)—Valuation of relief.

Although in cases falling under S. 7 (iv) the plaintiff is to state the amount at which he values the relief sought, it was never intended that he should assign an arbitrary value and then choose capriciously, the forum of trial. 40 Cal. 245=16 C.L.J. 194=17 C.W.N. 591=17 Ind. Cas. 162.

——S. 7 (iv)—(Mad.) Effect of amendment.

The Madras amendment to S. 7 (iv) did not alter the law as to the applicability of the sections of Court-fees Act, but merely to settle a lower limit to the amount of court-fee payable under certain circumstances which came within the mischief of S. 7 (iv) of the Act. A.I.R. 1937 Mad. 529=1937 M.W.N. 234=45 M.L.W. 491=(1937) 1 M.L.J. 739=I.L.R. (1937) Mad. 672=170 Ind. Cas. 573.

——Ss. 7 (iv), 8-A to 8-F, 17 (Ben.)—Suit for declaration with alternative reliefs.

By reason of the Court-fees Amendment Act (Bengal Act VII of 1935), S. 7, para (iv) is made subject to the provisions of S. 8-C which provides for an enquiry as to valuation of suits and further there is S. 17, sub-s. (2) of the amending Act, which provides "where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable." 172 Ind. Cas. 794=I.L.R. (1937) 2 Cal. 501=41 C.W.N. 977=67 C.L.J. 123.

——Ss. 7 (iv) (a) and (iv-A) (U.P.)—Applicability—Cancellation of compromise—Valuation.

A suit in which the relief of cancellation of a compromise and a decree for possession is asked for will be governed by S. 7 (iv-A) of the Court-fees Act as amended in U. P. The two reliefs have to be separately valued. The valuation for cancellation of the compromise must be on the value of the share of the plaintiff adversely affected by the compromise. I.L.R. (1949) A. 852=1949 A.W.R. 587=1948 O.W.N. 394=1948 A. L. W. 392=A.I.R. 1949 A. 170=1949 A. L. J. 377.

——S. 7 (iv) (a)—(U. P.)—Applicability.

The reliefs to which reference is made in S. 7 (iv) (a) are those which could be obtained in a suit under S. 42, Specific Relief Act. A.I.R. 1945 All. 290=I.L.R. (1945) All. 516=1945 A.W.R. (H.C.) 128=1945 A.L.J. 244=1945 O.W.N. (H.C.) 162.

——S. 7 (iv) (a) and (x) (c)—Applicability—Lease deed—Subsequent cancellation by lessor—Lessee not paying any consideration—Suit for declaration of right to deed to recover same and registration-receipt—Court-fee—If one for specific performance.

The defendants executed a mukarrari deed in favour of the plaintiffs, but subsequently cancelled it and refused to make over the deed or to endorse the registration receipt to the plaintiffs in order to entitle them to withdraw the registered deed from the registration office. The plaintiffs therefore sued for a declaration that they were entitled to get back the registration receipt duly endorsed in their favour or the mukarrari deed itself. It was admitted in the plaint that no consideration had passed till then in respect of the deed.

Held: (1) that suit, in form and substance, was neither one for specific performance of a contract of lease, nor for possession of the property and hence did not fall under S. 7 (x) (c) of the Court Fees Act; (2) that the suit was a simple suit for recovery of a document falling under S. 7 (iv) (a) of the Court Fees Act, and was not measurable in money, the subject-matter having no market-value. 35 I.A. 22, dist.; 10 P. R. 1871; 1924 Lah. 439, expl.; 4 Cal. 322, rel. on. 28 Pat. 313=A.I.R. 1949 Pat. 520.

——S. 7 (iv) (a)—Cancellation of deed.

——In a suit for cancellation of a document securing property having a money value, the amount or value of the property for which the document was executed is the amount on which the ad volorem court-fee is to be paid. 38 Mad. 922, Ref. 91. Ind. Cas. 709=22 M.L.W. 515=1925 M.W.N. 777=A.I.R. 1925 Mad. 1248=50 M.L.J. 406.

——S. 7 (iv) (a)—Cancellation of document.

——Where the mother, as guardian, under the Hindu law, of her minor sons, executes a release deed on behalf of the minors, the release deed is not void but only voidable and, as such, the minors if they complain that it is invalid, are bound to set it aside. Hence if the minors after attaining majority bring a suit praying for declaration that the release is invalid and for injunction, their suit, looking to the substance of it, must be treated as one for cancellation of the instrument and so will come under S. 7 (iv) (a). A.I.R. 1928 Mad. 816, Dist. 119 Ind. Cas. 38=A.I.R. 1929 Mad. 668.

——S. 7 (iv) (a)—Minor's suit for possession.

——A minor has not got to set aside the transaction by a guardian in suing to recover the property. He can ignore the transaction and merely pray for possession. That being so, he does not seek cancellation of the instrument and, therefore, 7 (iv) (a) does not apply. 14 Mad. 26 and A.I.R. 1924 Mad. 322, Ref.; A.I.R. 1925 Mad. 1248, Diss. from. 1928 M. W. N. 389=112 Ind. Cas. 96=A. I. R. 1928 Mad. 816.

——S. 7 (iv) (a)—Plaintiff's valuation—When to be accepted.

There is no doubt that S. 7 (iv) (a) of the Court-Fees Act confers upon a plaintiff or appellant the right to value the relief and that it is upon this value that the fee is to be charged. But where it is plain that the valuation placed by the plaintiff cannot be the real value but is merely a fictitious one, the Court has the power to charge upon what has to be called the real value of the relief. 23 Luck. 189=1948 O. A. (C. C.) 35=1948 A. W. R (C. C.) 35=A. I. R. 1948 Oudh 297=1948 O. W. N. 120.

——S. 7 (iv) (a)—Possession of mortgaged land—Mortgage by father not binding.

Where a plaintiff without seeking to set aside the mortgage brings a suit for possession of his share of the property and pays court-fee as for possession of his share without making any deduction, as regards the mortgage amount, the court-fee is adequate and he need not be made to pay court-fee on the mortgage over again. A.I.R. 1925 Mad. 1248, Diss. from A. I. R. 1928 Mad. 816, Foll. 38 Mad. 922, Dist. 117 Ind. Cas. 800=A. I. R. 1929 Mad. 307

——S. 7 (iv) (a)—Recovery of document.

——A suit to Have a sale deed executed and completed or for recovery of a sale deed already executed is a suit for specific performance of a contract though there is no prayer for possession of the property sold. 56 I. C. 323, Ref. 80 Ind. Cas. 953=5 Lah, 75=A. I. R. 1924 Lah. 439.

——S. 7 (iv) (a) — Suit for declaration that compromise decree is not binding—Cancellation not asked.

In a suit for declaration, that a compromise decree passed in a previous suit during plaintiff's minority was not binding on them, the plaintiffs did not ask specifically for the cancellation of the compromise decree. The court, however, must look at the spirit and real meaning of the plaint. If it holds that such a prayer is necessarily implied in it, such a plaint falls prima facie under S. 7 (iv) (a). Ad valorem court-fee must be paid in that case. A.I.R. 1944 Mad. 478=1944 2 M.L.J. 35=57 M.L.W. 432.

—S. 7 (iv) (a), (iii)—Suit for declaration that plaitiff is the real owner of promissory note and for recovery of note.

A suit for declaration that the person really interested in certain promissory notes is the plaintiff and not the defendant though they stand in the defendant's name and for recovery of the notes but not for recovery of the money due on the notes falls within the purview of S. 7, cl. (iv) (a) of the Court-fees Act and not cl. (iii) and the plaintiff has not got to pay court-fees on the value of the notes.

He has only to state the value at which he values the relief sought and pay court-fees thereon. A.I.R. 1934 Mad. 730 (1) = 40 M. L. W. 709=1934 M. W. N. 1321=67 M. L. J. 680=58 Mad. 228=152 Ind. Cas. 756.

—S. 7 (iv) (a), (v-B) and (xi).

Consequential relief of injunction in a suit for declaration that an order of the T.R.O. be declared null and void—Court-fee.

In a suit for a declaration that an order of the T. R. O. directing the plaintiff to vacate the rooms is null and void and for an injunction to restrain the defendant from interfering with the plaintiff's possession, the court-fee in such a suit for a consequential relief of injunction should be on one year's rent. 1949 A.W.R. (H.C.) 92=A.I.R. 1949 A. 560.

—S. 7 (iv) (a) (U.P.)—"consequential relief" and "Relief sought"—Meaning.

A consequential relief means a relief which necessarily flows from the principal relief sought It is a relief which in the circumstances of the case cannot be allowed if the principal relief is refused. The words "relief sought" in S. 7 (iv) (a) of the Court-fees Act do not refer to the consequential relief merely. They mean the relief sought as a whole. 1948 O. W. N. 292=1948 A. L. W. 287=A. I. R. 1949 All. 207=1948 A.W.R. (H.C.) 335.

Court-fees Act.

——S. 7. (iv) (a) and (d)—Revenue paying estate—Suit for possession of share—Court-fee on plaint—"Definite share" if, must also be separately assessed with revenue:— In a suit to recover possession of definite share in a permanently settled revenue paying estate, the Court-fee on the plaint should be calculated according to the first part of Cl. (a) of S. 7, (iv) of the Court-fees Act, i. e., at ten times the proportionate revenue annually payable. Whether such share is recorded in the Collector's register as separately assessed with revenue or not does not matter. The words "definite share" in the first part of the clause does not mean a definite share separately assessed with revenue. 12 C.W.N. 990.

—S. 7 (iv) (a)—Setting aside decree—Suit by reversioner.

Where reversioners seek to set aside a decree passed against them, the fact that the cancellation of the decrec will enure to their advantage only after the widow's death is no ground for considering their claim to be one to set aside a part of the decrec only and applying Art. 17 (6) on the ground that the widow's life-interest cannot be properly estimated. The decree cannot be treated as consisting of separate and independent parts with reference to the widow and the reversioners. 105 Ind. Cas. 171=26 M.L.W. 159=39 M.L.T. 193=1928 M.W.N. 120= A.I.R. 1927 Mad. 825=53 M.L.J. 267.

——S. 7 (iv) (a), Proviso (U.P.)—Applicability—Conditions.

The proviso to S. 7 (iv) (a) of the Court-fees Act refers to reliefs sought with reference to immovable property. This reference to immovable property must be direct and express. If the relief sought in a suit indirectly affect certain immovable property, that would be no ground for applying the said proviso. 1948 O.W.N. 292=1948 A.L.W. 287=A.I.R. 1949 All. 207=1948 A.W.R. (H.C.) 335.

——S. 7 (iv) (b.)

See also (1) Sch. I, Art. I.
(2) Sch. II, Art. 17 (iii) and (vi).

——S. 7 (iv) (b)—Appeal.

——Suit for partition—Decree directing partition of alleged waqf property—Appeal—Court-fee.

Where in a suit for partition, the Court directs the partition of certain property which was alleged by the plaintiff to be waqf and the plaintiff appeals against this decision, he need not pay ad valorem court-fee on the value of that property inasmuch as the decree merely amounts to a declaration that the property is partible. A.I.R. 1931 Lah. 170= 32 P.L.R. 304=131 Ind. Cas. 283.

——S. 7 (iv) (b)—Appeal — Partition suit — Joint possession.

In an appeal from a suit for possession by partition of certain land where the plaintiff alleges that he was in joint possession of the property in suit and the finding of the trial Court is to the effect that he was in such possession the provisions of Court-Fees Act applicable are Art. 17 (vi), Sch. 2 and not S. 7 (iv) (b). The court-fee payable in such case is, therefore, Rs. 10 and not an ad valorem court-fee on the market price of plaintiff's share of the property. 8 Cal. 757; 34 All. 184; 44 Ind. Cas. 216; 43 Mad. 396. Rel. on. 104 P.R. 1895; 96 P. R. 1916; 28 P.R. 1903, Dist. 123 Ind. Cas. 525 =31 P.L.R. 315=A.I.R. 1930 Lah. 839.

——S. 7 (iv) b—Applicability—Suit for partition and separate possession of share in joint family property—Plaintiff claiming to be in joint possession of that property—Court-fee payable. See Court-Fees Act, Sch. II, Art. 17 (vi) and S. 7 (iv) (b). 1948 N.L.J. 203.

——S. 7 (iv (b)—Applicability—Suit not based on ouster.

Where there is no ouster by the defendants of the plaintiff from the joint possession of the joint family property, S. 7, (iv) (b) applies to the case. The proper test to be applied to the case to see whether S. 7, (iv) (b) applies will be whether, if the plaint state of affairs continued for 12 years, the plaintiff would be barred from suing. Where the suit is on the footing that the right to share exists admittedly and has never been denied, and the plaintiff is merely suing to enforce that right to share, he could not be barred from suing if the plaint state of affairs continued for 12 years. 8 Ind. Cas. 627=21 M.L.W. 207= A.I.R. 1925 Mad 468.

——S. 7 (iv) (b) and (v) and Sch. II, Art. 17 (vii) (Bom)—Partition suit by coparcener claiming to be in constructive possession—Decree—Appeal by defendant—Court-fee.

A suit for partition of property belonging to a joint Hindu family where the plaintiff claims to be in constructive possession with other coparceners, is governed for purposes of court-fee by Art. 17 (vii) of Sch. II to the Court-Fees Act, as amended in Bombay and is not governed either by S. 7 (iv) (b) or by S. 7 (v) of the Act, and the court-fee payable is a fixed fee of Rs. 15. The same court-fee is payable on the memoradum of appeal arising from such suit, whether the appeal be by the plaintiff or by a defendant, notwithstanding the nature of the findings recorded by the trial Court and without reference to the question as to who the appellant is. An appeal preferred by a defendant in such suit against a decree based on the finding that the properties in suit are the properties of the joint family and that they do not belong to the defendant as his exclusive properties similarly falls under Sch. II, Art. 17 (vii). 18 Bom. 209; 33 Bom. 658, diss.; 49 Bom. L.R. 72 (F.B.), foll. 52 All. 756; 56 Cal. 188; 22 Lah 234 (F.B.); 14 Luck. 346; 16 Pat. 491, rel. on. 51 Bom. L.R. 602=A.I.R. 1950 Bom. 4.

——S. 7 (iv) (b) and (c) and Sch. II, Art. 17 (v.) —Partition suit—Court-fees payable.

A suit for partition and separate possession of joint family, where the plaint asserts a separation in status before the suit, is not governed by S. 7 (iv) (b) of the Cout-Fees Act. 1949 N.L.J. 1, foll. For the purpose of determining court-fees, one must look not merely to the prayer clause or to the turn of phrase employed in the plaint but to the substance of the claim. If a particular relief is implicit in the action then court-fees must be paid on it, whether the relief is specifically asked for or not. If in a suit for partition and possession it is clear on the allegations in the plaint that the plaintiff's title to the property is denied, there is implicit in the consequential relief that is sought, namely partition and separate possession, a prayer for a declaration of title, and if this is capable of valuation, S. 7 (iv) (c) of the Court-Fees Act would be attracted to the case. 20 P. 780, foll. But if the plaintiff does not admit that there has been any denial of title and all that he says is that the defendants have evaded partition, the position is exactly the same as the one which occurs when the family is joint. In such a case the plaintiff merely seeks a change in the mode of enjoyment, and as it is incapable of valuation, the case is governed by Art. 17 (vi) of the Act and a fixed court-fee is payable. A denial by the defendants in their written statements filed in the suit, of the plaintiff's title to certain items of property alleging that they were previously partitioned is not enough to constitute ouster. 1949 N.L.J. 1, referred to. I.L.R. 1950 Nag. 778=1950 N.L.J. 107=A.I.R. 1950 Nag. 81.

—S. 7 (iv) (b)—Partition—Suit for by co-owner against transferee from another co-owner—Claim for declaration of title and possession of share—Court-fee paid in respect of same—Prayer for relief under S. 4, Partition Act, for buying out defendant—Ad valorem court-fee.

Where in a suit for partition by a co-owner against the transferee from another co-owner, the plaintiff asks for relief under S. 4 of the Partition Act, permitting him to buy out the defendant, he is doing nothing more than asking for partition and indicating the manner in which the partition should be made. The relief in question is of an equitable nature and does not flow as a consequence of any finding as to the title of the plaintiff. It cannot be said that because the plaintiff wants to buy out the defendant and get the whole property for himself, he must pay ad valorem Court-fee on the value of the share of the defendent in the property when he has already paid the requiste court-fee in respect of his claim for partition after declaration of his title to his own share in the property. The suit cannot be regarded, on the ground of the plaintiff asking for relief under S. 4 of the Partition Act, as one for confirmation of possession or recovery of possession requiring ad valorem court-fee on the share of the other co-sharer transferred to the defendant. The court-fee already paid by him in respect of the declaration of title and recovery of possession and partition would be sufficient to cover the claim under the Partition Act also. A.I.R. 1950 Pat. 317.

—S. 7 (iv) (b)—Partition suit.

—Defendant pleading that some of the family properties were purchased in the names of strangers by plaintiff fraudulently and collusively and benami and that they should be included in the suit—The benamidars added as parties—Defendant need not pay court-fee on his share of such items.

Where, in a suit for partition, one of the defendants pleaded that the plaintiff had purchased some properties in the names of strangers fraudulently and collusively and benami with a view to defeat the rights of the several members to the family properties and that those items should be brought into the hotchpot, and the benamidars also were added as parties, that defendant is not bound to pay court-fees in respect of his share in such items as in a suit for declaration as no question of set-off or counter-claim arises and there is no provision in the Court-Fees Act which requires court-fee to be paid in respect of such a claim by a defendant in a partition suit. 62 M.L.W. 413=1949 M.W.N. 7=A.I.R. 1949 Mad. 471=(1949) 1 M.L.J. 648.

—S. 7 (iv) (b)—Partition suit — Defendants claiming separate possession.

Where in a suit for partition, in which a stranger in possession of some of the joint family property is also made a party, the defendants claim that their share be separated and put in their possession, no court-fee is payable. A.I.R. 1945 Nag. 273=I.L.R. (1945) Nag. 856=1945 N.L.J. 361.

—S. 7 (iv) (b)—Partition suit—Decree passed—Defendant cannot be called upon to pay additional court-fee for recovering possession from Receiver as per decree.

When, in a suit for partition, defendant asks for his share to be given, the Court can order his share to be separated and given, and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Stamp Act that the final decree should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendant in such a suit. The defendant is, therefore, entitled to recover possession of his share from the Receiver in accordance with the terms of the decree and the Judge is wrong in calling upon him to pay any additional court-fee. A.I.R. 1944 Bom. 58=45 Bom. L.R. 1052=212 Ind. Cas. 432.

——S. 7 (iv) (b)—

——Partition suit—Defendant's liability.

There is nothing in the law which requires a defendant in a partition suit to pay court-fees in order to have his share separately allotted to him, he is merely to ask for it in his written statement, and it is open to the Court to order the share to the defendants in a partition suit to be separated as amongst themselves. The decree that is finally drawu up in the partition suit has to be stamped as an instrument of partition under the stamp Act and except the stamp duty levied on the decree, no other duty as court-fee is payable by the defendants. 29 Bom. 79, Ref. 23 Bom. 188 and 23 Bom. 184. Dist. 7 P. L. T. 295=1925 P. H. C. C. 330=90 Ind. Cas. 739=A. I. R. 1926 Pat. 154.

——S. 7 (iv) (b)

——Partition decree, execution of—Court-fees—Defendant seeking to recover his share in execution:—The defendant in a partition suit is entitled to seek the execution of the decree ordering partition so far as it is in his favour and he cannot be made by the executing court to pay court-fees over his share when the decree itself imposes no such terms. There is nothing in the Court Fees Act imposing on the defendant the burden of paying court-fees on his share. (1904) 6 Bom. L. R. 834=29 B. 79.

——S. 7. (iv) (b)—Partition suit.

——Determination of the nature of the relief claimed.

It is necessary to consider the allegations in the plaint and as to what is the real nature of the claim and if, in essence, the suit is one to obtain a decree for money or a decree for immovable property and the plaintiff is not, on his averments, in joint possession, an ad valorem court-fee must be paid. Primarily it is the allegations of the plaintiff and not the written statement of the defendant that determine the nature of the relief claimed. But the Courts have the power to go behind the outward nature of the allegations in the plaint to determine what, in its essence, is the real nature of dispute between the parties. Hence, in a case where the joint family is no longer in possession of the property referred to in the schedule attached to the plaint, an ad valorem court-fee must be paid on the property specified in the schedule. A. I. R. 1945 Sind 128=I. L. R. (1945) Kar. 84.

——S. 7 (iv) (b)—Partition suit—

——Hindu coparcener—Purchaser of interest in joint family property—suit for partition—Court-fee. See I. L. R. (1945) Bom. 729=222 Ind. Cas. 14=47 Bom. L. R. 350=A. I. R. 1945 Bom. 336.

——S. 7 (iv) (b) Partition suit.

——Tarwad property—Decree obtained against karnavan—Court-fee.

In a suit for partition and possession of the shares, the plaintiffs, who were the members of a

tarwad, have to ask for the cancellation of decrees passed against the karnavan as such and must pay court-fee accordingly. A.I.R. 1944 Mad. 19=56 L.W. 549=1943 M.W.N. 571=(1943) 2 M.L.J.396= I.L.R. (1944) Mad. 430=217 Ind. Cas. 26.

——S. 7 (iv) (b)—

——Partition suit—Plaintiff must be in possession either actually or constructively at date of suit—Plaintiff not in possession—Defendant in actual possession in assertion of hostile title known to plaintiff—Suit for partition on fixed fee, if lies—Suit for possession either joint or on partition—Court-fees payable.

As the scope and object of a suit for partition is to convert the joint possession of the co-sharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the joint property but his co-sharer, the defendant, is and there is no ouster, the suit would be maintainable for his co-sharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable on a fixed court-fee of Rs. 15 but a suit for possession, either joint possession or possession after partition, must be brought on payment of ad valorem court-fee. A.I.R. 1942 Cal. 180=74 C.L.J. 261=46 C.W.N. 561=200 Ind. Cas. 392.

——S. 7 (iv) (b) and Sch. II, Art, 17 (vi) —Partition suit—Plaintiff not alleging his actual or constructive possession—Prayer for delivery of his share to him and also for accounts and his share in amount found to belong to joint estate—Suit held fell within S. 7 (iv) (b) and not Sch. II, Art. 17 (vi). A.I.R. 1941 Rang. 297=1941 Rang. L.R. 249=197 Ind. Cas. 111.

——S. 7 (iv) (b) Sch. II, Art, 17 (vi)—Partition suit—Suit by Muhammadan co-sharer in actual possession of portion of property, for partition alleging his joint possession of entire property by reason of possession of another co-sharer —Court-fees payable.

S. 7 (iv) (b) applies to cases relating to joint family property, where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment. It does not apply where he is in enjoyment of the right but merely seeks to change the mode of such enjoyment. It does not apply to a suit for partition of joint property by a person alleging himself to be in joint possession whether he owns property in co-parcenary or as a tenant-in-common with the defendants. Hence a Muhammadan co-sharer, who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property, can bring a suit for partition on a stamp of Rs. 10 only and the case falls under Art. 17 and not under S. 7 (iv) (b), Court-fees Act. A.I.R. 1941 Lah. 152=43 P.L.R 238=I.L.R. (1941) Lah. 308=194 Ind. Cas. 125 (F.B.)

[Overrules A.I.R. 1939 Lah. 568=186 Ind. Cas. 328.]

——S. 7 (iv) (b)—

——Partition suit—Plaintiff abandoning claim to portion of property in his possession and claiming re-partition of entire property—If entitled to credit for court-fee payable on portion in his possession.

Where in a partition suit, the plaintiff abandons the claim to portion of property in his possession and seeks a re-partition of the entire estate throwing into hotchpot that portion of it of which he had been in exclusive possession, he is not entitled to credit for the court-fees payable in respect of that part of the property of which he was already in possession. A.I.R. 1941 Sind 154=I.L.R. (1941) Kar. 102=197 Ind. Cas. 590.

——S. 7 (iv) (b), Sch. II, Art. 17 (vi)—Partition suit alleging joint possession—Allegation found to be untrue—Court-fee payable ad valorem under S. 7 (iv) (b)

S. 7 (vi) (b) of the court-fees Act will not apply to cases where the plaintiff is in joint possession of the joint family property but it must apply to cases where he is out of possession of it, or is excluded from the enjoyment thereof and seeks partition which means recovery of or restoration to such enjoyment although the enjoyment after the decree is to be not by way of joint possession but by separate possession of that which falls to his share.

In a suit for partition of joint family property, where the plaintiff alleges joint possession, the court-fee is levied under Art. 17 (vi) of Sch. II and S. 7. (iv) (b) does not apply to such suits. The principle is that such a suit involves merely a change in the enjoyment of the plaintiff's share and merely seeks to change the mode of enjoyment of the property and hence this particular relief is incapable of being valued at money, but if the Court finds that the plaintiff is out of possession and must sue for it, then ad valorem court-fee is payable either under S. 7 (iv) (b) or on the relief for possession. A.I.R. 1940 Oudh 47= 1939 A.W.R. 310=1939 O.W.N. 1055=15 Luck. 76=184 Ind. Cas. 371.

——S. 7 (iv) (b)—Partition suit.

Suit by member of joint Hindu family for partition of property held in joint possession of parties —Court-fee payable is Rs. 10 only and not ad valorem. A.I.R. 1938 Lah. 321=40 P.L.R. 2=179 Ind. Cas. 710.

——S. 7 (iv) (b)—Partition suit.

——Decree for partition—Whether must be on stamp-paper.

A decree for partition is an instrument of partition and as such has to be engrossed on stamp-paper. A.I.R. 1938 Lah. 321=40 P.L.R. 2=179 Ind. Cas. 710.

——S. 7 (iv) (b), Sch. II, Art. 17, cl. 6—Partition suit alleging family continued undivided though one member separate.

The plaintiff sued for partition alleging that his father, M, the father of the first defendant and N another brother of theirs formed members of a joint Hindu family; that N was given some pro-

perty and that the remaining two brothers, M and the father of the plaintiff continued as members of the joint family without any division in status between them; M died and thereafter he and the defendants continued as members of an undivided family and he has been living with his maternal uncle and allowed the 1st defendant to be in possession and management of the properties; as the 1st defendant was wasting away the property, he called upon him to account but the 1st defendant declined to render and hence the necessity for the suit:

Held, that the plaintiff had alleged in the plaint that the family continued undivided and the court-fee will have to be calculated on the allegations in the plaint and hence his claim was to enforce the right to share in the suit property on the ground that it was joint family property and before the plaintiff could be called upon to pay a court-fee on any basis other than under S. 7, (iv) (b), Court-fees Act, it had to be established in this case whether the separation of N did not effect a severance of the entire joint family as well and the remaining brothers continued undivided. If this was found against, then the plaintiff should be called upon to pay a valuation on the findings of the Court because it may be he may be entitled to value the plaint under Art. 17, (vi) of the Court-fees Act. But for the present allegations, court-fee under S. 7, (iv)(b) was sufficient. A.I.R. 1937 Mad. 606=45 M.L.W. 541=1937 M.W.N. 613=181 Ind. Cas. 940.

——S. 7 (iv) (b) partition suit—

—One co-sharer filing suit for partition alleging that he is in joint possession with defendant—Court-fees payable.

Where the plaintiff files a suit for partition of his share and alleges that he is in joint possession with the defendant co-sharer, the suit is a suit for partition and ad valorem court-fee need not be paid; but if the Court finds that evidence establishes that he is altogether out of possession, it can ask for ad valorem court-fees. A.I.R. 1935 Cal. 273=60 C.L.J. 377=155 Ind. Cas. 815.

——S. 7 (iv) (b)—Sch. II, Art, 17-A (1)—Partition suit by coparcener in possession with prayer for declaring sale by Receiver not binding on his share.

Where the suit as framed was one for partition of joint family property by a coparcener in possession and there was also a prayer for a declaration that certain alienations made by the Official Receiver in his father's insolvency were not binding on the plaintiff's share and the first relief was valued at Rs. 10:

Held (i) that the valuation of the first relie- rested under S. 7 (iv) (b) of the Court-fees Act with the plaintiff and the valuation could not be said to be wrong;

(ii) that as regards the second relief, it was sufficient for the plaintiff to obtain a mere declaration that the sales were not binding on him and the proper article applicable to the relief was Art. 17-A (i) of Sch. II of the Court-fees Act. A.I.R. 1935 Mad. 66=40 M.L.W. 837=1934 M.W.N. 1373 =67 M.L.J. 858=58 Mad. 385=153 Ind. Cas. 666.

——S. 7 (iv) (b), Sch. II, Art. 17 (vi)—Partition suit—Plaintiff alleging to be in actual or constructive possession Court-fee payable for suit.

In a suit to enforce the right to share in joint family property, i. e., a suit to be restored to joint possession or enjoyment of joint family property, court-fee would be payable under S. 7 (iv) (b) ad valorem on the value of the relief as fixed by the plaintiff, and in a suit for partition of joint property, whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, court-fee payable would be Rs. 10 under Art. 17 (vi) of Sch. II of the Court-fees Act. S. 7 (iv) (b) applies only to cases relating to joint family property where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment. If, however, he has been excluded from joint enjoyment or where he has never been in enjoyment or possession, actual or constructive, of the joint property and desires to separate his share from the other co-sharers, he must sue for possession and partition and in such a case he must pay ad valorem court-fee on his share. A.I.R. 1934 Lah. 563=36 P.L.R. 48=15 Lah. 531=150 Ind. Cas. 994 (F.B)

[Overrules A.I.R. 1932 Lah. 421: 33 P.L.R. 261:139 Ind. Cas. 676.]

——S. 7 (iv) (b) Partition suit—Plaintiff in possession—Title not denied—Proper court-fee.

Where in a suit for partition, it appeared that the plaintiff was in possession of some of the properties and his right to a share was not denied by the defendant:

Held, that the plaintiff need not pay ad valorem court-fee, a court-fee of Rs. 10 being sufficient.

Ordinarily in a suit for possession by partition of a share in joint property, the plaintiff is bound to bring into the hotchpot the entire joint property. But this rule is not applicable where the plaintiff does not admit the existence of other property or abandons his claim with regard to them. A.I.R. 1933 Lah. 780 (2)=34 P.L.R. 772=144 Ind. Cas. 614.

——S. 7 (iv) (b)—Partition suit.

—A suit for partition of property which is admittedly joint requires only a court-fee of Rs. 10. The plaintiff need not pay ad valorem court-fee. A.I.R. 1933 Lah. 208=34 P.L.R. 84=141 Ind. Cas. 175 (1).

——S. 7. (iv) (b)—Partition Suit.

——Defendant claiming partition of his share, whether bound to pay court-fee.

In a suit for partition it is open to the court to order the defendant's share also to be separated, and the right of the crown to some revenue on the claim of the defendant is satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition, and except that stamp duty no other duty as court-fee is payable by the defendants in such a suit. A.I.R. 1932 Mad. 722=1932 M. W. N. 949=36 M.L.W. 604=63 M.L.J. 845=55 Mad. 975=139 Ind. Cas. 457.

S. 7. (iv b)—Partition.

——Suit for partition of property of family divided in status.

Where a coparcenary has been disrupted by division in status, it cannot be described as a joint family, though the property has not been divided by metes and bounds. Therefore, where a member of a family sues for partition by metes and bounds alleging that the family has already been divided in status, the suit would not fall within S. 7 (iv) (b) of the Courts-fees Act and the valuation of suit connot be notional. A.I.R. 1931 Mad. 49=33 M L.W. 12=1930 M.W.N. 508=59 M.L.J. 913=129 Ind. Cas. 462.

—S. 7. (iv) (b)—Partition suit.

——Setting aside decree against manager.

Partition suit by Hindu son—Mortgage decree in respect of some property passed against father, son not being party — Son must pray for declaring mortgage decree not binding on him and pay ad valorem Court-fees. 9 N.L.R. 1, 16 N.L.R. 64, Ref. 102 Ind. Cas. 10=A.I.R. 1927 Nag. 239.

—S. 7. (iv) (b)—Partition suit.

——Items disallowed in the final decree.

Where the object of appeal is to attack various items allowed or disallowed in the final decree, held, that before this final decree can be attacked on these grounds an ad valorem Court-fee should be paid on the amounts entered in the various grounds of appeal. 1 L. 234, Foll. 69 Ind. Cas. 196=A.I.R. 1924 Lah. 325.

—S. 7. (iv) (b)—Partition Suit.

——Plaint is the basis.

Where the family is joint the possession of one is the possession of all and the stamp reporter has no authority to determine Court-fees by reference to what is afterwards decided by the Court. If the plaintiff's case is unture it will fail. But the Court-fee must be ordered only on the footing of the plaint. 79 Ind. Cas. 913=1924 P.H.C.C. 210=5 Pat. L.T. 655=A.I.R. 1924 Pat. 640.

——S. 7 (iv) (b)—Partition Suit.

A person suing for partition when he is out of possession must also ask for possession and must pay ad valorem Court-fee both on the plaint and on the memorandum of appal. 9 C.L.J. 128=3 Ind. Cas. 304.

——S. 7 (iv) (b) Partition Suit.

—A suit to enforce the rights to share in joint family property is governed by S. 7(iv) (b). 61 Ind. Cas. 628=2 Lah. 114=3 Lah. L.J. 349=73 P.L.R. 1921=A.I.R. 1921 Lah. 34.

——S. 7 (iv) (b)—Plaintiffs must decide at the outset what their case is and must pay court-fee accordingly. The court-fee cannot be made conditional on a decision in the suit itself A.I.R. 1944 Mad. 19=56 M.L.W. 549=1943 M.W.N. 571=(1943) 2 M.L.J. 396=I.L.R. (1944) Mad. 430.

——S. 7 (iv) (b)—Scope and applicability.

S. 7. (iv) (b), Court-fees Act makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Partition is enforcement of the right to share in the joint family estate. This clause is specifically meant to govern suits for the enforcement of the right to share in the joint Hindu family estates. A.I.R. 1941 Rang. 297=1941 Rang. L.R. 249=197 Ind. Cas. 111.

——S. 7 (iv) (b)—Scope.

The language of S. 7 (iv) (b) is incompatible with a claim for partition when the plaintiff is in joint possession with the other members of his family. A suit to enforce a right to share in any property on the ground that it is joint family property is a suit of a different nature from a suit to enforce the right to a share. Where the claim is to share, it implies that the plaintiff is not in possession; whereas a suit to obtain possession of a share is compatible with the plaintiff being in joint possession of the whole. If the words of S. 7 (iv) (b) are to be given their ordinary meaning, they cannot apply to a suit for partition by a member of a joint family who is still in joint possession. In these circumstances, the only provision in the Court-fees Act which is applicable is Art. 17 (iv) of Sch. II, Art. 17-B of Sch. II. A.I.R. 1940 Mad. 113=(1940) 1 M.L.J. 32=51 M.L.W. 11=1940 M.W.N. 126=I.L.R. (1940) Mad. 259=186 Ind. Cas. 494 (F.B.)

[Overrules 21 M.L.J. 21=1910 M.W.N. 755=9 M.L.T. 3=8 Ind. Cas. 512 (F.B.)]

—Ss. 7 (iv) (b) and (f)—Suit for administration on basis of joint possession.

In a suit for administration and partition on the basis of joint possession of immovable property, the plaintiff can value his relief regarding administration at Rs. 1,000 and the payment of court-fees thereon and Rs. 15 for the relief of partition is sufficient. A. I. R. 1945 Sind 11 =I. L. R. (1944) Kar. 325=221 Ind. Cas. 439.

—S. 7 (iv) (b) and (c) (Mad.)—Suit for declaration and partition.

A plaint set out a claim by the plaintiffs in the alternative characters of members of a joint family or of tenants-in-common for a declaration that the defendant had no right in certain immovable property, and for a permanent injunction. The plaint contained a further prayer for a partition of two-third share in the event of the Court holding that the plaintiffs were tenants in common with a co-tenant since deceased:

Held, that the valuation of the property for purposes of court-fee was governed by S. 7 (iv) (c) and not by S. 7 (iv) (b) of the Court-fees Act, 1870, as amended by the Madras Court-fees Act, 1922. A.I.R. 1931 Mad. 69=1930 M.W.N. 656=59 M.L.J. 899=33 M.L.W. 68=129 Ind. Cas. 625.

——S. 7 (iv) (b) —

——Words "enforce the right, . . , . . property," in S. 7 (iv) (b) meaning of.

The words "enforce the right to share in any property," in S. 7 (iv) (b), Court-fees Act, mean to be restored to possession of the share in any property; in other words, where the plaintiff who sues for partition, and is out of possession claims the relief of partition. his suit is covered by S. 7. (iv) (b). A. I. R. 1940 Oudh 47=1939 A. W. R. 310=1939 O. W. N. 1055=15=Luck. 76=184 Ind. Cas. 371.

——S. 7(iv)(b)—Co-sharers—Adverse possession—Suit for partition of house—Court-fees—

M who had two sons G and A, purchased a house in G's name. After the death of M, G brought a suit against A's widow and son claiming the house as his own and seeking to eject the latter from a portion of it. It was decided in this suit that G and A were entitled to the house in equal halves and the suit was dismissed. A's widow then brought a suit for partition of half of the house against G alleging that A had made a gift of his half-share to her. In this suit it was decided thad that A owned a half-share but had not made a gift of it to his widow. A's widow and her children then brought a fresh suit claiming half the house as the heirs of A:

Held, (1) that the suit was governed by S. 7 (iv) (b) of the Court-fees Act and not by Sch. II;

(2) that though G had asserted in his suit that he owned the whole house, his possession of the house as a co-sharer was not adverse;

(3) that the decision in the first suit that G had only a half-share was res judicata. A.I.R. 1932 Lah. 421=33 P.L.R 261=139 Ind. Cas. 676.

—S. 7. (iv) (b)—Partition suit—Remand— Appeal —A District Judge in appeal in a suit for a partition of a house remanded the suit, after deciding to what fractional shares the parties were entitled, in order that the partition might be carried out by the court of first instance. The District Judge, however, erroneously described his order as an order of remand under S, 562 of the Code of Civil Procedure. **Held** on appeal from such order attacking the case on the merits that the memorandum of appeal must be stamped as an appeal from a decree. A.W.N. 1889 p. 198 foll. 1908 A.W.N. 40=5 A.L.J. 545.

—S. 7 (iv) (b)—Partition.

——Prior partition alleged.

Where the plaintiff stated in his plaint that the family had been divided in status since 1921 and prayed for a partition by metes and bounds, held, that ad valorem court fee is payable and that the plaint would not fall under S. 7 (iv) (b) of the Court Fees Act. When a co-parcenary has been disputed it cannot be described as a joint family though the property of the family has not been divided by metes and bounds. 1930 M.W.N. 508= A.I.R. 1931 Mad. 49=33 M.L.W. 12=129 Ind. Cas. 462=59 M.L.J. 913.

—S. 7. (iv) (b)—Partition suit Valuation.

——In partition suit valuation both for the purpose of Court-fee and jurisdiction is the amount at which the plaintiff values his share and not the value of the entire partible estate. A.I.R. 1925 Cal. 320; A.I.R. 1923 Pat. 342, Dist., 20 Mad. 289, Ref.; 24 All. 381 Foll. 118 Ind. Cas. 122=7 Rang. 164=A.I.R. 1929 Rang. 211.

—S. 7 (iv) (b)—Partition suit.

Where a suit is one to enforce a right to share in any property on the ground that it is joint family property ad volorem fee must be paid. A.I.R. 1924 Nag. 86, Foll. The correct method of computation of Court-fees in suits where partition is claimed by a co-parcener, who is in joint enjoyment of part of the property at the date of the suit, is to determine whether merely a change in the mode of possession is asked for or whether, in reality, the relief of ejectment is claimed. To arrive at a conclusion on such point, one has to look beneath the mere form and verbiage of the plaint and to arrive at what is its real substance. 23 N.L.R. 73=101 Ind. Cas. 770=A.I.R. 1927 Nag. 248.

——**S. 7 (iv) (b)—Partition suit**—Right to partition questioned.

Where the relief sought is something more than a change in the mode of enjoyment and the suit is in substance one to enforce the right to share in the property on the ground that it is joint family property. Plaintiff's valuation of the relief sought determines the Court-Fees (20 Mad. 289; 22 Bom. 315, Foll). Thus, where plaintiff alleges a partial partition and sues for partition as some property was left un-partitioned and the defendants plead complete partition, the defendant's contention amounts to denial of plaintiff's right to enforce the right and the suit is covered by S. 7, Cl. (iv) (b). 43 Mad. 396 Dist. 81. Ind. Cas. 766=20. N. L. R. 43=A. I. R. 1924. Nag. 86.

——**S. 7 (iv) (b)—Partition suit—When plaintiff** is out of possession.

Ad valorem court-fee must be paid where plaintiff is not in possession of any joint family property. 21 C. L. J. 253=20 C.W.N. 51=27 Ind. Cas. 465.

——**S. 7. (iv) (b)—Plaintiff** sued to set aside a sale held under Public Demands Recovery Act also claiming a share in the entire property sold.

Held, that the suit should be valued on the value of the whole property sold and not the share claimed by plaintiff. 12 B. L. R. 370 (F. B.) Foll. 79 Ind. Cas. 333=50 Cal. 892=A.I.R. 1924 Cal. 239.

——**S. 7 (iv) (b)—Distinction between dispute as to title and otherwise.**

There is a distinction between suits for partition pure and simple, where the plaintiff is in joint posession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property. Where there is no question as regards the title of the plaintiffs, and the only question before the Court is as regards partition, the value of the whole of the properties sought to be partitioned must be the value for the purpose of jurisdiction. 1 P.L.T. 595. Dist. 72 Ind. Cas. 916=2 Pat. 432= 4 P.L.T. 257=A.I.R. 1923 Pat. 342.

——**S. 7 (b)—Partition—Stamp on plaint.**

The plaint must be stamped according to the plaintiffs. valuation of his share which he seeks to recover. 9 Bur. L. T. 97=35. Ind. Cas. 731.

——**S. 7 (iv) (b) and Sch. II, Art 17 (iv) partition-**Suit for—Court fee.

If plaintiff is in possession of his share but wants to change the mode of enjoyment as his separate property, he has to pay 10 Rupees stamp but if he is not in possession he has to pay ad valorem fee for his share in the whole. 5 P.L.J. 540=1 P.L.T. 595=58 Ind. Cas. 236.

——**S. 7 (iv) (b) and (v) and Sch. II Arts. 1** and 17 (vi)—Partition suit by a Co-parcener in joint possession—Court fee.

Per White C. J. and Krishnaswami Iyer, J (Ayling, J. dissenting). In a suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners, the Court fee is to be fixed under Sch. II, Art. 1 and not Art 17 (iv) (b). 33 Bom. 658; 6 C.L.J. 651; 8 Cal. 757 and 20 Cal. 762, Diss.; 20 Mad. 289, Foll. It is doubtful whether a suit for joint possession by a co-parcener, excluded from possession, would fall under S. 7 (iv) (b) or S. 7 (v). Per **Ayling, J.**—The Court fee in the case referred to should be fixed under Sch. II. Art. 17 (vi). 21 M.L.J. 21=(1910) M.W.N. 755=9 M.L.T. 3=8. Ind. Cas. 512. (F.B.)

——S. 7 (iv) (b)—Partition suit.—Where the plaintiff rested her case on a complete partition made years ago and it is proved that she had never possessed the property in dispute, she is not entitled to sue for partition without suing at the same time for the possession of her share, a course entailing payment of court-fees calculated ad valorem on the plaint. 9 C.L.J. 128=3 Ind. Cas. 304.

——S. 7 (iv) (b) and Art. 17 (vi).

A suit for partition of joint property by a person in possession is impossible to be valued and S. 7 (iv) (b) has no application to the case and the proper provision under which it should be valued is Art. 17 (vi) of the third schedule of that Act. 61 P. L. R. 1916=89 P. W. R. 1916=96 P. R. 1916=140 P. W. R. 1916=34 Ind. Cas. 587.

——S. 7 (iv) (b)—Partition suit for—Valuation.

The valuation of the relief, though arbitrary, cannot be rejected by the Court in a suit for partition of properties of which the plaintiff claims to be in joint possession along with his co-parceners. 24 Mad. 34 and 27 Mad. 480, Foll. 3 M.L.T. 128=24 M. L. J. 233=1913 M. W. N. 105=18 Ind. Cas. 363 (F. B.),

——S. 7 (iv) (b)—Right to share.

S. 7 (iv) (b) of the Act refers to a suit to enforce the right to share in any property and not the right to "a share" in property. Therefore a suit for separate possession by partition, falls under S. 7 (v) of the Court-fees Act, and its market value determines the jurisdictional value. 33 Bom. 658=11 Bom. L. R. 1074=4 Ind. Cas. 243.

——S. 7 (iv) (b) Proviso—(U. P.)—Scope and applicability.

The proviso to S. 7 (iv) (b) of the Court-Fees Act as amended in U.P. does not apply to appeals from final decrees.

There is no reason to limit the applicability of the provisions of S. 7 (iv) (b) to an appeal filed by a plaintiff and it follows that it would be open to a defendant appellant to put his own valuation on the relief which he may seek in his appeal. I. L. R. (1949) All. 929=1949 A. L. J. 90=A. I. R. 1949 A. 382 (F. B.).

——S. 7 (iv) (b) and Sch. II, Art. 17—Partition suit—Allegations in plaint—If determine court-fee—Defendant alleging and plaintiff not admitting ouster—Procedure to be followed.

S. 7 (iv) (b) of the Court-Fees Act applies to all suits for partition where the family is still joint at the date of the suit, and there has been ouster or exclusion from possession or enjoyment in some form. But it does not apply where there has been a division of status before the suit; nor does it apply where the plaintiff is in joint possession, actual or constructive, of the whole of the estate and his right to share is not in dispute. In that event the plaintiff is not seeking to "enforce" his right to share. If that is admitted then there is no need to "enforce" it. All that plaintiff need do is to alter the mode of enjoyment. A claim of that kind falls under Sch. II. Art. 17.

The court-fees payable on a claim for partition has to be determined in the first instance on the allegations in the plaint. Of course the plaint must be carefully scanned and its real substance determined, and in cases of obscurity the plaintiff would be called upon to clariy doubtful passages. Unless the plaintiff admits ouster from the outset a claim for partition falls in the first instance under Sch. II, Art. 17. If the defendant alleges ouster before suit then, unless the plaintiff amends the plaint straightaway and sues in the alternative, the question of ouster would have to be determined as a preliminary issue. If it turns out that there was no ouster before the suit the matter would proceed on the original plaint. If, however, the defendant succeeds in proving ouster before suit then the plaintiffs suit must be dismissed unless the plaintiff is prepared to amend and is allowed to do so. If the plaintiff amends the plaint he has to pay court-fees under S. 7 (iv) (b). He need not necessarily pay ad valorem on the total value of his share but only for his share of the portion from which he has been ousted plus whatever he feels is proper for the change he seeks in the mode of enjoyment. 27 N. L. R. 131 (P. C.), applied. 1938 N. L. J. 203, approved. 20 N.L.R. 43 and 23 N.L.R. 73, disapproved. I. L. R. (1949) Nag. 35=A. I. R. 1949 Nag. 305=1949 N. L. J. 1.

——S. 7 (iv) (b) and Sch. II, Art 17. (iv)—Partition suit—Deft. in possession — Court-fee.

Where defts. are in possession of any part of the property to be partitioned and have denied the plaintiff's title thereto, the suit is not one for partition but one to recover possession of that part of the property and a Court-fee ad valorem on the share claimed in that part must be charged. 1 Pat. L. T. 529=56 Ind. Cas. 570.

——S. 7 (iv) (b), and (v)—Partition suit—Valuation.

A suit for the partition and separate possession of the joint family property consisting of lands, houses and movables, does not, for purposes of court-fees, fall within S. 7 (iv) (b) but falls under S. 7 (v) of the Court-fees Act 1870, and therefore, S. 8 of the Suits Valuation Act has no application to such a suit. It is the market value of the lands and houses, etc., that determines the jurisdiction of Subordinate Judges. 11 Bom. L. R. 1074=33 B. 658=4 Ind. Cas. 243.

——S. 7 (iv) (b) and (v) and Sch. II, Art. 17 (6)—Suit by co-tenant in possession for partition—Court-fee.

A suit by a co-tenant for partition of immoveable property of which he is in possession on behalf of himself and the other co-tenants is incapable of valuation under Sch. II, Art 17 (6) of the Court Fees Act and is not governed by S. 7 (v). 43 Mad. 396=38 M. L. J. 92=11 L. W. 174=(1920) M. W. N. 124=27 M L.T. 146=55 Ind. Cas. 517.

——S. 7. (iv) (b) (U.P.) — Basis of valuation for purposes of Court-fee in a suit for accounts.

In the case of a suit for accounts, the court-fee chargeable is a court-fee payable according to the amount at which the relief sought is valued in the plaint or the memorandum of appeal, in case of an appeal. The plaintiff has been given a right to value the relief and a Court cannot with-

out any meterials on record increase its value and compel a plaintiff to pay court-fee on the higher value of the relief. 1950 A.L.J. 285=1950 A.W.R. 97.

——S. 7. (iv) (b) (U. P.)—Suit for accounts—Approximate sum due—Statement of plaintiff—If to be taken as value both for purposes of court-fee and jurisdiction—Dispute as to approximate sum due—Determination—Proper stage.

In a suit for accounts under S. 7 (iv) (b) of the Court-Fees Act as applicable to the U.P., the plaintiff has to state the approximate sum due to him and the sum so stated has to be taken as value of the suit both for the purposes of payment of court-fee and jurisdiction. Even if the matter is contested, the Court is not to enter at that preliminary stage, into any enquiry for the purpose of determining the approximate amount due to the plaintiff except when the matter can be decided upon the admitted facts of the case. I.L.R. (1949) A. 434=1948 O.W.N. 348=A.I.R. 1949 A. 161=1948 A.L.W. 346=1949 A.W.R. 116=1949 A.L.J. 26.

——S. 7 (iv) (b) (U. P.)—Suit for dissolution of partnership and accounts where the liabilities are alleged to exceed the assets—Plaintiff can put his own valuation.

Where in a suit for dissolution of a partnership and for accounts, the liabilities are alleged to exceed the assets, it is a case where the relief can be valued only at the discretion of the plaintiff. I.L R. (1948) All. 25=A.I.R. 1949 All. 359=1947 A.W.R. (H.C.) 410=2 D.L.R. 689=1947 A.L.J. 591.

—S. 7. (iv) (c).

See also, (1) CIVIL P. C., O. 7, R. 11.

(2) COURT-FEES ACT, SCH. II, ART. 17 (iii) AND (vi).

Synopsis.

1. Alternative Relief
2. Appeal
3. Applicability
4. Appointment of Receiver
5. Cancellation of Document
6. Consequential relief
7. Declaration and Conesequential relief
8. Declaratory suit
9. Injunction
10. Interpretation
11. Joint Hindu family
12. Partition suits
13. Possession
14. Setting aside decree
15. Valuation
16. Miscellaneous

1. Alternative relief.

—S. 7. (iv) (c)— Alternative reliefs.

Where the plaintiff claims possession of certain property and prays in the alternative for a decree for cancellation of some documents he cannot be considered to be asking for two reliefs separately. Such a su t is not suit for declaration with consequential relief so as to make S. 7 (iv) (c) apppli-cable. A.I.R. 1924 All. 612; A.I.R. 1928 All. 248, Dist, A.I.R. 1926 Oudh 380, Ref=120 Ind. Cas. 398=6 O.W.N. 704=A.I.R. 1929 Oudh 419.

S. 7 (iv) (c) Alternative relief—

—Suit for possession or fixing rent.

A suit for recovery of possession with mesne profits, and in the alternative for assessment of fair equitable rent, and is a suit for declaration of the plaintiff's title to the land and for consequential relief and it comes within S. 7, Cl. (4) (c) and not under S. 7 Cl. (2). 4. P.L.J. 561, Foll. 100 Ind. Cas. 913=6 Pat. 17=8 P.L. T. 366=A. I. R. 1927 Pat. 123.

2. Appeal.

——S. 7. (iv) (c)—Appeal.

——Claim under S. 11, U. P. Encumbered Estates Act (XXV of 1934)—Claim in nature of suit under O.XXI, R. 63, Civil P. C.—Order thereon amounts to declaratory decree— Appeal therefrom—Court-fee payable.

Where a claim by a person under S. 11, U. P Encum. Estates Act, is analogous to a suit under R. 63 of O. XXI, Civil P. C., the oder passed thereon amounts to a declaratory decree and in an appeal from such decree, court-fee payable is as on appeal from a declaratory decree. A.I.R. 1939 Oudh 64=1938 O.W.N. 1018 (1)=1938 A.W.R. 122 (1)=177 Ind. Cas. 976.

——S. 7 (iv) (b)—Appeal.

——Mortgage suit—Preliminary decree—Order for sale—Defendant made personally liable for balance due after sale—Appeal—Personal liability alone disputed—Court-fee payable for appeal.

Where under a preliminary mortgage-decree, the sale of the motgaged property is ordered and the plaintiff is directed to apply for a personal decree for any balance left after sale and the defendant appeals disputing his personal liability but not the liability in respect of the property, court-fee for the appeal is leviable on the excess of the decree amount over the net sale proceeds although in many such cases at the time of appealing from the preliminary decree, the amount of net sale proceeds will not be ascertainable as the sale has not been held and the valuation must, therefore, be more or less conjectural. A.I.R. 1934 Mad. 230=1933 M.W.N. 1408=66 M.L.J. 348=39 L.W. 648=57 Mad. 632=149 Ind. Cas. 518.

——S. 7 (iv) (c)—Appeal.

——Suit for sale of mortgaged property—Mortgagor denying puisne mortgages—Decree to pay puisne mortgagees after paying plaintiff—Appeal by mortgagor against that portion of decree—Court-fee payable.

In a suit for sale of mortgaged property, the mortgagor and the purchasers of the property after the mortgage, were impleaded as well as the puisne mortgagees of the same property. The mortgagor pleaded inter alia that the puisne mortgages did not exist but the trial Court held that the mortgages existed and were enforceable and passed a preliminary decree, ordering that the balance after paying off the plaintiff should be paid to the puisne mortgagees and the surplus, if any, to the mortgagor. The mortgagor appealed challenging the portion of the decree in favour of the puisne mortgagees:

Held, that court-fee should be paid ad valorem on the amount due on the mortgage and not merely that for a declaration.

The question of the sufficiency or otherwise of the property mortgaged to satisty the decree does not affect the question of court-fee. A.I.R. 1933 Lah. 952=34 P.L.R. 1057=146 Ind. Cas. 1003.

——S. 7 (iv) (c)—Appeal — Decision under — Ben. Alluvial Lands Act S. 5.

A decree by a Subordinate Judge on a reference by the Collector under S. 5 of the Bengal Alluvial Lands Act is in effect only a declaratory decree and therefore in an appeal against it, a court-fee stamp of Rs. 20 is sufficient. A.I.R. 1931 Cal. 779 (1)=53 C.L.J. 619=133 Ind. Cas. 222.

——S. 7. (iv) (c)—Appeal—Claim that portion of property not liable to be sold.

An appellant, who claims on appeal that a portion of the property is not liable to be sold in execution of a mortgage decree, must pay ad valorem Court-fee on the appeal. 5 O.L.J. 663= 48 Ind. Cas. 535.

——S. 7 (iv) (c) Appeal—Conditional decree—Appeal against—Court-fee.

Plaintiff's suit for possession was decreed on condition of the plff. paying off the encumbrances on the property and plff. preferred an appeal against the condition in the decree. Held, ad valorem Court-fee should be paid on the value of the eucumbrance. 5 Pat. L.J. 455=1 Pat. L.T. 738=57 Ind. Cas. 481.

——S. 7 (iv) (c)—Appeal.

—Jurisdiction—Claim to Shamilat as Proprietor.

Where a person is not suing for a declaration about land on which the revenue assessed is Rs. 3-0-6, but is asking for a declaration that as owner or quondum owner of Rs. 3-0-6 share of the revenue assessed land, he is entitled to a share in the shamilat in proportion, the High Court has jurisdiction to entertain the first appeal if the market value is sufficient to invest High Court with such jurisdiction. 120 Ind. Cas. 794=A.I.R. 1930 Lah. 18.

——S. 7 (iv) (c)—Appeal—Inter-pleader suit as to money.

In an appeal from a decision in an inter-pleader suit in respect of noney, a Court-fee of Rs. 10 is sufficient and appellant need not pay a Court-fee calculated according to S. 7 (iv) (c) of the Court Fees Act. 61 Ind. Cas. 820=2 P.L.T. 280=A.I.R. 1921 Pat. 305.

——S. 7. (iv) (c)—Appeal—

——Order by first court to pay additional court fees—Non-payment—Pleading non-liability to pay —Suit dismissed—Appeal—Discretion of court to allow payment:—Where a suit was dismissed for non-payment by plaintiff of additional court-fees ordered by the court to be paid, the appellate court refused to grant further time.—6 C. W. N. 157.

——S. 7. (iv) (c)—Appeal—

—variation of valuation.

Where the suit was for a temporary injunction as a consequential relief and injunction was sought for pending the disposal of the suit and there after the suit was reduced into a mere suit for declaration and it was tried as such with the result that the declaration was given in favour of the plantiffs and at the stage when the plaintiffs filed their memorandum of appeal they appealed against the suit in which declaration without consequential relief was prayed.

Held, the nature of the relief sought may vary at the stage when the appeal is preferred and the Court Fee leviable will be upon the altered relief in appeal and the suit should be treated as falling under Article. 17. Schedule II. 5 Pat. L. J. 394 Foll. 80. Ind. Cas. 563=3 Pat. 640=2 Pat. L.R. Civ. 193=6 P.L.T. 62=A.I.R. 1924 Pat. 582.

3. Applicability.

——S. 7 (iv) (c) and Sch. II. Art. 17 (vi) (Bihar)—Applicability —Hindu joint family—Suit for partition by coparcener—Claim for separate possession—Allegation that alienation by manager in favour of strangers (made-parties) were sham and without consideration —Court-fee—Ad valorem fee.

Where in a suit by certain members of a joint Hindu family against the manager and certain alienees from him, a claim is made for partition and separate possession of their shares, and it is alleged that certain alienations made by the manager in favour of the alince-defendants were without consideration and of the nature of sham transactions, the suit cannot be regarded as a pure and simple suit for partition as between co-owners, falling under Art. 17 (vi) of the Court-Fees Act as amended in Bihar, but has to be regarded as a suit declaration of title as against strangers in the guise of a suit for partition, and for possession; and therefore ad valorem Court-fee is payable under S. 7 (iv) (c) of the Court-Fees Act, as applicable in Bihar. As there can be no relief of partition against the strangers, without displacement of their title, based on the alienations in their favour the suit so far as they are concerned is in substance one for a declaration of title and for possession under S. 7 (iv) (c). 34 Cal. 329 (P. C.); 1940 Mad. 259; 16 Pat. 766; 20 Pat. 780; 24 P. L. T. 424 dist. 30 P. L. T. 214.

——S. 7 (iv) (c)—Applicability—Koja Mahomedan family—Award and decree against father charging immovable properities—Sale of properties in execution—Suit by sons after father's death

for declaration of invalidity of decree and sale against their interests — Maintainability — Court-fee—Specific Relief Act, S. 42, proviso.

Where a plaintiff sues for a mere declaration that an award decree is not binding upon him, he must first establish that he had an interest in the property affected by the award at the date of the award; where the award is passed affecting property in which the plaintiff had no interest at the date of the award and the decree based thereon he must sue to have the decree set aside; and if he sues for a mere declaration he has to pay court-fees not for the mere declaration only but on the footing that consequential relief by way of setting aside the decree is implicit. S. 7 (iv) (c) of the Court-Fees Act will apply to such a case.

Held, further, that the proviso to S. 42, Specific Relief Act, would make it incumbent on the plaintiff to seek consequential relief. Where an an award decree was passed charging certain immovable properties of a khoja Mohomedan who was the head of the family, and in execution thereof the properties of the family are sold in execution if his sons want to get rid of the sale and the decree leading to it, is not enough for them to sue far a declaration that the award decree was not binding on them and that the said decree and sale did not affect their interests in the property. They cannot plead that the decree and the sale were void as against them.

The principles governing void and voidable decrees have application only to parties affected by such decrees. The award decree passed against a khoja Mahomedan would not affect the right of his sons because they had none at the date of the award or the decree thereon. The fact that they succeeded to his property after his death would not make the decree passed rightly or wrongly against their father during his life-time void or voidable decrees. The sons can have the decree and execution sale set aside after his death on the same ground on which their father could have challenged them, but only by a suit filed in that behalf upon payment of proper court-fee. A suit for a declaration or declarations merely, without a prayer for the consequential relief of setting aside the decree and the sale, would be incompetent. I.L.R. (1946) Kar. 218=231 Ind. Cas. 162=A.I.R. 1947 Sind 84.

——**S. 7 (iv) (c), (v) and S. 17—Applicability—Hindu son—Suit for possession of properties alienated by father by private sale and properties sold in execution of mortage decrees—Court-fee.** See 27P.L.T.67=24 Pat. 334=A.I.R. 1945 Pat. 421.

——**S. 7 (iv) (c) and (v)—Applicability—Sale of villages forming part of estate of Zamindar in execution of money decree against him—Suit by Zamindar for declaration ot title and possession—Plaint alleging that estate being Government Ghatwali and inalienable, not liable to be sold in execution—Declaration, if essential part of relief.**

Certain villages belonging to the estate of a Zamindar was sold in execution of a money-decree against him. The Zamindar as judgment—debtor made an application under O.21, R. 90, C. P. Code, to get the execution sale set aside but it was dismissed. He therefore brought a suit for a declaration of his title and for possession alleging in the plaint that his estate was a Government Ghatwali estate and accordingly inalienable and not liable to be sold in execution of a money-decree against him. It was contended that the estate being a Government Ghatwali and inalienable the sale was a complete nullity and did not need to be set aside, that no declaration was therefore necessary, and all that was needed was a finding by the Court on the point and the suit was merely one for recovery of possession and as such governed by S. 7 (v) of the Court-Fees Act. Overruling that contetion,

Held, that a declaration of the status and legal character of the estate was essential before the plaintiff could obtain relief and the suit was essentially one for a declaration of the nature of the plaintiff's title to the property which was sold, a declaration which if given, would protect the estate from any sale in execution of the money decree or of any other money-decree. Wehre a sale was made by the Court in the very presence of the judgment-debtor, he being a party to the execution proceedings, and after consideration of all objections made by him and rejection thereof, the judgment-debtor could not assert that it was a complete nullity so far as he was concerned. He could not get any relief as against the sale unless he could get that sale set aside. The suit was, therefore, quite clearly a suit for declaration of title and consequential relief and governed by S. 7 (iv) (c) of the Court-fees Act. 2 P. 125, 16 P. 766; 20, P. 780 and 22 P. 783, dist.; 1949 Pat. 278, applied. A.I.R. 1949 Pat. 291.

——**S. 7 (iv) (c) and (v)—Applicability— Suit for declaration that deed is void and for possession—Court-fee payable.**

In a case where the plaintiff makes an allegation that a certain deed is null and void and prays for a declaration to this effect he cannot sue for possession of the property involved by way of consequential relief. It is not necessary for him to get a declaration at all and he can bring a suit for possession simpliciter. He cannot, therefore, value his plaint under the provisions of S. 7 (iv) (c) of the Court-Fees Act and must pay court-fee on the value of the property involved. A.I.R. 1950 E.P. 360.

——**S. 7 (iv) (c) and (v)—Applicability**—Suit for declaration that gift deeds and partition deed were void against plaintiff and for fresh partition and possession—Valuation for court-fees.

A suit by the plaintiff for a declaration that certain gift deeds and a partition deed were void and inoperative as against him on account of misrepresentation, fraud and undue influence and for a fresh partition and possession of his share of the property left by his father, falls under S. 7 (iv) (c) and not under S. 7 (v) of the Court-Fees Act, and the plaintiff his to state the amount at which he values his suit. Where the deeds comprise revenue-paying fields and the plaintiff states the value to be $7\frac{1}{2}$ times the land revenue payable on them, the plaintiff's valuation is not fanciful or otherwise unreasonable since that would be the right valuation if the plaintiff brings a suit for possession only. The plaintiff is liable to pay court-fee only on the value of his share of the property and not on the entire value of the property. I.L.R. (1947) Nag. 902=A.I.R. 1948 Nag. 219.

——**S. 7 (iv) (c)—Applicability—Suit for declaration that plaintiff's interest in property not liable to be sold**

in execution of mortgage decree against father—Court-fee payable. **See** Court-Fees Act, Sch. II, Art. 17 (iii) and S. 7 (iv) (c). 1948 N.L.J. 121.

——S. 7 (iv) (c) and (v)—Applicability—Suit for possession and redemption—Additional prayer for declarations of invalidity of sale deed and ownership of properties—Court-fee—Consequential relief — Market-value.

S. 7 (iv) (c) of the Court-Fees Act has application to declarations properly so called, and has no reference to the plaintiff's title necessary for granting a decree for possession, In every suit for possession the plaintiff has to allege and prove the facts necessary to establish his title, but the real remedy is a decree for delivery of possession. The mere fact that he goes on to claim a declaration of title, in addition to an order for possession, would not make the suit one for a declaration and consequential relief the Court may and should treat the case as a claim for possession pure and simple, falling under S. 7 (v) of the Court-Fees Act ignoring entirely the claim for a declaration of title. In a suit for possession and redemption the plaintiff also asked for two declarations: (1) that an alleged sale was illegal and not binding on him and (2) that the properties were of his ownership. He valued the relief as falling under S. 7 (**iv**) (**c**) of the Court-Fees Act and paid court-fee on the claim for redemption at Rs. 2,000, which according to him was higher than the valuation regarding the two declaration; the claim for possession was, according to him, consequential to the declarations sought by him.

Held (1) that the Court had to ascertain the real nature of the relief sought irrespective of the form in which the prayer or prayers for relief were framed; (2) that for purposes of court-fee the suit was governed by S. 7 (**v**) and not by S. 7 (iv) (**c**) of the Court-Fees Act; (3) that the market-value had to be determined by reference to the rates prevailing in the market at the rate of the suit. 48 Bom. L.R. 193=A.I.R. 1946 Bom. 363=227 Ind. Cas. 447.

——S. 7 (iv) (c) and (v)—Applicability—Suit for possession of property sold in execution—Allegation that decree and execution sale were not binding on plaintiff—Court-fee—Prayer for declaration of invalidity of decree and sale—If implied.

Where in a suit for possession of property sold in execution of a decree, it is necessary for the plaintiff, in order to succeed in the suit, to obtain a declaration that the decree is void or in-operative or that the execution sale is not binding on him, there is by implication a prayer for a declaration that the sale is not operative against him, though he prays merely for possession of the property. The suit is governed for purposes of Court-fee not by S. 7 (v) but by S. 7 (iv) (**c**) of the Court-fees Act. 18 P.L.T. 977, Dist. 3 P.L.J. 92 foll. 23 P.L.T. 780. ref. A.I.R. 1949 Pat. 363=29 P.L.T. 316.

——S. 7 (iv) (c) and (v)—Applicability— Suit for possession by reversioner after death of widow—Court-fee—Absence of prayer to declare invalid or set aside alienations by widow.

On the death of a Hindu widow the reversionary heirs may sue for possession of the property which she had alienated when alive, and need not ask in terms for a declaration that the alienations are not binding on them, or pray for setting them aside. Where the suit is for possession of the estate, without any prayer for a declaration or for setting aside, Court-fees are payable on the plaint under S. 7 (v) of the Court Fees Act; and S. 7 (iv) (c) does not apply to such a suit. I.L.R. 20 Pat. 780, 1944 Pat. 17, dist., 34 Cal. 729 (P.C.) 2 Pat. 125, 16 Pat. 766, 9 Rang. 401, rel. on. 27 Pat. 14= A.I.R. 1949 Pat. 328.

——(as amended by Bombay Finance Act 1932) S. 7 (iv) (c) and Sch. II, Art 17 (v)—

Applicability—Suit to declare decree for over Rs. 5,000 void and unenforceable and for restraining execution—Court-fee—Jurisdiction — Suits Valuation Act, S. 8—Bombay Civil Courts Act, S. 24. **See** I.L.R. (1945) Bom. 1033,=A.I.R. 1945 Bom. 574.

——S. 7 (iv) (c) and Sch. II, Art. 17 (vi) Applicability—Suit for reducing maintenance decree by certain amount.

A suit for reducing the amount of maintenance awarded by decree in favour of a widow, by a certain amount, is not one for a declaration and S. 7 (**iv**) (c) does not apply. The case does not also fall under any other sub-section of S. 7. It must consequently be relegated to the subsidiary Art. 17 (vi) of Sch. II. A.I.R. 1945 Nag. 264=I.L.R. (1945) Nag. 661=1945 N.L.J. 365.

——S. 7 (iv) (c) and (v)—Applicability—Test— Suit for declaration that plaintiff was tenant of certain shops and for possession from trespasser—Court-fee payable.

S. 7 (**iv**) (c), Court-Fees Act, contemplates a suit in which the declaratory relief is the basic relief and the consequential relief asked for is incidental to the declaratory relief. Indeed, in order to bring a suit within S. 7 (iv) (c) the two reliefs are to be so connected together that if the Court in the exercise of its discretion refuses to pass a declaratory decree the claim for consequential relief also fails.

The above test is not fulfilled in a suit for a declaration that the plaintiff is a tenant of a certain person in respect of the shops in suit and for their possession on the allegation that the defendant has unlawfully and forcibly taken possession of them, as the relief for possession is not incidental to the declaratory relief. Such a suit falls within S. 7 (v) of the Act and Court-fee is to be paid on the market-value of the shops in suit and not on the value of the right of the plaintiff to their possession for the period of the lease. 52 P.L.R. 336.

——S. 7. (iv) (c) and Sch. II, Art. 17 (iii) Applicability—Test.

In order to decide whether a suit is governed by S. 7 (iv) (c) or by Art. 17 (iii), Sch. II, Court-fees Act, one must look to the substance and the nature of the claim and not to the language or the form in which the relief claimed is framed. (Tests for determining as to applicability laid down). A.I.R. 1946 Nag. 30: I. L.R. (1945) Nag. 975 : 1945 N.L.J. 431.

——S. 7. (iv) (c)—Applicability— Plaintiff brought a suit alleging that the agreement arrived at before D. C. Board should be declared as without jurisdiction — Even supposing it to be within jurisdiction it was not for payment of a sum for which debt was conciliated but merely for conveyance of certain property — **Ad valorem** fee is payable on difference in original debt and amount stated in agreement. 1940 N.L.J. 96.

——S. 7 (iv) (c)—Applicability—Test.

The cardinal question in such cases is to determine whether the reliefs claimed in the suit are such as

would bring the case within the terms of S. 7 (iv) (c). It speaks of two kinds of reliefs: (1) to obtain a declaratory decree or order, and (2) consequential relief. It is possible to disguise even the reliefs for recovery of money or land in declaratory forms. It is, therefore, necessary in the first instance to find out what is the substantive relief claimed in the suit. If on the averments made in the plaint, the substantial relief could not be other than one for a declaratory decree and it is coupled with another relief which follows naturally in the wake of the declaration, then the case must be regarded as falling within the ambit of S. 7 (iv) (c), Court-fees Act. A.I.R. 1937 Nag. 14=165 Ind. Cas. 106.

——S. 7 (iv) (c)—Applicability—Suit for restitution of conjugal rights and injunction.

In a suit for restitution of conjugal rights, pure and simple, where no injunction against third parties is sought for, the plaintiff's valuation will determine the jurisdiction of the Court to try it. But where in a suit for restitution of conjugal rights and for an injunction restraining the parents and other relatives from obstructing the recovery of the wifes the plaintiff values it at a certain amount for purposes of jurisdiction, the suit comes under S. 7, Court-fees Act, and has to be valued as a suit for a declaratory decree and an injunction and the value for the purposes of jurisdiction and the purpose of court-fees is the same in both cases. When the plaintiff has by valuing the suit at a certain amount chosen the **forum** according to what he regards as the pecuniary value of the suit to him, after he has enjoyed the advantage resulting from his choice of **forum,** he cannot be heard to say that this valuation was made by him merely for the purposes of jurisdiction. A.I.R. 1935 Cal. 338=60 C.L.J. 201=39 C.W.N 131=157 Ind. Cas. 356.

——S. 7 (iv) (c)—Applicability.

Property sold by widow acquired compulsorily—Claim to compensation by reversioners and purchaser—Appeal—Case held fell under Ss. 8 and 7 (iv) (c) Court-fees Act. A.I.R. 1935 Cal. 243 = 60 C.L.J. 216= 62 Cal. 331 = 39 C.W.N. 110 =155 Cas. 817.

——S 7 (iv) (c)—Applicability.

——Suit under S. 92, C. P. Code—Sch. 2, Art. 17 (4).

Where the suit instituted was one under S. 92, C. P. Code and the relief claimed was (1) one that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that along with the Mahant so appointed a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly appointed Committee and the list of the said property may be perpared.

Held, that Art. 17, cl. (vi), Sch. 2, Court-Fees Act, applied to the case as it was brought under the provisions of S. 92, C. P. Code, and there was nothing in the relief claimed which would take the case out of the purview of Art. 17., cl. (vi) and so the court-fee stamp of Rs. 10 was sufficient. 110 Ind. Cas. 264=8 Lah. 730=29 P.L.R. 97=A.I.R. 1928 Lah. 113.

——S. 7. (iv) (c)—Applicability—Two reliefs not co-extensive.

The plaintiff prayed for two reliefs. The first relief related to a declaration as to the general title of the plaintiff to all the properties inherited by her from her husband. The second relief related to the particular deed of transfer executed by defendant No. 1 in favour of defendant No. 2 with respect to a particular property as part of the estate inherited by her from her husband.

Held, that the two reliefs prayed for were not co-extensive, nor was one of them a surplusage. Hence the suit was one for a declaration and a consequential relief and an **ad valorem** court-fee under S. 7 (iv) (c) was payable. 29 Bom. 207; 22 C. L. J. 415 and 63 I. C. 38, Dist. 5 Pat. 496=8 P.L.T. 296=98 Ind. Cas. 432= A.I.R. 1926 Pat. 453.

——S. 7(iv)(c) Applicability—Suit for sale on mortgage —Prior charge—Appeal as to—Court-fee.

In a suit for sale on a mortgage, one of the defts. claimed priority in respect of a charge in her favour. The Court decided that the plff.'s mortgage was prior in date. The deft, appealed and in her appeal sought that her security shouvld have priority. **Held,** that the deft. must pay **ad valorem** Court-fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief. 16 A.L.J. 81=47 Ind. Cas. 311.

——S. 7 Cl. (iv) (c) Applicability—Bengal Tenancy Act S. 111, A—Suit under—Consequential relief.

Where in a suit under S. 111, A, B.T. Act., the plff. prays for a declaration of his occupancy right of which he claims to be in possession and for another declaration that the entry in Record of Rights as to his status is a nullity, the latter relief is consequential on the former one and the plaint comes under Section 7, Cl. (iv) (c) of the Court fees Act. 44 Cal. 352=21 C.W.N. 834=40. Ind. Cas. 96.

——S. 7 (iv) (c)—Applicablity — Bengal Tenancy Act—Suit under S. 104-H—

A suit under S. 104-H of the B. T. Act for a declaration that the plaintiff is a raiyat and not a tenure holder, and for settlement of fair rent, falls under S. 7 (iv) (c) and not under Sch. II, Art. 17, Cl. (1) and (iii) 817 C.L.J. 426=1. Ind. Cas. 188.

——S. 7 (iv) (c) and (d)—Applicability—

Religious endowment—Suit by Dharmakarta or gadinashin—Prayer for possession, necessity of—Prayer for injunction claiming to be entitled to manage the properties of a deity in virtue of his right to a gadi, an injunction restraining all interference with the occupancy by the plaintiff of the gadi, secures in the most complete manner to him the right he claims it is not a suit for possession of the property and court-fees need not be paid on it. (1904) 6 Bom. L. R. 475=28 Bom. 567.

4. Appointment of Receiver.

——S. 7 (iv) (c)—Appointment of Receiver—Suit by reversioner alleging waste and asking for appointment of receiver—Absence of prayer for declaration—Court-fee—Sch. II. Art. 17 (vi).

It is incumbent on a reversionary heir who asks for appointment of a receiver to show that the widow in possession of the property has been committing waste. but there is no obligation on him to ask in terms for a declaration that she is doing so or that the alienations made by her are not binding on him. The appointment of receiver is not a relief which can be estimated in terms of money. Where the suit is for the appointment of a receiver only, alleging acts

of waste, without any prayer for a declaration, the Court-fee payable on the plaint is that prescribed by Art. 17 (vi) of Sch. II of the Court-Fees Act, S. 7 (iv) (c) of the Act does not apply to the suit. 36 I. C. 831, doubted. 1922 Pat. 61, not foll., 27 All. 406; I.L.R. (1946) All. 457, rel. on. 27 Pat. 11=A.I.R. 1949 Pat. 346.

——**S. 7 (iv) (c)—Appointment of receiver—**

——**Suit for declaration that plaintiff is reversioner and for injunction and appointment of Receiver.**

Per **Niyogi, J.** in order of reference.—In a suit by the plaintiff that he be declared the next reversioner and that a permanent injunction restraining the defendant from committing acts of waste be granted and that the Receiver be appointed to manage the property, the reliefs for injunction or the appointment of Receiver are consequential reliefs and consequently, the suit comes within the purview of S. 7 (iv) (c), Court-fees Act. A.I.R. 1939 Nag. 50=I.L.R (1938) Nag. 558=1938 N.L.J. 327=180 Ind. Cas. 271 (F.B.).

——**S. 7 (iv) (c) — Appointment of Receiver, whether consequential relief**—Plaintiff's right to value—Putting higher value in trial Court—Right to change valuation in appeal—Suits Valuation Act, S. 8.

In a suit for declaration of the plaintiffs' title as next reversioners and for setting aside certain alienations made by the widow with a prayer for the appointment of a Receiver, the appointment of a Receiver is a relief consequential upon the granting of the declaration of the plaintiffs' title and the suit falls under S. 7 (**iv**) (**c**), Court-fees Act, for the purpose of court-fee.

In a suit of this nature, in the trial Court, the plaintiff is entitled to put his own valuation upon the relief sought and such valuation determines both the court-fee and the jurisdiction.

In such cases, the value should first be determined for the computation of the court-fee in accordance with the Court-fees Act, and when such value has been determined, it will govern the value for the purposes of jurisdiction also.

But if the plaintiff puts a high valuation on a suit under S. 7 (**iv**) (**c**) for the purpose of jurisdiction and a lower valuation or no valuation at all on the consequential relief and thus obtains an adjudication from a Court of superior grade, he cannot be permitted in appeal to put the low valuation upon the relief claimed. A.I.R. 1932 All. 114=1931 A.L.J. 837=54 A. 232=135 Ind. Cas. 237.

——**S. 7 (iv) (c) Appointment of receiver.**

——**Declaration as to invalidity of a widow's alienation—Consequential relief.**

The relief by a reversioner for the appointment of a Receiver to take possession of the estate from the widow and manage it during her lifetime is not consequential to the relief for a declaration that an alienation specifically mentioned in the plaint is not binding on him, as there is no necessary connexion between the two reliefs. But it is quite conceivable that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts, so as to constitute the relief for Receiver as consequential to the one for declaration. 96 Ind. Cas. 129=23 M.LW. 581=A.I.R. 1926 Mad. 678=51 M.L.J. 67.

——**S. 7. (iv) (c)—Appointment of receiver.**

——Suit for appointment of Receiver and injunction restraining widow from committing waste — plaint valued at Rs. 10,000 while no valuation for Court-fee, and Rs. 100 paid as Court-fees—Court's order to pay **ad valorem** Court-fees on Rs. 10,000 taking it as applying also for valuation, is not without jurisdiction. 92 Ind. Cas. 730=A.I.R. 1926 Mad. 591.

——**S. 7 (iv) (c)—Appointment of receiver.**

—Plaintiff can fix his own value for suit for declaration, injunction and for appointment of Receiver on the ground of waste. 43 Bom. 376, Foll. 79 Ind. Cas. 668=A. I. R. 1924 Nag. 316.

——**S. 7. (iv) (c)—Appointment of receiver and administration of estate.**

The first prayer was for declaration, of plaintiff's right, but in the fourth prayer the plaintiff prayed for administration of the estate (if in the judgment of the court any portion of it was yet unadministered) and for the appointment of a receiver.

Held, the suit is therefore one for a declaratory decree where consequential relief is prayed. The plaintiff was in possession and there was nothing in the plaint to show that he was suing for possession. That being so, the case does not come under S. 7 (v). A suit for a declaratory decree where consequential relief is prayed falls under S. 7, (iv) (c) of the court-fees Act. The valuation of the relief sought in cases coming under S. 7 (iv) therefore rests with the plaintiff and not the court. 75 Ind. Cas. 567=27 C. W. N. 457=A. I. R. 1923 Cal. 329.

——**S. 7. (iv) (c)—Appointment of receiver.**

A suit by a reversioner for declaration that certain transactions do not bind the estate and for the appointment of a receiver to preserve the property from waste is to be valued as under S. 7 (iv) (c). 36. Ind. Cas. 831 (Mad.).

——**S. 7 (iv) (c) and (d) — appointment of receiver, etc—suit to be valued by plaintiff.**

A suit for a declaration that certain alienation made by a Hindu widow does not affect plaintiff's reversionary rights, for appointment of a receiver and for restoration of property to the **status quo ante** falls within the purview of S. 7 (iv) (c) and (d) and **ad valorem** court-fee is calculated on the valuation of the plaintiff is leviable. 134 P. W. R. 1913=232 P. L. R. 1913=93 P. R. 1913=19 Ind. Cas. 859.

——**S. 7. (iv) (c) Appointment of receiver.**

—It is not possible to value a claim for appointment of receiver.—1905 A. W. N. 6=27 A. 406=2 A.L.J. 84.

5. Cancellation of document.

——**S. 7 (iv) (c) and Sch. II, Art. 17 (iii)**—Cancellation of document—Suit cast in form of declaratory relief in substance aiming at setting aside of deed formally executed and registered.

In considering what court-fee is payable on a plaint caution must be observed so as not to import anything which the plaint does not really contain, either actually or by necessary implication. In construing the plaint, the Court must take it as it is, not as the Court may

think it ought to have been. A relief not asked for cannot be imported so as to charge court-fee thereon. Where a plaintiff who is entitled to consequential relief frames his suit as one for a declaration only, the Court cannot insist upon plaintiff's praying for a consequential relief and paying the court-fee for such suit.

But the dexterity of the person drawing up the pleadings avoiding the use of certain words in the plaint, which would make the relief a consequential one, should not determine the amount of court-fee payable on the plaint. The court-fee depends not on the form of the pleadings, but on the real subtance of the relief claimed.

A suit though framed in a form declaratory relief only, but in substance aiming at setting aside a deed formally executed and registred in accordance with law, is governed by S. 7 (iv) (c) and not by Sch. II, Art. 17 (iii).

The plaintiff alleged that the defendants fraudulently got the plaintiff to execute certain sale deeds which were without consideration. He prayed for a declaration that the sale deeds were got up and fraudulent and that the defendants had acquired no title by virtue of the same:

Held, that as the sale deeds on their very face had been duly executed and properly registred, carrying with them the necessary legal consequence that title passed from the transferor, to the transferee, the sale deeds would necessarily require to be cancelled in order to get rid of the legal consequences attaching to them. That being the very object of the suit though the plaintiff did not in terms ask for the cancellation of the deeds that relief was implicit in the relief sought for. The suit therefore being one for declaration and consequential relief, was governed by S. 7. (iv) (c) and not Sch. II, Art. 17 (iii). A.I.R. 1944 Pat. 17=24 P.L.T. 446=11 B.R. 111=22 Pat. 783=216 Ind. Cas. 132 (F.B.)

Cancellation of instrument—S. 7 (iv) (c)—Cancellation of document—Suit to adjudge document void or voidable, whether involves anything besides prayer for declaration.

In determning the question whether a suit for adjudging a document void or voidable involves anything otherwise than a prayer for a declaration, the plaint must be examined and construed to see if it carries by necessary implication a prayer for cancellation of the document. A.I.R. 1942 Pat. 60=20 Pat. 780=8.B.R 471=23 P.L.T. 218=198 Ind. Cas. 866.

—S. 7 (iv) (c)—Cancellation of document—Suit for.

A suit for cancellation of a document is a suit for a declaration and consequential relief, and governed by S. 7 (iv) (c). A.I.R. 1942 Pat. 60=20 Pat. 780 =8 B.R. 471=23 P.L.T. 218=198 Ind. Cas. 866.

S. 7. (iv) (c)—Cancellation of document.
——Prayer for cancellation when present by implication—Declaration, if necessary to give relief.

It can never be said that a plaint carries by necessary implication a prayer for a relief which is in fact unnecessary, and a clear distinction must be drawn between cases where it is necessary for the plaintiff to get the document declared void and cancelled before he can obtain relief, and cases where the plaintiff can obtain his relief without any such declaration and cancellation, upon a mere finding that the document does not affect him, that is to say, the Court must distinguish between voidable documents and wholly void documents and between declarations in the true sense and declarations so called, which are merely the findings of fact necessary to give the plaintiff relief. The prayer for cancellation can only be deemed to be present by necessary implication where upon its true construction, the plaint, in asking for avoidance of the document asks for reliefs which necessarily involve its cancellation, that is to say, in the case of a document which is voidable as opposed to void.

Similarly, a declaration cannot be said to be asked for by necessary implication where no declaration in the true sense is necessary before the plaintiff can be given relief. A.I.R. 1942 Pat. 60=20 Pat. 780= 8 B.R. 471=23 P.L.T. 218=198 Ind. Cas. 866.

——S. 7 (iv) (c)—Cancellation of document—Suit for declaration that certain deed is null and void and for its cancellation.

Quoere.—Whether a suit for a declaration that certain deed is null and void and that it should be withdrawan from the defendant and be cancelled, is a suit for declaration with consequential relief. A.I.R. 1941 Lah. 265 =43 P.L.R. 252 = 196 Ind. Cas. 254.

S. 7. (iv) (c) Cancellation of document.
—If the plaintiff has been a party to instrument or decree sought to be avoided, and decree or instrument is not absolutely void, he must sue for its cancellation. A.I.R. 1941 Mad. 493 =53 M.L.W. 311=I.L.R. (1941) Mad. 708 = 1941 M.W.N. 243=(1941) 1 M.L.J. 414= 199 Ind. Cas. 528.

—S. 7 (iv) (c)—Cancellation of document—Suit for declaration that sale-deed was fictitious and did not affect plaintiff in realising his decree—No prayer for cancellation of deed—Suit is merely declaratory and involves no consequential relief.

A suit was brought by the plaintiff for a declaration that a sale deed was fraudulent and fictitious and does not stand in his way in realising the amount due in respect of a decree obtained by him, without any request for the cancellation of the deed, is merely of a declaratory character and involves no consequential relief. No **ad valorem** Court-fee is, therefore, payable on the amount for which the deed was executed. 193 Ind. Cas. 363=1941 O.W.N. 471.

Ss. 7 (iv) (c) and 7 (v)—Cancellation of document—

Prayer for declaration with consequential relief of cancellation and possession—Suit falls under S. 7 (iv) (c) and not S. 7 (v). 1938 N.L.J. 130.

——S. 7 (iv) (c) Cancellation of document. ——Partiiion Suit.

The plaintiff filed a suit for partition against his father and step brother. It appeared that, prior to the filing of the suit there was a registered deed of partition but the plaintiff alleged that it was voidable at his option and sought for relief on the basis that the partition deed was avoided. **Held,** that substantially the plaint was one for a declaration that the partition deed is not binding on him and for further reliefs following such declaration. The court-fee payable so far as the immoveable properties [mentioned in the plaint is the same as that prescribed by S. 7 (iv) (c) and that as regards other moveable properties, the plaintiff was entitled to value them in the way he liked. **Held** further that under those circumstances Art. 17 (b) of the Second Schedule was inapplicable. 1930 M.W.N. 358.=129 Ind. Cas. 824=A.I.R. 1931 Mad. 94.

S. 7 (iv) (c)—Cancellation of document. ——Where the document has become operative

A made a will in favour of his wife **B** of some immovable property for her maintenance and after her death the property was to be inherited by his grandsons. He subsequently, by another will conferred upon **B** the right of alienating the property. **B** gifted the property to her son who sold it away to **H**. The grandson brought a suit for declaration that the gift and the sale were null and void as the second will was invalid for **A** was a member of a joint family. It was contested that a suit for a mere declaration without possession did not lie.

Held, that as **B** was living, a suit for possession was not tenable.

Held, further, that as **A** was dead, the will challenged had lost its ambulatory character and had become operative and that consequential relief in the shape of the cancellation of the will must be asked for and court fees on that relief must be paid. 87 P. R. 1916, Foll. 112 Ind. Cas. 48=10 Lah. 403=10 L.L.J. 562=30 P.L.R. 672=A.I.R. 1929 Lah. 811.

S. 7 (iv) (c)—Cancellation of document — Declaration that it does not affect plaintiff's title.

A suit for a declaration that a registered deed does not affect plaintiff's title, is one clearly made under the provisions of S. 39, Specific Relief Act, and such a suit is a suit for a declaratory decree with consequential relief and Court fee must be paid under Court Fees Act, S. 7 (iv) (**c**). The relief claimed is really the same whether the plaint purports to ask that a document should be adjudged voidable or declared not to affect the plaintiffs title or be set aside or cancelled. 38 Mad. 922 (F. B). Foll.; 30 Cal. 788, not Foll.; 16 N.L.R. 84. Rel. on. 118 Ind. Cas. 465=25 N.L.R. 52=A.I.R. 1929 Nag. 71.

S. 7. (iv) (c) Cancellation of document.

Where a person not only asks for a declaration that certain deeds are voidable against him because his consent to their execution has been caused by fraud or mis-representation but also asks that the deed should be cancelled and delivered up; the suit is distinctly a suit for declaration with a prayer for consequential relief and **ad valorem** fee must be paid under the provisions of S. 7 (iv) (**c**) and stamp of Rs. 10 is insufficient. 29 Bom. 207, Rel. on; 5 All. 331 (F. B.) and I.O.C. 123 not Foll. 121 Ind. Cas. 281=6 O.W.N. 885 = A.I.R. 1929 Oudh 491.

——S. 7 (iv) (c)—Cancellation of document. ——Suit for—Refund of Purchase money.

Where a Purchaser sues for a refund of purchase money on the ground that he was induced to purchase the property by fraud, the main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases S. 7 (iv) (**c**) has no application. 91 Ind. Cas. 729=1925 M.W.N. 826=A.I.R. 1926 Mad. 96=49 M.L.J. 608.

——S. 7 (iv) (c)—Cancellation of document. ——Invalidity of a sale deed.

In cases falling under S. 7. (iv) (c) the plaintiff must value in his plaint the relief sought and the plaint must be stamped according to such valuation. Where the suit was for declaration that sale deed was invalid and might be cancelled,

Held, the Court-fee was to be according to the value of the relief claimed as it was put in the plaint by the plaintiff. 27 Mad. 480, Foll. 84 Ind. Cas. 201=3 Bur. L.J. 128=A.I.R. 1924 Rang. 378.

——S. 7 (iv) (c)—Cancellation of Document. ——Suit for Cancelling sale deed and Possession —S. 7 (v) (a) (b).

The father and brother of the plaintiff alienated joint family property in which the plaintiff was interested as a co-parcener. The plaintiff brought this suit for possession of his share and added a relief for cancellation of sale-deed:—**Held** as the plaintiff asked for cancellation of sale-deed, he was liable to pay **ad valorem** fee on the value of the whole estate sold unless his plaint, which came under S. 7. (iv) (**c**) was amended. Where the Court has decreed the claim for possession on the plaintiff paying certain amount to the purchasers the defendants are liable to pay on their memorandum of appeal court-fee only on ten times the Government revenue of the property in dispute. 68 Ind. Cas. 265=44 All. 629=20 A.L.J. 587=A.I.R. 1922 All. 358.

——S. 7 (iv) (c), Sch. II, Art. 17 (iii). Cancellation of document.

Where a party prays for a cancellation of a document which he believed he had signed as witness but which he subsequently read as though executed by him as the vendor of the property conveyed thereby, he must pay **ad valorem** fee on his plaint, for the relief by way of cancellation, more especially because he had valued the suit for purposes of jurisdiction at a big figure. Rs. 10 is not the proper fee. (1893) R.P. 109, Dist. U.B.R. (1915) II 102=33 Ind. Cas. 624.

——S. 7 (iv) (c) and Sch. 1, Art. 1. Sch. II. Art. 17—Cancellation of document—Declaratory suit to Cancel registered release deed.

A declaratory suit that a registerd release deed be considered cancelled, must be valued for Court-fees at the amount at which the relief is valued. 35 P.R. 1914=237 P.L.R. 1914=25 Ind. Cas. 435.

——S. 7 (iv) (c) Cancellation of document.

To decide whether a suit comes under S. 7 (iv) (c) the substance of the claim and not the mere words in the plaint should be considered. A suit for a declaration that a deed is in-operative is in substance one for its cancellation and **ad valorem** fee must be paid. 30 Mad. Ref. 18. 20 M.L.J. 791=7 M.L.T. 177=5. Ind. Cas. 927.

——S. 7 (iv) (c), Sch. II, Art. 17 (v) — Cancellation of document — Deed of adoption, cancellation, of.

A suit for cancellation of a deed of adoption should be stamped, whether under S. 7 (iv) (**c**) or Sch. II, Art. 17 (v), Court-fees Act, at Rs. 10, for the court-fee on a suit to declare an adoption invalid, where the consequential relief claimed is that of cancellation of the deed, cannot be more than the court-fee to set aside an adoption, which is Rs. 10. A.I.R. 1937 Rang. 400=173 Ind. Cas. 909.

S. 7. (iv) (c) Cancellation of document. ——Suit for declaration that certain deed executed by plaintiff was not executed by him and for cancellation with notice to Registration officer — Whether declaration with consequential relief.

The plaintiff - respondent brought a suit in respect of a deed of relinquishment purported to have been executed by him in favour of the defendants praying for a decree declaring that the deed of relinquishment was not executed by him and further for cancelling the deed with the usual notice to the Registration officer concerned:

Held, that the suit was strictly in terms of S. 39 of the Specific Relief Act, for cancellation of the document and was a suit for declaration with consequential relief within S. 7 (**iv**) (**c**) of Court-fees Act, and **ad volorem** court-fee was necessary. In asking for the delivery and cancellation of the deed and for making it over to the Registrar, the plaintiff had asked for a substantial relief and consequently relief within the meaning of S. 7 (**iv**) (**c**). 164 Ind. Cas. 367=39 C.W.N. 250=62 Cal. 479.

——**S. 7. (iv) (c) Cancellation of document**—Declaratory suit that plaintiff is owner of house in suit and that mortgage-deed by defendants is in-effective —Held, suit falls under S. 7 (**iv**) (**c**).

The plaintiff instituted a suit for declaration that he was the owner of the house in suit, and the mortgage-deed executed by the defendants was in-effective against him, being null and void. He valued the suit for purposes of jurisdiction at Rs. 12,000 but he paid a court-fee of Rs. 10:

Held, that the suit fell within the ambit of S. 7 (**iv**) (**c**), Court-fees Act. In the circumstances described, it was necessary not only that he should get a declaration that he is the owner but that he should pray for the cancellation of the mortgage-deed. In such a case the plaintiff could not place one value for jnrisdiction and another for court-fees. It must be the same for both and when once he had put his own value for jurisdiction, **ad valorem** court-fees must be paid on the value so stated. A.I.R. 1936 Lah. 703=38 P.L.R. 923=165 Ind. Cas. 670.

S. 7 (iv) Cancellation of document.

The plaintiff instituted a suit for the cancellation of two documents, a sale deed in which the consideration was stated to be Rs. 700 and a promissory note for Rs. 500. The suit was valued for purposes of Jurisdiction and court-fees at Rs. 100:

Held, that from the value of the documents sought to be cancelled, it was manifest that there was no reasonable ground for placing such a low value on the relief sought by the plaintiff.

In such cases, although the value put by the plaintiff on his suit **prima facie** determines the jurisdiction on the plaint, the plaintiff is not at liberty to place an arbitrary value on the suit. A.I.R. 1933 Rang. 40=142. Ind. Cas. 705.

S. 7 (iv) (c) Cancellation of document.

——**Execution of document of** shankalap **by plaintiff**—Plaintiff continuing in possession—Suit to declare deed invalid and ineffective—Allegation of coercion and undue influence.

Where the plaintiff's case was that she executed a document of **shankalap** in favour of the defendant, but that she was still in possession of the property to which the deed related and prayed that it be declared invalid and in-effective as against her on the ground that she executed it under coercion and undue influence exercised by the defendant:

Held, that having regard to the nature of the suit and the relief prayed for, a court-fee of Rs. 10 on the plaint was sufficient. A.I.R. 1933 Oudh 127=10 O.W.N. 133=142 Ind. Cas. 699 (1).

——**S. 7. (iv) (c) Cancellation of document.**

——While in cases where a declaration alone is sought, a stamp of Rs. 10 is sufficient, in other cases under S. 39 of Act I of 1877, in which not only is a declaration sought but it is further asked that the document shall be delivered up, cancelled, and its registration set aside, an **ad valorem** court-fee must be paid under the provisions of S. 7 (iv) (c) Court-fees Act. A.I.R. 1933 Oudh 116=10 O.W.N. 19=8 Luck. 674=141 Ind. Cas. 798.

——**S. 7. (iv) (c)—Cancellation of document**

——Suit for cancellation of mortgage deed and decree thereon—First relief held did not fall under S. 7 (iv) (c). A.I.R. 1932 All. 485=1932 A.L.J. 684=54 All. 812=139 Ind. Cas. 32 (F. B.) (Overrules 1883 A.W.N. 55=5 All. 331. (F B).).

——S. 7 (iv) (c)—Cancellation of document—Suit to declare deed ineffective on ground of coercion.

A suit to declare a deed which the plaintiff himself had executed to be ineffective and in-operative against him on the ground that he executed it under coercion, undue influence and fraud, need bear only a court-fee of Rs. 10, and nothing more is necessary. 138 Ind. Cas. 147=9 O.W.N. 440.

——S. 7 (iv) (c) and (b), Sch. II, Art. 17-B—Cancellation of document—Suit to set aside partition deed and for fresh partition.

The plaintiff sued for partition alleging that a previous deed of partition which had been executed between the parties was voidable at his option owing to fraud and undue influence, and seeking relief on the basis that that partition deed was avoided by him. The suit was valued at Rs. 51,903-12-0 for purposes of jurisdiction. The trial Court held that the suit was not maintainable without a prayer to set aside the partition deed and that the plaintiff should further pay court-fee on Rs. 51,903-12-0 under S. 7 (iv), Court-fees Act:

Held, (1) that the suit being in substance one to set aside the partition deed, the absence of a formal prayer to set aside the deed was immaterial ;

(2) that as the status of jointness had been put an end to, even according to the plaint, the case was governed by S. 7 (iv) (c) if not by (b) of the Court-fees Act, and not by Art. 17-B of Sch. II ;

(3) that as the plaintiff had framed the plaint on an entirely different basis, an opportunity ought to be given to him so that he may state the valuation of his share of the immovable properties in the manner stated be the proviso, that is, according to para. 5, S. 7, and the valuation of the properties allotted to him and half the difference between the two would be the minimum value on which he was to pay the court-fees. A.I.R. 1931 Mad. 94=1930 M.W.N. 358=129 Ind. Cas. 824.

——S. 7 (iv) (c), Sch. II. Art. 17-B (Madras)—Cancellation of document—Suit by beneficiary to set aside alienation by trustee.

The plaintiffs brought the suit as beneficiaries under a certain trust, the the primary object of which was to provide for the wants of **Bhairagis** but in which they possessed a beneficiary interest in the surplus

incomes in order to recover certain properties forming the subject-matter of the trust which had been alienated by the trustees. The alienations were made, one by sale, one by mortgage and the remainder by lease. The plaintiffs offered to pay a court-fee of Rs, 100 under Art. 17-B. Sch. II, Court-fees Act, on the ground that the subject-matter of the suit was incapable of valuation. The trial Court held that it must be paid under S. 7 (iv) (c), Court-fees Act, read with the proviso added to it by the Madras Court-fees Amendment Act (Act V of 1920), on half of the market value of the suit properties. On revision:

Held, that the case did not fall under Art. 17-B but was provided for by S. 7 ((iv) (c), Court-fees Act, but according to the proviso which applied to the Madras Presidency, court-fee should be assessed not upon half the market value but in the manner provided by para. (v) of S. 7. A.I.R. 1931 Mad. 24 =33 M. L. W. 206=61 M. L. J. 39=130 Ind. Cas. 449.

——S. 7 (iv) (c) Cancellation of document.—
—Suit by reversioner for declaration that deed of gift executed by deceased is invalid.

The substance of the plaint and not merely the exact reliefs asked for has to be looked into in order to determine the court-fee payable on the plaint. If in substance, the plaintiffs ask for a cancellation of a deed of gift, they ask for a declaration with cansequential relief, and the case falls under S. 7 (iv) (c), Court-fees Act.

Where reversioners of a deceased Hindu sued, during the life-time of his widow, for a declaration that a deed of gift executed by the deceased in favour of his wife's brother was 'illegal, null and void' as it was executed under fraud,coercion and undue influence.

Held, that the suit was really one for cancellation of the deed of gift and, therefore , fell within S. 7 (iv) (c), Court-fees Act, and the court-fee payable on the plaint was **ad valorem**. A. I. R. 1931 Pat. 78=10 Pat. 432=13 P. L. T. 155=130 Ind. Cas. 46.

—S. 7 (iv) (c) Cancellation of document—suit to declare a document not binding,

A Suit by an insolvent, to declare a deed by the Official Receiver not binding on him, and for consequential relief, can be valued as plff, likes. Such a suit is not in substance a suit to obtain a cancellation of the deed. 20 M.L.J. 791; 30 Mad. 18; 20 Mad. 490. Dist. 32 M.L.J. 447=40 Ind. Cas. 620.

—S. 7 (iv) (c)—Cancellation of document.

A suit for the cancellation of a Registered Instrument under S. 39 of the Specific Relief Act, is a suit for declaration and consequential relief, within the meaning of S. 7 (iv) (c) in as much as the declaration necessitates the further and consequential relief of sending the decree to the Registration office. **Ad valorem** Court-fee must be paid on the relief. 29 Bom. 207, Foll. 3 Pat. L.J. 194=45 Ind. Cas. 238.

—S. 7 (iv) (c)—Cancellation of document—Will.

Suit for cancellation of a will falls under S. 7 (iv) (c). 87 P.R. 1916=127 P.W.R. 1916=31 P.L.R. 1917=36. Ind. Cas. 95.

—S. 7 (iv) (c) Cancellation of document—Malabar Law—Alienation by Karnavan—Anandara van's right to set aside:—If it is incumbent on the plaintiff to avoid a deed, then it might be proper to hold that the plaint is virtually one for consequential relief. But where an instrument is void as against a person (as in the case of deed of alienation by a Karnavan against an Anandaravan) then it is not necessary that such a person must get rid of the transaction by having it actually cancelled in order to rely on its invalidity against him, the suit will be alike in form and substance a suit for a mere declaration and S. 7, (iv) (c) is not applicable to the case. 30 M. 18.=1. M.L.T. 412.

—S. 7. (iv) (c) — Cancellation of document:— A suit for the cancellation and delivery of a mortgage bond executed by the plaintiff falls under Cl (iv) (c) of S. 7 of the Court Fees Act and not under Cl. (iv) (a) of S. 7 in the absence of any rules framed by the High Court under S. 9. In cases falling under S. 7, Cl. (iv) the plaintiff should state in the plaint itself under the sanction of verification the amouut at which he values the relief sought, and the court has no jurisdiction to decline to accept the same or to revise it, a power which is limited to cases provided for by S. 9. The same is the value for purposes of jurisdiction according to the Suits Valuation Act. 23 M. 490: 24 M 34 ref. . 14 M.L.J. 343=27 M. 480.

6. Consequential relief.

——S. 7 (iv) (c)—"Consequential relief"—Test.

A suit for a declaration and consequential relief falls under S. 7 (iv) (c) of the Court-Fees Act and court-fees must be paid on the valuation put by the plaintiff.

The expression "consequential relief" in S. 7 (iv) (c) means some relief which would follow directly from the declaration given. Where it is quite independent of the declaratory relief and thus can be either granted or refused apart from the relief of declaration, it is not a consequential relief. Where, therefore, the plaintiff is not entitled to a relief of injunction unless the relief of declaration is granted, to him, and once the relief of declaration is granted; the other relief would necessarily follow without any further proof, the plaintiff's suit is for a declaration and a consequential relief. 54 A 812 (F.B.), referred to. The question whether the decree sought by the plaintiff is a mere declaratory decree without any consequential relief coming under Art. 17 (iii) of Sch. II of the Court-Fees Act or whether it is a decree with consequential relief governed by S. 7 (iv) (c) of that Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under S. 42 of the Specific Relief Act. 14 Luck. 176 (F.B.), foll.; I.L.R. (1938) 2 Cal. 64, referred to. I.L.R. (1949) Nag. 195=A.I.R. 1949 Nag. 347=1949 N.L.J. 389.

——S. 7 (iv) (c)—"Consequential relief," meaning of.

A declaration within the meaning of S. 7 (iv) (c) does not include what is really the finding of fact necessary before the relief can be granted.

The expression consequential relief means a substanal and immediate remedy in accordance with the title which the Court has been asked to declare. A.I.R. 1945 Pat. 81=23 Pat. 749=219 Ind. Cas. 453.—**See also** 42. P.L.R. 364.

——S. 7 (iv) (c)—Consequential relief.

The expression "consequential relief" in S. 7 (iv) (c) Court-fees Act, means some relief, which would follow directly from the declaration given, the valuation of

which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a 'substantial relief.' It follows therefore that if the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere 'consequential relief' in the above sense, the plaintiff must pay court-fee on the substantial relief. A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.)

—S. 7 (iv) (c), Sch. II, Art. 17 (iii)—Consequential relief—Prayer for 'Such relief as Court may think fit'—Such prayer involves consequential relief and S. 7 (**iv**) (**c**) applies and not Art. 17 (**iii**) of Sch. II.

It does not matter how the prayer is framed. What matters is what must be done in order, if that prayer be granted, to make the granting of it effective. In all cases for declaration where there is a subsequent prayer for 'such relief as the Court may think fit' or 'any other proper and lawful declarations be made,' although all that is asked for is declaration, the prayer involves a consequential relief and S. 7 (iv) (**c**) applies and not Art. 17 (**iii**) of Sch. II of the Court-fees Act.

By a decree in a partition suit, certain property was charged with the right of the maintenance of a widow. The plaintiff purchased this property and brought a suit for declaration that the property was not liable to maintenance charge of the widow. There was a subsequent prayer for other proper and lawful declaration:

Held, that the declaration was to the effect that the property was not burdened by the maintenance charge not merely while in the ownership of the plaintiff but generally; and if this declaration was given, it would free the land for ever in whosesoever hands it may be of this maintenance charge; and this could not be done without amending the partition decree. The declaration, therefore, involved the consequential relief. A.I.R. 1938 Nag. 183=I.L.R. (1939) Nag. 373=174 Ind. Cas. 891.

—S. 7. (iv) (c)—Proviso—Consequential relief.

To attract proviso, consequential relief must directly relate to immovable property. 1936 M.W.N. 406.

—S. 7. (iv) (c)—Consequential relief.

——The reference to consequential relief in sub-cl. (c) of cl. (iv) of S. 7 of the Court-fees Act, must be read along with other clauses providing for particular reliefs which in a sense are also consequential reliefs.

The High Court will be justified in interfering in revision with an order relating to court-fee where the question bears upon the valuation of the suit for purposes of jurisdiction. A.I.R. 1936 Mad. 411=1936 M.W.N. 148=70 M.L.J. 398=43 M.L.W. 582=161 Ind. Cas. 679.

—S. 7 (iv) (c)—Consequential relief.

——When the relief of injunction followed directly from the right which the plaintiff desired to be declared, the relief should be considered to be but one of the nature described in S. 7 (iv) (c). 1935 A.L.J. 1319=1935 A.W.R. 1324.

——S. 7. (iv) (c) Sch. II, Art 17, cls. 3 and 6—Consequential relief—Meaning.

Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. A prayer for possession being unwarranted by plaint averments, is not a relief consequential upon a declaratory decree. 1. L.W. 398=24 Ind. Cas. 316.

——S. 7 (iv) (c)—Consequential relief—Injunction—Valuation of.

Where there is a prayer, for an injunction, relief can be valued arbitrarily and such valuation is conclusive. If along with the injunction relief, additional consequential reliefs are prayed for, they should be valued according to law. The proper Court-fee for the plaint would then depend upon the total value of the consequential reliefs. (1913) M.W.N. 105 and (1914) M.W.N. 707, Ref. (1918) M.W.N. 40=43 Ind. Cas. 995.

——S. 7. (iv) (c), (d)—Consequential relief—Suit to set aside decree or award with consequential relief for injunction restraining decree-holder from enforcing decree—Fixed fee prescribed by Bombay Court-fees Amending Act (III of 1926), Art. 17, cl (5), whether is the only fee payable—Injunction, if can be valued arbitrarily—Court, if can revise valuation.

Clauses (c) and (d) of sub-s. (iv) of S. 7, Court-fees Act, must be read with O. 7, R. 11, Civil P.C., and these provisions of the Civil P.C. control the provisions of the Court-fees Act. Therefore, in a suit to set aside a decree or an award, where consequential relief is sought by way of an injunction restraining the decree-holder from enforcing his decree, the fixed fee prescribed by cl. (5) or Art. 17 of the Bombay Court-fees Amending Act is not the only fee payable and it is not open to the plaintiff to value the injunction arbitrarily and pay court-fee thereon, and such value can be revised by the Court.

A suit for declaration and an injunction is a suit for consequential relief and in such a suit, iti s not open to the plaintiff to put any arbitrary value upon the injunction sought and pay court-fee on such value. A.I.R. 1937 Sind 241=31 Sind L.R. 442=171 Ind. Cas. 420 (F.B.)

——S. 7 (iv) (c)—Consequential relief.

Where the suit was for a declaration that a decree obtained by defendant was fraudulent and for injunction against defendant restraining him from interfering with plaintiff's possession of the property in the suit and thirdly for consequential relief confirming plaintiff's possession:

Held, the valuation of the decree which the plaintiff seeks to set aside is the value of the suit for purposes of Court-fee and that the suit need not be valued according to the value of the property. 79 Ind. Cas. 982=40 C.L.J. 150=A.I.R.1924 Cal. 969.

——S. 7 (iv) (c) —Consequential relief—Prayer for setting aside decree.

A suit to set aside a decree on the ground of fraud is one for declaration and for a consequential relief and the Court-fee must be computed under S. 7 (iv) (c). 5. All. 331; 20 Bom. 736 ; 30 Cal. 788, Ref. 16 N.L.R. 84=56. Ind. Cas. 360.

——S. (7) (iv) (c)—Consequential relief—Suit to set aside decree.

A suit to have a compromise decree, declared invalid and to have things restored to their original state is a suit for a declaratory decree and consequential relief and hence **ad valorem** Court-fee is payable. 5. Ind. Cas. 582 (Cal.)

——S. 7 (iv) (c)—**Consequential relief — Suit to enforce Registration**—The proper court-fee payable on a plaint and memorandum of appeal against a decree in a suit to enforce registration of a document under S. 77, Act III of 1877, is a fixed fee and is Rs. 10 only and not **ad valorem** on the value of properties comprised under the document. 8 C. 31 foll. 12 M.L.J. 87 not foll. 12 M.L.J. 88.

——S. 7 (iv) (c)— **Consequential relief—Suit to enforce rsgistration** — Declaration — Consequential relief—Proper fee:— A suit to enforce registration of a document under S. 77, Act III of 1877, is not a suit for a mere declaratory decree but one in which consequential relief is prayed for. The proper stamp fee must be calculated with reference to the amount at which the relief is valued under S. 7. Cl. (iv) (c) Court-Fees Act.— 12 M.L.J. 87.

7. Declaration and Consequential relief.

——S. 7 (iv) (c) (Bengal)—Declaration consequential relief—Mode of valuation.

S. 7 (iv) (c), Court-Fees Act, would apply. if the suit is one for a declaration where a consequential relief is prayed for. The expression, "consequential relief" has been defined to mean some relief which follows directly from the declaration, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for and cannot be claimed independently of the declaration as a substantial relief. 54 A. 812 and I.L.R. (1941) Lah. 451, referred to.

In a Case coming within S. 7 (iv) (c) of the Act, court-fees are payable **ad valorem** on the amount at which the relief is sought to be valued in the plaint, subject to the provisions of S. 8 (c) of the Act. The correct mode of valuation of the relief in such a case is to put a single valuation, the option of valuing the relief resting with the plaintiff. 58 C. 281, referred to.

In cases arising under S. 7 (iv) (c) of the Court-Fees Act, the value for the purpose of jurisdiction follows the valuation for the purpose of Court-fees. 54 C.W.N. 139=A.I.R. 1950 Cal. 85.

——S. 7 (iv) (c) — **Declaration and consequential relief—Plaintiff's right to value relief—Limits to.**

In the case of a suit for declaration of any legal character and for consequential relief, the valuation for court-fee would be the value at which the plaintiff values the relief. He has in such cases some amount of liberty to put his own valuation and this liberty cannot be curtailed or diminished so long as he does not value the relief arbitrarily. The value of the relief certainly depends upon the value of the benefit that is to be derived from it; and the valuation would weigh according as the quantum of the benefit involved in the relief varies. 27 Pat. 494.

S. 7. (iv)(c)—Declaration and Consequential relief, what is.

——**Relief claimed not capable of being granted** until decree or alienation standing in plaintiff's way avoided or until his legal title or character declared.

Where the plaintiff claims relief to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court, the suit comes under cl. (iv) (c) of S. 7, Court-fees Act even though a declaration which it is necessary for him to obtain before further relief can be granted has not been in terms asked for in the plaint. A.I.R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

——S. 7 (iv) (c)—Declaration and consequential relief.

——**Gift by Hindu widow—Reversioner out of** possession—Suit by, against donee and his brother for declaration of gift as invalid and for possession and partition of alienated property.

Where the reversioner files a suit against his brother and the donees from the widow for declaration that the gift by the widow is invalid, and for possession and partition of the alienated property, the suit falls under S. 7 (iv) (c), the consequential relief being partition and possession. A.I.R. 1943 Sind. 56=I.L.R. (1942) Kar. 358=205 Ind. Cas. 27.

S. 7 (iv) (c)—Declaration and Consequential relief—Test.

The Court has to look at the substance of the plaint in each case to determine whether the suit is really one for a declaration with a consequential relief or is merely a camouflage attempt in words to disguise a specific relief claimed in the garb of a suit for declaration coupled with a consequential relief.

Where it is open to the plaintiff to frame his suit in one of the two ways, there is no obligation in law that he should frame his suit in any other way than he would choose to frame it. In other words, if it is open to the plaintiff to bring a suit for possession or to bring a suit for a declaration with consequential relief for possession, it is entirely for the plaintiff to choose in which form he brings the suit and to the results that may flow from his choice in the way of limitation or otherwise, the question of court-fee payable is wholly irrelevant. The court-fees will be determined on the nature of the suit as framed at the choice of the plaintiff always, provided it is legally open to him to do so. It cannot be said that in all suits where possession is one of the reliefs claimed, the suit must fall within S. 7 (v), Court-fees Act, any more than if the relief was not possession but was somewhere specifically provided for, say in Art. I of the Schedule, the relief would necessarily fall within that article. It will depend on the facts and circumstances of each case whether the relief by way of possession or any other relief claimed is or is not consequential on the declaration sought. A.I.R 1942 Lah. 209=44 P.L.R. 162=202 Ind. Cas. 174.

S. 7 (iv) (c) Declaration and Consequential relief.

——**Suit for declaration that plaintiff was entitled** to property in suit on death of a widow and person who claimed under will of widow's deceased husband has no accrued right —Allegation in plaint that will was brought about by undue influence and was voidable — Declaration held involved consequential relief. A.I.R. 1939 Oudh 125=1939 O.W.N. 184=14 Luck. 536=180 Ind. Cas. 61.

——S. 7 (iv) (c)—**Declaration and consequential relief—Two prayers make only one, for declaration and consequential relief and require ad valorem Court-fee.**

There were two main prayers in the suit, one for a declaration of plaintiff's title to an 8 annas interest in

the estate, and the other was that should the Court be of opinion that the plaintiff was not in possession of her interest, she should get joint possession of it along with the defendant:

Held, that the two prayers together made only one prayer for declaration and consequential relief and the plaint required **ad valorem** court-fee. A.I.R. 1939 Pat. 219=5 B.R. 818=20 P.L.T. 818=182 Ind. Cas. 743.

——S. 7 (iv) (c)—Declaration and consequential relief.

——The prayer for a declaration that the properties are **debutter** and the prayer for perpetual injunction restraining the defendants from doing certain things taken together amounts to this, that the plaintiff wants perpetual injunction as a consequential relief flowing from the declaration that the property is **debutter**. These two reliefs must, therefore, be taken to come not under Sch. II, Art. 17, cl. (vi), Court-fees Act, but under S. 7, cl. (iv) (c). A.I.R. 1938 Cal. 865=I.L.R. (1938) 2 Cal. 64=42 C.W.N.504=179 Ind. Cas. 355.

——S. 7 (iv) (c)—Declaration and consequential relief.

——Suit for declaration and possession—Consequential relief of possession cannot be valued under S. 7 (iv) (c). A.I.R. 1937 Mad. 529=1937 M.W.N. 234=45 L.W. 491=(1937) 1 M.L.J. 739=I.L.R. (1937) Mad. 672=170 Ind. Cas. 573.

—S. 7 (iv) (c)—Declaration and Consequential relief—Suit for declaration and injunction.

A suit for a declaration to the effect that the plaintiffs were the lessees of a certain agricultural land for a term of years and for a perpetual injunction restraining the defendants from interfering with the plaintiffs' possession as lessees, is a suit for a declaration with consequential relief within the meaning of S. 7 (iv) (c), Court-fees Act according to which the plaintiff is entitled to put his own value for purposes of court-fees. 140 Ind. Cas. 73=33 P.L.R. 458.

——S. 7 (iv) (c)—Declaration and consequential relief.

A suit brought for a declaration with consequential relief, for purposes of Court fee and jurisdiction is governed by S. 7 (iv) (c) of the Court-Fees Act Art. 17 (vi) of Sch. II of the Court-Fees Act cannot apply where it is possible to estimate the money value of the claim. 71 Ind. Cas. 31=A.I.R. 1922 Nag. 264.

——S. 7 (iv) (c) Declaration consequential relief—Declaration of status as landlord and ejectment.

Where a plaintiff sues for a declaration that he is a raiyat and that the defendants are his under raiyats and for ejectment of the latter the suit falls within S. 7, cl. (iv) (c) of the Court Fees Act. 65 Ind. Cas. 240 (Pat.).

——S. 7 (iv) (c)—Declaration and consequential relief—Suit for declaration and consequential relief—Court-fee must be paid on the consequential relief as valued by plaintiff. 62 Ind. Cas. 36=3 Pat. L.T. 21=A.I.R. 1922 Pat. 61.

——S. 7 (iv) (c) and (v) — Declaration and consequential relief, not for possession.

A suit for a declaration that a certain decree was fraudulent and unfit for execution and that the family property could not be sold in execution and that, if the whole property could not be released from execution, atleast the plaintiff's portion, would come under S. 7 (iv) (c) being a declaratory suit with a prayer for consee quential relief; and Sub. S. (v) does not apply becauss the suit is not for possession. 40 Cal. 615=21 Ind. Ca-. 404.

——S. 7 (iv) (c)—Declaration and Conseuqential relief.

A suit for a declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under S. 7 (iv) (c). 38 Mad. 922. Appl. 3 Pat. L.J. 448=46. Ind. Cas. 385.

——S. 7 (c) and Sch. II, Art. 17 (1)—Declaration and consequential relief—Prayer for releasing property from attachment and possession—Appeal—Court-fee.

Where plaintiff's property was attachad at the instance of a creditor of its ostensible owner and plaintiff asked only for the release of his property from attachment, the Court-fee payable would be Rs. 10 under Sch. 11, Art. 17 (1) of the Court-fees Act. If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the Court-fee payable would be on the value of property in accordance with S. (iv) 7 (c) of the Act. If in such a suit the plaintiff is defeated and he prefers an appeal he must pay Court-fees on the value of the property plus Rs. 10 for declaration. If the plaintiff succeeds and an appeal is preferred by the defendants the Court-fee to be paid must be regulated by a consideration of the relief sought in appeal. If the attaching creditor appeals, the Court-fee payable would be Rs. 10 only. If the ostensible owner appeals, the Court-fee payable would be Court-fee calculated upon the value of the property. 43. Ind. Cas. 971 (Pat.)

——S. 7 Cl. (iv) (c) — Declaration and consequential relief—Arbitrary Valuation.

Where in a suit for a declaration and consequential relief the plaintiff fixes upon the latter relief a ridiculously low value, the Court is entitled to insist upon his fixing a reasonable value. 6 C.L.J. 427, Ref. 2 Pat. L.W. 173=41. Ind. Cas. 95.

——S. 7 (iv) (c) — Declaration and Consequential relief. Record of rights and settlement of fair rent — Suit for amendment — Court-fees — Valuation of suit—Court-fees on declaration suit —**Ad valorem** fees.—The court-fees payable on a plaint for amendment of a record of rights and for settlement of fair rents must be determined under S. 7 (iv) (c) of the Court-fees Act, by the amount at which the reliefs sought are valued and not at the sum of ten rupees required for a declaratory decree. 11 C. L. J. 158=5 Ind. Cas. 141.

——S. 7, (iv), (c), (d)—Declaration and consequential relief—Valuation for purposes of Court-fees—In Cases covered by S. 7 (iv), (c), (d), of the Court Fees Act, although it is for the plaintiff to state the amount at which he values the relief sought, and although the amount of court-fees payable varies with the amount at which the relief sought is valued in the plaint, it is open to the Court, if a question is raised as to the true valuation of the suit, to determine such question, and it is within the power of the court to take action under S. 54 of the Civil Procedure Code if it is established that the valuation is improper,

Where the suit was for a declaration that a mortgage decree for Rs. 10,000 obtained by the defendant against the plaintiff was fraudulent and for an injunction to restrain the defendant from executing it by a sale of the mortgaged properties.— **Held,** that the prayer for injunction was a prayer for a consequential relief within S. 7 (iv) (c) of the Court Fees Act. That the proper value of the relief by way of injunction was the amount sought to be realized under the decree at the plaintiff's valuation of the same at Rs. 1,001 was so manifestly unjust that the court was justified in rejecting the plaint under S. 54, C.P.C. 32 C. 734 ref. to; 17 C. 680 app. 11 C.W.N. 705=6 C.L.J. 427.

——**S. 7 (iv) (c) Sch. II, Art. 17, (1) Declaration and consequential relief**:—Per **Russell**, Ag. C.J.:—A suit for a declaration with consequential relief falls under S. 7 (iv) (c) of the Court Fees Act and so it is a suit "other than" suit referred to in Cls. (v) (vi) (ix) and (x) (d) of that section. 8 Bom. L.R. 885=31 B. 73.

——**S. 7, Cl. 4. (c)—Declaration and Consequential relief**—Cancellation of a document—Specific Relief Act, S. 39:—A suit for cancellation of a document under S. 39 of the Specific Relief Act is a suit for a declaration and consequential relief, to which S. 7, Cl. (4), of the Court Fees Act applies. 5 A. 331 diss. from.— 6 Bom. L.R. 1125=29 B. 207.

——**S. 7 (iv) (c), Schedule II, Art. 15—Declaration of marriage—Marriage not admitted—Prayer for a declaration that the marriage took place**:—Art. 15 of Schedule II of the Court Fees Act applies only where the marriage between the parties is admitted and a declaration that the marriage took place is prayed for. S. 7, (iv) (c) applies to such a case.— 28 C. 567.

——**S. 7 (iv) (c) Declaratory relief.**

—Appeal from decree cannot be valued as one for mere declaration where plaint asks for consequential relief also. 68 Ind. Cas. 577=34 C.L.J. 529=26 C.W.N. 177=A.I.R. 1922 Cal. 203.

8. Declaratory suit.

——**S. 7 (iv) (c) and Sch. II, Art. 17 (iii) Declaratory suit—Court-fee.**

A suit for a declaration that plffs. were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong and not binding on them falls under Art. 17 (iii) of the Court-fees Act. 4 P.L.J. 302=50 Ind. Cas. 298.

——**S. 7 (iv) (c), Proviso (Madras), Art. 17-A (1) of Sch. II—Declaratoty suit — Injunction prayed for as further relief**—Reliefs not founded on the same facts—Court-fee payable.

A suit was filed for declaration that the plantiff was entitled to the suit properties and for a permanent injunction restraining the defendants from interfering with the plaintiff's possession. The plaintiff paid a court-fee of Rs. 100 under Art. 17-A (1) of Sch. II of the Court-Fees Act for the relief of declaration of title valuing the properties at Rs. 5,200 and an **ad valorem** Court-fee on Rs. 50-10-0 being half of ten times the kist for the relief of injunction.

Held, that the court-fees paid by the plaintiff was correct. On the facts as alleged in the plaint, which must be assumed to be correct for the purpose of determining the court-fee, it cannot be said that the relief of injunction is consequential on the relief of declaration because both the reliefs are not founded on the same set of facts. 51 M.L.J. 67, **ref.** I.L.R. (1950) Mad. 242=62 L.W. 460=1949 M.W.N. 469=(1949) 2 M.L.J. 117.

S. 7 (iv) (c)—Declaratory suit—Suit for declaration of Plaintiff's right to a fourth share in mirasi office—Valuatiom for jurisdiction at certain amount—Court-fee is payable **ad valorem** on same valuation for the consequential reliefs.

In a suit for a declaration of his right to a fourth share in a **mirasi** office in a temple as cook entitled to certain emoluments, the plaintiff valued the suit for purposes of jurisdiction at Rs. 3,100 and paid for the declaration he sought court-fee of Rs. 100 under Art. 17-B of Sch. II of the Court-Fees Act. He asked for certain consequential reliefs, one of them being, for an injunction to the temple committee to cancel certain orders and to permit him to perform his duties and enjoy the emoluments. He valued this relief at Rs. 100 and paid a court-fee of Rs. 11-3-0.

Held, as the plaintiff has taken upon himself to value the office which he substantially seeks to recover at Rs. 3,100, he cannot be heard to say that he can value his relief for purposes of jurisdiction at Rs. 3,100 and then that for purposes of consequential relief, the value of the suit is incapable of valuation to evade court-fee on this ground by valuing it at Rs. 100. Art. 17-B does not apply and **ad valorem** court-fee is payable. 1949 M.W.N. 473=(1949) 2 M.L.J. 65

—**S. 7 (iv) (c) and (v)—Declaratory suit—Suit for** possession of property alienated by Hindu widow with declaration that plaintiff was owner of property and that sale deed in respect thereof was illegal—**Held,** relief of possession being principal relief and not consequential relief suit was governed by S. 7 (v) and not by S. 7 (iv) (c)—Market value at date of suit held should be considered. A.I.R 1946 Bom. 363=48 Bom. L.R. 193.

——**S. 7 (iv) (c) and Sch. II, Art. 17 (iii)—Declaratory suit**—Suit for two declarations, second consequential on first—S. 7 (iv) (c) applies and not Sch. II, Art. 17 (iii).

In order that a suit should fall within S. 7 (iv) (c) the consequential relief prayed for by the plaintiff need not necessarily be a relief other than a declaratory relief. Hence a suit for a declaration that certain darga and other properties belonging to the darga are not wakf within the meaning of the Mussalman Wakf Act of 1923 and hence are not liable to registration under the Bombay Amendment Act 18 [xviii] of 1935, falls under S. 7 sub-cl. (iv) (c) and not Sch. II, Art. 17 (iii) because the second declaration is not an independent declaration but merely one which is consequential upon the first. A. I. R. 1946 Bom. 167=47 Bom. L. R. 859=I. L. R. (1945) Bom. 1080.

——**S. 7 (iv) (c) and Sch. 2 Art. 17 (iii) Declaratory Suit**—Suit for declaration that decree passed by certain Court is null and void and for such other relief as Court deems fit—Suit falls under S. 7 (iv) (c) and not under Sch. II, Art. 17 (iii). A.I.R. 1946 Nag. 251=1946 Nag. L. Jour 246=I.L.R. (1946) Nag. 578.

——**S. 7 (iv) (c)—Declaratory suit—Suit for declaration that decree is void and ineffective—Art. 17 (v), Sch. II (Bombay).**

A Suit for declaration that a decree for Rs. 5,366 odd is void and ineffective is governed by

Sch. II, Art. 17 (v) as amended by Bombay Finance Act and not by S. 7 (iv) (c). S. 8, Suits Valuation Act does not govern the suit which must bear a Court-fee stamp of Rs. 15. A.I.R. 1945 Bom. 474=47 Bom. L.R. 386.

—S. 7 (iv) (c)—Declaratory suit—Plaintiff can frame suit in any manner—Further relief deliberately not asked—Court's duty—plaintiff, if can claim that Court-fee paid is sufficient.

The plaintiff is entitled to frame a suit in any manner he likes and there is no duty cast upon the Court to give him advice that unless he seeks further relief, his suit may not be successful. The plaintiff takes the consequences of his selection and he runs the risk of his suit being dismissed if later on it is found by the Court that the case was one in which a further relief should have been asked by the plaintiff. In cases in which the plaintiff makes up his mind beforehand that he is not going to claim further relief and he deliberately so frames his suit as to avoid asking for further relief, all that the Court has to see is whether on the allegations set forth in the plaint, the suit is one for a mere declaration or it is a suit for a further relief plus a declaration though the real nature of the claim is concealed. In cases of this kind, the plaintiff is certainly entitled to institute a suit for a mere declaration and he can say to the Court that as no further relief is claimed by him, the court-fee paid by him is quite sufficient. A.I.R. 1937 All. 411=1937 A.L.J. 562=1937 A.W.R. 480=I.L.R, (1937) All. 259=170 Ind. Cas. 459.

—S. 7 (iv) (c)—Declaratory suit.

—Suit by decree-holder for declaration that conveyance made by judgment-debtor is void and that property is capable of attachment.

A suit by a decree-holder for a declaration to the effect that a deed of gift and a sale-deed executed respectively by his judgment-debtor and his judgment-debtor's wife were fictitious and void and the property covered by the two deeds was capable of being attached and sold in execution of the plaintiff's decree is a suit for a mere declaration without a prayar for consequential relief and requires only a Court-fee of Rs 10. A.I.R. 1931 Oudh 72=8 O.W.N. 124=130 Ind. Cas. 344.

—S. 7 (iv) (c) (U.P.) Declaratory suit—Prayar to declare trust executed by defendant null and void.

The plaintiff sued to recover certain properties on the basis of his being an adopted son. The plaint among other reliefs contained a prayer for declaration that the trust deed executed by the defendant in respect of a dharmshala was null and void on the ground that that dharmshala was built by the defendant on the plaintiff's land with plaintiff's money. The plaintiff valued the dharmshala at Rs. 5,000 and paid ad valorem court-fee thereon. On the objection of the Inspector of Stamps that the proper valuation of the property was Rs. 20,000 because that was the valuation mentioned inthe deed of trust executed by the defendant:

Held, that the plaintiff was entitled to put his own valuation on the relief claimed. It was open to the defendant to raise an objection on the ground that the relief had been under-valued and the Court could on such objection have made proper inquiry and asked the plaintiff to amend the valuation if necessary until the valuation put by the plaintiff was proved to be wrong. **Ad valorem** court-fee must be determined only upon that basis. A.I.R. 1944 All. 84=1944 A.L.J. 70=1944 O.W.N. (H.C.) 25=1944 A.W.R. (H.C.) 38=I.L.R. (1944) All. 133=213 Ind. Cas. 412.

—S. 7 (iv) (c)—Declaratory suit.

—Suit by stranger for declaration that property sold at auction sale was his and was not liable to be sold in execution of decree passed in suit in which he was not represented—Suit held fell under Sch. II. Art. 17 (iii) and not S. 7 (iv) (c)—Relief for cancellation held mere surplusage. A.I.R. 1943 Lah. 348=I.L.R. (1943) Lah. 565=46 P.L.R. 83=210 Ind. Cas. 218.

—S. 7 (iv) (c)—Declaratory suit.

—Suit under S. 42, Specific Relief Act, for declaration that decree obtained against plaintiff is null and void—No consequential relief to set aside decree—Court finding such relief essential—Suit is bad—Plaintiff asked to pay additional court-fee but plaintiff persisting in refusing—Case should be dismissed. A.I.R. 1942 Pat. 309 8 B.R. 107=197 Ind. Cas. 185.

—S. 7 (iv) (c)—Declaratory suit—Relief for declaration that plaintiff is owner of property does not include relief for possession—Court-fee payable is not ad valorem but only Rs. 15.

The Law allows a plaintiff if he is in possession of property or if the defendent is not in possession to get a declaratory decree, only that he is the owner of the suit property. If he is out of possession and if he gets a declaratory decree he will not be entitled to take possession under that decree. The relief for possession is not implied in the relief for such a declaration and the plaintiffs need not pay a court-fee for possession. When the plaintiff has claimed two such declarations in respect of two sets of properties, comprising two causes of action, he has to pay Court-fees of Rs. 15 only on each relief. A.I.R. 1942 Oudh 58=1941 O.W.N. 1107=1941 R.D. 857=1941 A.W.R. Rev. 877=17 Luck. 145=196 Ind. Cas. 593.

——S. 7 (iv) (c)—Declaratory suit.

——Plaintiff asking for declaration that he was shebait and properties in schedule belonged to idol—Relief for removal of defendants from shebaitship, framing scheme of management, injunction restraining defendants from dealing with certain property as secular and accounts—Claim for accounts valued tentatively at Rs. 100 and remaining reliefs at Rs. 2,000, Court fixing value of injunction alone at Rs. 6,975.

Held, that in so far as the suit was one under S. 7 cl. (c) of para. (iv), the relief sought was a declaration coupled with consequential relief and it would not be right to detach the declaration from the consequential relief and value them separately. The declaration asked for was as regards the character of the properties in suit and the status of the plaintiffs as **Shebaits** and this was a relief which, taken by itself could not be estimated at a money-value, but admitted of such valuation only if it was coupled with the consequential relief prayed for,

The consequential relief here was the framing of a scheme of management, and also the injunction, though the latter might be regarded as an independent relief by itself. The plaintiffs had put their own valuation on the declaration and the consequential relief at Rs. 2,400, but as the Judge had found the injunction alone should be valued at Rs. 6,975 and as there was no objective standard by which the other part of the relief, namely the framing of a scheme could be valued, the total valuation of the suit under cl. (c) of para. (iv) should be raised from Rs. 2,000 to Rs. 6,975. In addition to this, the plaintiffs must pay a fixed fee of Rs. 15 on the prayer for removal of the defendants from Shebaitship, and as for the prayer for accounts, they should pay ad valorem on their own tentative valuation of Rs. 100. A.I.R. 1941 Cal. 509=197 Ind. Cas. 128.

—S. 7 (iv) (c), Sch. II, Art. 17 (vi), Sch. I, Art. 17, —Declaratory suit—Suit for declaration that property is waqf and alienations thereof are ineffectual against waqf property.

Where the plaintiff sued for a twofold declaration that the property described in the plaint was waqf and that certain alienations thereof by the mutwalli and his brother were null and void and were ineffectual against the waqf property:

Held, that the first part of the relief viz., that it be declared that the property in dispute was waqf was purely declaratory and it involved no consequential relief. Had it stood by itself, a court-fee of Rs. 10 would undoubtedly have been sufficient. The second part of the declaration, however, stood on a different footing. The plaintiff wished to have the alienations of the waqf property to be declared null and void and ineffectual as against the waqf property. In substance, the second part of the relief as claimed was tantamount to the setting aside or cancellation of the alienations reffered to in the plaint. In the circumstances. the relief claimed by the plaintiffs could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief. The relief claimed in this case could not be treated as a declaration with a 'consequential relief' falling within S. 7 (iv) (c), Court-fees Act. The relief claimed fell neither under S. 7 (iv) (c) nor under Sch. II, Art. 17 (iii) but under the residuary article, Schedule I, Art. 17, and a court-fee of Rs. 10 was sufficient for the first relief as to declaration that the property was waqf, but the second relief which was a substantive one in the shape of setting aside of alienations required ad valorem court-fee on the value of the subject-matter of the sales.

Held, also that even if the suit were held to fall under S. 7 (iv) (c), it was doubtful whether that would help the plaintiffs in this case. The plaintiffs had themselves valued the relief in the plaint at rupees ten lacs. They did so, for purposes of jurisdiction but they were bound to fix the same for the purposes of court-fee in view of Ss. 8 and 9, Suits Valuation Act.

Held further that the suit did not fall within the purview of S. 42, Specific Relief Act. A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.).

[Overrules (1) 18 P R. 1913=19 Ind. Cas. 219 (2) (2) A.I.R. 1923 Lah. 373=73 Ind. Cas. 767.]

—S. 7 (iv) (c), Sch. II, Art. 17 (iii) Declaratory suit—Suit for declaration to recover dower debt from certain property—Declaration falls under S. 42, Specific Relief Act—Decree sought is declaratory without any consequential relief—Suit falls under Sch. II. Art 17 (iii) and not S. 7. (iv) (c) 1939 OW.N. 152.

—S. 7 (iv) (c), (iii) and (v)—Declaratory suit —Title suit in guise of partition suit—Proper court-fee—Partition suit—Plaintiff claiming more property than already possessed—Value of suit for purposes of court-fee.

When a partition suit is actually in the nature of a title suit, ad valorem court-fee is payable by the plaintiff, whether the suit is regarded as governed by S. 7 (iv) (c), or by sub-ss. (iii) or (v) of S. 7, Court-fees Act.

In a suit for partition, the plaintiff alleged that a private partition had been unfair. He estimated his loss at a certain figure. He asked the Court to set aside the partition and stated that he was in possession of what purported to be his share in the joint family but that that property in his possession was of less value than the property to which he was entitled:

Held, that the value of the suit for purposes of court-fee would be the difference between the value of the property in his possession and the value of property claimed by him as coming to his share. A. I. R. 1939 Pat. 274=18 Pat. 267=5 B. R. 893=183 Ind. Cas. 281.

—S. 7 (iv) (c), (a)—Declaratory suit—Prayers in plaint that (1) plaintiff's title to property be declared and possession confirmed, (2) decree given to defendants as claimants of property be declared void, and (3) for injunction not to disturb plaintiff's possession—Amendment deleting first prayer—Suit, whether still one for declaration.

Where the prayers in the plaint are (1) that the plaintiff's title to the property be declared and his possession thereof be confirmed; (2) that the decree obtained by the defendants as claimants of property was void and inoperative as against the plaintff; (3) that a permanent injunction be issued against the defendants that they may never disturb the possession of the plaintiff and the plaintiff wants by his amendment that his prayer (1) be deleted, viz., the declaration of his title and confirmation of possession, but he keeps the other two prayers, these prayers cannot be granted to the plaintiff unless he proves his own title to the property and his possession thereof. The suit in spite of amendment is in effect a suit for declaration of the plaintiff's title to the property and permanent injunction against the defendants that they may not disturb his possession. The suit being a declaratory suit comes under S. 7 (iv) (c), Court-fees Act, to obtain a declaratory decree or order where consequential relief is prayed and (d) to obtain an injunction. A.I.R. 1938 Cal. 302=66 C.L.J. 462=175 Ind. Cas. 261.

S. 7. (iv) (c)—Declaratory suit.

—Where the plaintiff brought a suit for a declaration that the defendants had no right and were not entitled to execute the decree, the suit was one which fell under S. 7- (iv) (c) of the Court-fees Act, and hence it was for the plaintiff to value the relief

at such a figure as he chose and the Court must accept the figure put by the plaintiff. 40 P.L.R. 204.

——**Sch. II, Art. 17 (ii) — Declaratory suit**— Whether declaratory decree sought is without or with consequential relief depends not on whether plaintiff was or was not party to decree sought to be avoided but on whether or not relief comes under S. 42, Specific Relief Act.

The question whether a decree sought by a plaintiff is merely declaratory decree without any consequential relief coming under Art. 17 (**iii**), of the Second Schedule of the Court-fees Act, or whether it is a decree with consequential relief governed by S. 7 (**iv**) (**c**), of the Court-fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under S. 42 of the Specific Relief Act.

Where a mortgage was executed by the father of the plaintiff and a decree was obtained, a suit to set aside the decree in which the plaintiff alleged that if the defendants were mortgagees of certain property, they, nevertheless had no rights in it and in any case, the plaintiff himself was not bound by that decree does not fall within the purview of S. 42 of the specific Relief Act, and consequently it cannot be said to be a suit merely for a declaratory relief. A.I.R. 1938 Oudh 201=1938 O.W.N. 889=177 Ind. Cas. 550. (F.B.)

——**S. 7 (iv) (c), Sch, II, Art. 17 (vi) Declaratory suit**—Plaintiffs minors at time of compromise between adult members for partition — Preliminary decree on compromise—No partition by metes and bounds — Plaintiffs all along in joint possession — Plaintiffs' suit for (1) Declaration that preliminary decree was inoperative and (2) for partition— Court-fee payable.

Held, that as regards the first relief, the suit fell under S. 7 (**iv**) (**c**), Court-fees Act. The second relief claimed by the plaintiffs for partition of the property, which was in their joint possession in accordance with the ordinary law applicable to the circumstances of the case, clearly fell under Art. 17 (**vi**) of Sch. II. It was open to them to put such value as they thought proper under S. 7 cl. (**iv**) (c). A.I.R. 1938 Sind 189=32 S.L.R. 124=177 Ind. Cas. 498.

——S. 7. (**iv**) (c) (**d**) **Declaratory suit — Suit for** declaration that assessment made is **ultra vires** and illegal and for injunction to restrain defendant from recovering excess—Valuation, if open to revision by Court.

In a suit for a declaration that the assessment made by the Settlement Officer of Sewai income in three named villages having been in contravention of S. 8 (c), C. P. Settlement Act, was **ultra vires**, illegal and void and for a perpetual injunction to restrain the defendant from recovering the assessment in so far as it exceeded what according to the plaintiffs was the statutory limit, which only challenges the validity of the action of the public officer and in which the plaintiffs do not repudiate their liability to pay the amount for which they are assessed, the relief for a declaration that the Settlement Officer's assessment is **ultra vires** and illegal is the substantive relief and the prayer for injunction for recovering the questioned assessment is a secondary relief which follows as a consequence from the grant of the main relief. Consequently, the suit falls within S. 7. (**iv**) (c) and (**d**), Court-fees Act, and the plaintiffs' valuation is not open to revision by the Court. A.I.R. 1937 Nag. 14 =165 Ind. Cas. 106.

——**S. 7 (iv) (c), Sch. II, Art. 17 (iii)—Declaratory suit—Suit by decree-holder for declaration of his rights to pursue attached Property**—Injunction to restrain defendants from objecting to attachment and sale—suit held merely one for declaration—Court-fees payable are under Sch. II, Art. 17 (iii). A.I.R. 1937 Sind 248= 171 Ind. Cas. 900.

——**S. 7 (iv) (c)—Declaratory suit.**

—Suit for declaration and compelling lambardar **to accept revenue.**

In a suit for a declaration that a certain **lambardar** cannot refuse to accept land revenue and for compelling him to accept revenue, the court-fee is governed by S. 7 (iv) (c), Court-fees Act and in such cases the Court should not allow the plaintiff to reduce the jurisdictional value of the suit. 163 Ind. Cas. 227=38 P.L.R. 688.

——**S. 7 (iv) (c)—(Madras Proviso)—Declaratory suit—Suit for declaration that plaintiff is entitled to take water for his land free of irrigation cess and for refund of cess—Proper court-fee— Meaning of the proviso.**

Where the plaintiff who was a **mittadar** brought a suit against the Secretary of State for a declaration that in respect of certain lands in his **mitta** he was entitled to take water from a river free of irregation cess and for refund of a sum which according to him had been illegally levied from him:

Held, that the suit was not one with reference to immovable property within the meaning of the proviso added to S. 7, cl. (iv) (c) of the Court-fees Act, as amended by Madras Act V of 1922:

Held further, that the words 'relief sought' in the said proviso must be read as relating to the words 'consequential relief' in cl. (c) of the main Act and the consequential relief in the present case being a claim for recovery of money, the case did not fall within the proviso. A.I.R. 1936 Mad. 201=1936 M.W.N. 115=43 L.W. 192=70 M.L.J. 625=59 M 962=160 Ind. Cas. 939.

——**S. 7 (iv) (c)—Declaratory suit—Suit for injunction and declaration—Plaintiff valuing relief for jurisdiction—Court-Fees payable.**

When the plaintiff in a suit for declaration and injunction chooses to value the relief at a certain figure for the purposes of jurisdiction, he is bound to pay court-fee on the same amount. A.I.R. 1935 Lah. 698= 38 P.L.R. 349=161 Ind. Cas. 173.

——**S. 7 cls. (iv) (c), (v), (xi), (cc)—Declaratory suit—Suit by inamdar for ejectment—Title to kudivaram in dispute.**

Where an **inamdar** claiming both the **warams** sues to eject the tenants after giving them notice and the tenants dispute his claim for **kudivaram** and set up occupancy right, the suit is really one for a declaration that the plaintiff is entitled to the **kudivaram** and for consequential relief of possession and court-fee is payable under S. 7 cl. (iv) (c) and not under cl. (xi) (cc) or cl. (v) (e). A.I.R. 1933 Mad. 42=63 M.L.J. 759= 1932 M.W.N. 1197=36 L.W. 701=56 M. 314=140 Ind. Cas. 462.

——S. 7, (iv) (c)—Declaratory suit—Minor—Suit for bare declaration that mortgage is void—Consequential relief, whether should be prayed for.

It is open to a minor plaintiff to institute a suit for a bare declaration that a deed of mortgage executed by him is void as against him. He need not ask for any consequential relief in such a suit and S. 7, cl. (iv) (c) Court-Fees Act is not applicable. A.I.R. 1933 Rang. 109=11 R. 66=143 Ind. Cas. 541.

——S. 7 (iv) (c)—Declaratory suit.

——Where appellants who were defendants in a suit for sale on mortgage claimed to be prior mortgagees but trial Court found that they were subsequent mortgagees and they preferred an appeal claiming declaration that these mortgages were in appeal prior to that of plaintiff:

Held, that prayer in appeal was not one for a mere declaration falling within Art. 17, (iii) and appellants must pay an **ad valorem** court-fee on their interest in property in dispute. A.I.R. 1932 All. 221=54 A. 347=140 Ind. Cas. 39.

—S. 7 (iv) (c)—Declaratory Suit.

——Decree not binding on plaintiff—No prayer for setting aside decree.

A suit for a declaration that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff does not fall under S. 7 (iv) (c) but is governed by Art. 17, Sch. II. In such a case, no further consequential relief by way of setting aside the decree is necessary. 34 C.W.N. 1129=A.I,R. 1939 Cal. 787=53 C.L.J. 91=58 Cal. 474=130 Ind, Cas. 369.

——S. 7 (iv) (c) Declaratory Suit.

—Right to a cheque where drawee is not a party.

A suit was brought for a declaration to establish plaintiff's right to obtain payment under a cheque or at any rate for a declaration that the cheque was endorsed to him for valuable consideration. At first the Bank on which the cheque was drawn was made a party defendant but the trial Court struck off its name as an unnecessary party.

Held, that after striking off the Bank's name the suit became one for mere declaration, such a suit was sustainable and so ad valorem Court-fee was not necessary. 119 Ind. Cas. 158=A.I.R. 1929 Mad. 572.

——S. 7 (iv) (c)—Declaratory suit.

——Title to property.

Where a plaintiff instead of merely claiming to be the landlord wants a declaration of his title also, the prayer as to declaration cannot be called unnecessary and so the suit will be governed by S. 7 (4) (c) and not by S. 7 (11) (cc). 30 Mad. 101 (F.B.) Dist. 119 Ind. Cas. 577=29 M.L.W. 760=1929 M. W.N. 239 =A.I.R. 1929 Mad. 529.

——S. 7 (iv) (c)—Declaratory suit.

—To prevent a sale.

Where the plaintiff's case was that he was the next heir to an inalienable estate which the then holder was about to sell for Rs. 40,000 and he prayed for a decree in the form of a declaration that would prevent him from doing so.

Held, that the Court-fee payable for such a claim was the ad valorem fee on that sum. 110 Ind. Cas. 163=A. I. R. 1928 Nag. 243.

——S. 7 (iv) (c)—Declaratory suit.

—Substance of the claim.

Where reliefs appear on the face of them to be of a declaratory nature, but they are really consequential ones, ad valorem Court-fees must be paid. A. I. R. 1924 Cal. 731, Foll. 106 Ind. Cas 335=31 C. W. N. 1045=A. I. R. 1927 Cal. 775.

——S. 7 (iv) (c)—Declaratory suit.

—Annuity.

A suit for a declaration that the plaintiff was the owner of the Toda Giras Hak annuity of a certain amount received by a certain lady, as her heir and as such entitled to recover the same, comes within S. 7 (iv) (c) and the court-fee stamp would be according to the amount at which the relief sought was valued in the plaint and the same is the value of the suit for purposes of jurisdiction. 87 Ind. Cas. 801=27 Bom. L. R. 247=A. I. R. 1925 Bom. 282.

——S. 7 (iv) (c)—Declaratory suit.

—Mortgage decree—Fraud.

A suit for a declaration that the mortgage decree passed against the plaintiff does not bind him as having been obtained by fraud, and praying that the former case be restarted, should be stamped ad valorem. 86 Ind. Cas. 680=7 L. L. J. 15=26 P. L. R. 73=A. I. R. 1925 Lah. 346.

——S. 7 (iv) (c)—Declaratory suit.

—Sale deed not binding—Coparcener.

A suit in which the plaintiffs ask for a declaration that a sale deed of the joint properties by their father is not valid and binding on them must be treated as a suit for the cancellation of the deed and an ad valorem fee is requisite. 91 Ind. Cas. 709 =22 M. L. W. 515=1925 M. W. N. 777=A. I. R. 1925 Mad. 1248=50 M. L. J. 406.

——S. 7 (iv) (c)—Declaratory suit.

—Mortgage by coparcener—Sch. 2, Art. 17 A (1).

Where the question is whether a suit is governeb by S. 7, Cl. 4 (c) or by Schedule 2, Art. 17 A (1) the answer must depend upon the relief which the plaintiff prays for because court fee must be determined with reference to the prayer contained in the plaint.

Where the plaintiffs who are some of the members of a Hindu joint family ask for declaration that the mortgage executed by some other members of the family is not supported by consideration and is not binding upon them, the suit falls under 2nd schedule, Art. 17-A (1) as a declaratory suit and not S. 7 Cl. 4 (c). 30 Cal. 788, Foll. 30 Mad. 18, 38 Mad. 922 (F. B.) and A. I. R. 1924 Mad. 611, Ref. 87 Ind. Cas. 660 =21 M. L. W. 649=1925 M. W. N. 276=A. I. R. 1925 Mad. 713=48 M. L. J. 688.

——S. 7 (iv) (c)—Declaratory suit.

——Where declaration can give full relief.

A consequential relief can be insisted upon only when the plaintiff will not get any redress by having

merely a declaratory decree. For instance, when the property is in possession of the defendant, the plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as consequential relief. But where a mere declaration is sufficient to give the plaintiff full relief, a further declaration will be deemed to be redundant, and the fact that the plaintiff asked for a reundant relief will not alter the nature and scope of the suit and make the suit one for a declaration with consequential relief.

Where the suit is for declaration that certain transactions diminishing defendant's share in joint family property so as to save it from attachment and sale in execution of plaintiff's decree, were void, and for declaration of plaintiff's right to realize their decree from the property, the latter relief is unnecessay and the suit is only a suit for declaration and not for declaration with consequential relief. It falls within Sch. II, Art. 17 (3) and not S. 7 (iv) (c) of the Act. 80 Ind. Cas. 655=3 Pat. 795= Pat. L.T. 82=A.I.R. 1925 Pat. 44.

——**S. 7 (iv) (c) Declaratory suit—Heirship.**

A suit by the heir of a lunatic for a declaration that he is entitled to the property of the lunatic which is in the custody of the manager appointed by the Court requires Rs. 10 Court-fee stamp. 72 Ind. Cas. 495= A.I.R. 1924 Pat. 385.

——**S. 7 (iv) (c) Declaratory suit—Sale of joint family Properties.**

Where the members of a joint Hindu family sue for a declaration that a sale of joint family property held in execution of a decree obtained on a handnote against some members of the family, is null and void to the extent of the plaintiff's shares in the property, the suit is a suit for a declaration with consequential relief. 1 Pat. 197=A.I.R. 1922 Pat. 404.

——**S. 7 (iv) (c)—Declaratory suit—Suit to declare invalidity of adoption.**

For the sake of Court-fees a suit to declare that an adoption did not take place is one to declare it invalid; and where it affects title to immoveable property **ad valorem** fee is to be charged. 58. Ind. Cas. 965 (Nag.)

——**S. 7 (iv) (c) and (d)—Declaratory suit—Suit for declaration of title to land comprised in deft's miras patta—Valuation.**

For jurisdiction, a suit for declaration of title to land in plff.'s possession and for a perpetual injunction against the deft., who resists the plff.'s claim on the strength of a **miras patta** which includes the land, should be valued at the market value of the land actually in suit and not of the whole area comprised in the **miras patta** although the decision of the suit in plff.'s favour would set aside the whole **miras patta**. 36 Ind. Cas. 615 (Cal.)

——**S. 7 (iv) (c)—Declaratory suit—Consequential relief.**

A suit for a declaration that the plaintiff is the real owner of a decree obtained by defendants against a third party and praying for transfer of the decree to the plaintiff is a mere declaratory suit on which no consequential relief is sought. (20 Bom. 736, 30 Cal. 788, Pol.) 25 Cal. 49; 26 Cal. 845; Dist. 47 P.L.R. 1911 =22 P.W.R. 1911=1 P.R. 1911=9 Ind. Cas. 673.

——**S. 7 Cl. 4. (c)—Declaratory suit—Declaration of voidness of will:**—The court fee payable on a plaint containing merely a prayer for declaration that a will disposing of certain property is not binding on the plaintiff is not an **ad valorem** duty on the value of the property affected, but only the duty payable in a declaratory suit. 15 M.L.J. 469=28 M. 560.

——S. 7 Para. 4, Cl. (c)—**Declaratory Suit**—A suit in which the plaintiffs prayed for declaration that a Jenm sale-deed of the suit properties was not valid and binding on the tarward of the plaintiffs (most of the plaintiffs having been parties to the deed through their mother as guardian) should be stamped with **ad valorem** fee as for cancellation of the deed. 20 M.L.J. 791=7 M.L.T. 177=5 Ind. Cas. 927 (1).

9. Injunction.

——**S. 7 (iv) (c)—Injunction—Site belonging to temple—Suit regarding—Site whether has got market value.**

The suit was filed for a declaration that the suit plot of land was trust property, that its alienation by the second defendant in favour of the first defendant was void and for a consequent injunction restraining the defendants from interfering with the rightful possession of the plaintiff.

Held, that court-fee was payable as for two separate declarations, one as regards the nature of the property and the other as regards the validity of the alienation and also on the consequential relief by way of injunction.

Held also, that the suit forming the subject-matter of the suit had a market-value. 61 L.W. 280=1948 M.W.N. 257=A.I.R. 1948 Mad. 345=(1948) 1 M.L.J. 269.

——**S. 7 (iv) (c) (Mad.) Injunction—Suit regarding temple property**—Claim for declaration, injunction and accounts—Inam land having cocoanut trees—Valuation—Jurisdictional value of suit.

The plaintiffs claiming to be hereditary trustees of a temple instituted a suit for permanent injunction restraining the defendants from interfering with the plaintiffs' management of the suit temple and its properties, delivery of cash and moveables and for a declaration that the plaintiffs were the sole trustees and managers of the temple. The reliefs were valued separately, the injunction under S. 7 (iv) (d), the relief for account on the value of the claim made under S. 7 Cl. (i) and the declaration under Art. 17-B of Sch. 11 of the Court-Fees Act. The Court below on a consideration of the allegations in the plaint came to the conclusion that the relief for declaration and injunction fell under S. 7 (iv) (c) of the Court-Fees Act. The Judge however in arriving at the valuation took into consideration the value of the moveable properties included in the suit.

Held, that plaintiffs were bound to pay Court-fee under the proviso to S. 7 (iv) (c) of the Court-Fees Act as amended in Madras, only on the value of the immoveable property forming the subject-matter of the suit.

Held also, that where the land consisted of inam land falling under S. 7 (v) (c) of the Court-Fees Act the fact that there were cocoanut trees on the land was no ground for requiring the land to be valued otherwise than on the basis of fifteen times the net profits,

Held, further, that the jurisdictional valule of the suit was the value as ascertained under S. 7 (iv) (c) together with the value of the claim for accounts. A.I.R. 1948 Mad. 344=1948 M.W.N. 175=61 L.W. 179=(1948) 1 M.L.J. 193.

——**S. 7 (iv) (c) and (d)—Lahore High Court Rules 4 and 7 (11) nnder S. 9, Suits valuation Act**—Injunction—Suit for injunction for closing drain—Valuation for jurisdiction and court-fee.

Where, in a suit, one of the reliefs sought is the injunction for the closing of a drain, the case clearly comes under R. 4 by virtue of R. 7 (11) framed by the Lahore High Court under S. 9, Suits Valuation Act, and thc plaintiff is bound to put a value for purpose of jurisdiction at a figure above Rs. 100 and not exceeding Rs. 500 and for purposes of court-fee, he can put any value which he honestly thinks proper and it need not be the same as the artificial jurisdiction value fixed by R. 4 (b). A.I.R. 1946 Lah. 94=47 P.L.R. 436=224 Ind. Cas. 4 (FB).

——**S. 7 (iv) (c) and (d)—Injunction—Suit for injunction for protecting easement—Held,** on frame of plaint, that suit fell within S. 7 (iv) (d).

It is well-established that in matters of court-fee and pecuniary jurisdiction, one must look to the real substance of the suit and not the form in which it has been clothed. If, therefore, there is any legal necessity for the plaintiff to get a declaration of his right of easement before he can get an injunction to protect it, the suit would have to be filed under S. 7 (iv) (c), Court-fees Act, even though he has sought this declaration by means of averments in the body of the plaint and not by praying for a declaration specifically amongst the reliefs at the end of the plaint. The safe rule is that when there is some legal obstacle which has th be removed before a consequential relief can be granted, it is incumbent upon the plaintiff to pray for a declaration which will have the effect of removing that obstacle. But if the plaintiff merely avers a title which can be established without the cancellation of a document or the nullification of any adverse title and only claims the relief which would naturally flow from the establishment of the title which he avers, it is not necessary for the plaintiff to pray expressly for a declaration of that title.

The plaintiff's case was that irrigation works in his occupation situate within the Hyderabad State, received their customary supply of water from the overflow of tanks belonging to the defendant and situate in British India and that the plaintiff had a right to require that the defendants should do nothing to the tanks in his possession which would adversely affect the customary flow of water to the tanks of the plaintiff. Consequently he demanded a series of injunctions restraining the defendant from carrying out projected works which, it was alleged, would endanger the customary flow of water to the plaintiff's tanks:

Held, that on the frame of the suit, all that the plaintiff had to do was to prove by evidence that he had a subsisting right of easement to the extent and of the nature claimed. If the evidence established the existence of this right, there was no legal impediment which had to be removed before the injunction protecting that right would be granted; and whether he had or had not sued for declaration, it was not necessary for him to pay court-fee on the footing that the finding which he sought as to his title was really a declaration, necessarily required as a preliminary to the grant of the injunction. The plaint, therefore, fell only under S. 7 (iv) (d), and not under S. 7 (iv) (c), and the plaintiff was entitled to place his own valuation on the injunction which he sought. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=52 L.W. 610=1940 M.W.N. 1062 = I.L.R. (1941) Mad. 157=195 Ind. Cas. 439.

——**S. 7 (iv) (c) Injunction.**

Suit by plaintiff in possession of property for permanent injunction restraining defendant from executing decree obtained by him—Objective standard of valuation, stated.

In a case where the plaintiff who is in possession of property is suing for a permanent injunction restraining the defendant from executing a decree obtained by him, the objective standard of valuation must be taken to be represented by the extent to which the plaintiff will be benefitted if he succeeds in his suit. It would, therefore, be necessary during the course of an enquiry under S. 8-C. Court-fees Act, to estimate the value to the plaintiff of the property, which is the subject-matter of suit, without the permanent injunction which is sought by him, and also on the assumption that a permanent injunction could be obtained. The difference in the amounts of these two estimates would be the measure of the value of the relief sought by the plaintiff and it would be according to the figure thus obtained that the plaintiff's suit should be valued. A. I. R. 1940 Cal. 560= I.L.R. (1940) 2 Cal. 33=44 C. W. N. 591=192 Ind. Cas. 279.

——**S. 7. cl. (iv) (c) Injunction—Suit to set aside** auction sale and for injunction — Plaintiff in possession of property—Property found in another suit inter partes to be worth Rs. 12,000 but sold at auction for one pice—Suit valued at one pice —Valuation put held correct.

The petitioners brought a suit in the Court of the Munsif against the opposite party for setting aside a sale held in a certificate case and for an injunction restraining the opposite party, who was a purchaser at such sale, from taking possession of the property. The property had been found to be worth at least Rs. 12,000 in another proceeding inter partes, but it had been purchased by the certificate-holder himself for one pice. The petitioners, however, were in possession. In this suit, they prayed that the sale might be held to be illegal and might be set aside. The petitioners, accordingly framed the suit under S. 7 cl. (iv), sub-cl. (c), Cour-fees Act, and put the valuation at the price for which the opposite party had purchased, viz., one pice and paid court-fees thereon:

Held, that as no objective standard of valuation was available in so far as the petitioner's claim was concerned, he was entitled to put his own valuation. A. I. R. 1939 Cal. 278=184 Ind. Cas. 106.

—S. 7 (iv) (c)—Injunction.

——Suit for permanent injunction—question of title incidentally raised—Prayer for declaration of title, whether neceesary—Proper court-fee.

The fact that the question of title also may have to be incidentally gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction.

Where in a suit for a permanent injunction, the Court, finding that the question of title has also to be gone into, directed the plaintiff to amend the plaint by adding a prayer for a declaration of title to the properties mentioned in the plaint and also to value the suit in accordance with the proviso to S. 7 (iv) (c) of the Court-fees Act:

Held, that the suit for a permanent injunction alone was maintainable and it was properly valued as such, and the order directing amendment was illegal. A.I.R. 1936 Mad. 200=1936 N.W.N. 113=43 L.W.334=160 Ind. Cas. 993.

—S. 7 (iv) (c)—Injunction—Suit for declaration and injunction.

The plaintiffs sued for a declaration that a certain compromise was illegal and that the decree based thereon was not binding on them, and in the alternative for a declaration that the land in dispute was waqf property and for an injunction against the defendants not to interefere with it. They valued the suit for purposes of jurisdiction at Rs. 2,100, being Rs. 2,000 for the declaration and Rs. 100 for the injunction but a court-fee of Rs. 10 was paid for the declaration and Rs. 7-8-0 for the injunction:

Held, that the suit fell under S. 7 (iv) (c), Court-fees Act, and court-fee was payable on the entire sum of Rs. 2, 100. A.I R. 1931 Lah. 307=32 P.L.R. 193=133 Ind. Cas. 120 (2).

—S. 7 (iv) (c) Injunction.

——Suit for injunction to restrain defendant from executing decree for money against plaintiff.

Where the plaintiff seeks an injunction restraining the defendants from enforcing a pure and simple money decree passed against him prosonally, there is no difficulty in ascertaining the benefit which he expects to derive from the injunct on sought which is equivalent to the decretal amount and he cannot, therefore, put an arbitrary value up on the injunction. This is the more so when a part of the decretal debt has actually been satisfied by attachment of another decree passed in his favour against the defendants and by appropriation of the amount due under that decree towards payment of the amount due under the decree which is sought to be set aside. A.I.R. 1931 Sind 15=25 S.L.R. 15=130 Ind. Cas. 445.

—S. 7 (iv) (c) and Sch. II Art. 17 (vi)—Injunction —Suit for removal of defendant from shebaitship—Prayer for injunction restraining defendant from wasting or possessing debuttar properties—Court-fee payable.

In a suit for removal of the defendant from shebaitship and for the appointment of any competent person as shebait and for injunction restraining the defendant from wasting or possessing the debutter properties, court-fee payable is ad valorem on the valuation of the debutter property. A.I.R. 1934 Cal. 250=58 C.L.J. 171=149 Ind. Cas. 1044.

—S. 7 (iv) (c)—Injunction.

——Execution sale illegal—Injunction.

A suit for a declaration that a sale in execution is illegal and in-operative and for an injunction restraining the auction-purchaser and puisne mortgagee from taking possession, is suit to obtain a declaratory decree or order where consequential relief is prayed under S. 7 (4) (c). The case is clearly outside the provision of S. 17 of the Act and the plaintiff has the right and duty to put down one single entire sum as representing the value of the total relief sought by him in the suit. 35 Cal. 202 (P.C.) Rel. on. A.I.R. 1930 Cal. 686=34. C.W.N. 870=58 Cal. 281.

—S. 7 (iv) (c)—Injunction.

——Valuation.

A plaintiff in a suit coming under sub cl. (c) or sub-cl. (d) of cl. (iv) of S. 7 of the Court Fees Act may justly say that his valuation of the relief is what he has prayed for.

Per Curiem.—If the plaintiff's valuation of the relief may at times appear to be arbitrary or too low the assessment of the real value is often no less arbitrary and almost an impossibility. A plaintiff no doubt ought not to be permitted to have his relief without paying adequate court-fees but the remedy lies not in nullifying the words of the Act but in the rule making power of the High Court conferred on it by S. 9 of the Suits Valuation Act. 34 C.W.N. 321=A.I.R 1930 Cal. 473.

—S. 7 (iv) (c) Injunction.

——Valuation.

In a suit for declaration of right to office of the shebait of a temple and also for permanent injunction restraining defendant from interfering with that right, the plaint is to be valued for purposes of jurisdiction and court-fees at the value of the debutter property or such portion of it from which the plaintiff is dispossessed. 28 Bom. 567, Dist. A.I.R. 1930 Cal. 41=126 Ind. Cas. 267.

—S. 7 (iv) (c)—Injunction.

——Immoveable property.

A suit for declaration and injunction in respect of immoveable properties is governed by S. 7,cl.(iv) (c) proviso and court-fee should be paid on half the value of the immoveable property. 1930 M.W.N. 656=129 Ind. Cas. 625=33 M.L.W. 68=A.I.R. 1931 Mad. 69=59 M.L.J. 899.

—S. 7 (iv) (c) Injunction.

——Right of residence and Collection of rent.

Where a plaint is for a declaration that the plaintiff has a right to reside in and recover rent from, certain immoveable properties under the family arrangement, in lieu of maintenance and for an injunction against the decree-holder restraining him from causing the sale of those properties in execution of his decree against the plaintiff's cousins, so as to prejudice the plaintiff's right of residence and maintenance, for the purposes of stamp, S. 7(iv)(c) is applicable and not S. 7 (ii). 123 Ind. Cas. 240 A.I.R. 1930 Sind 198.

——S. 7 (4) (c)—Injunction—Plaintiff seeking injunction to restrain defendants from enforcing money decree passed against him—He must value injunction according to amount of decree. A.I.R. 1931 Sind 15=130 Ind. Cas. 445=25 S.L.R. 15.

——S. 7. (iv) (c) Injunction.
—Sham document.

Where a plaintiff sued for declaration of his title and injunction alleging in the plaint that the settlement deed under which the defendant claimed was a sham and fictitious document under which no property was intended to pass, he is not obliged to get the document set aside, before becoming entitled to the other reliefs and so the court-fee paid by him under S. 7 (iv) (c) is sufficient. 15 Cal. 58; 14 Mad. 26; A. I. R. 1925 Mad. 1005; 36 M. L. J. 180; and 38 Mad. 321, Dist.; 35 Cal. 551 (P. C.); A. I. R. 1924 Bom. 174 and 11 M. L. W. 106, Rel. on. 120 Ind. Cas. 378=30 M. L. W. 796=A. I. R. 1929 Mad. 478.

——S. 7 (iv) (c)—Injunction.
—Valuation.

According to S. 7 cl. 4 (c) and (d), the amount of the fee is to be computed according to the amount at which the relief sought is valued in the plaint, provided valuation is not arbitrary —not under-valued to evade payment of proper court-fees—and it is for that purpose necessary to look to the substance of the allegations made and of the relief sought for. The value of the relief is its value to the plaintiff and not the value of the property involved and, therefore, the value of the injunction to the plaintiffs is really the value at which the injury to the plaintiffs should be assessed. 105 Ind. Cas. 80=A. I. R. 1928 Cal. 55.

——S. 7 (iv) (c) Injunction.
—Forged will.

Where a party to a suit alleged that a certain will had been set up by the opposite party and asked for a declaratory decree to the effect that it had not been executed by the deceased, that the document produced was a forgery and that he was the legal heir of the deceased and for a perpetual injunction directing the opposite party to refrain from interfering with the property.

Held, that the suit clearly fell within the ambit of S. 7 (iv) (c), Court-fees Act, and that, therefore, it was necessary for the plaintiff to fix a value on the relief sought by him. 36 All. 500; 40 Cal. 245 and 33 Bom. 307 Foll. 9 Lah. L. J. 579=29 P.L.R. 27=A.I.R. 1927 Lah. 890.

——S. 7 (iv) (c)—Injunction—Easement.

In a suit for a declaration that the plaintiffs have certain customary and mamool rights(inter alia—to graze cattle, to take leaves for manure, to cut and take wood required for fuel and other building and domestic purposes and for agricultural implements and to take grass for roofing—all free of charges) in a forest area belonging to the defendant with a prayer also for injunction, the plaint was valued at Rs. 100 under S. 7, Cl. (iv)(c) of the Court-Fees Act. It was contended on behalf of the defendant that the case came directly under Cl. (iv)(c) of S. 7 as amended in Madras and that the suit was with reference to an immovable property and as such must be valued at half of the full value of the land for purposes of court-fee and jurisdiction. Negativing that contention,

Held, as easements do not involve possession of land, house or gardens the Madras Amendment to S. 7 Cl. (iv) (c) does not apply to the case which must be confined to cases where title to or possession immovable property is involved. Accordingly the case comes under S. 7 Cl. (iv)(c) of the Court-Fees Act and the plaint was properly valued. I.L.R. (1946) Mad. 885=59 L.W. 41=1946 M.W.N. 80= A.I.R. 1946 Mad. 235=(1946) 1 M.L J. 61.

——S. (iv) (c) Injunction—Easement.

Suit for a declaration of rights of way and drainage over a certain paramba and for a mandatory injunction ordering defendants to remove the fences, wall etc., that have been built in defiance of the said rights, falls under S. 7 (4) (c) and the valuation for puposes of court-fees shall not be less than half the value of the immoveable property over which the rights are claimed according to Madras proviso. 25 M.L.W.158=38 M.L.T.18=100 Ind. Cas. 263=A.I.R. 1927 Mad. 348=52 M.L.J. 121.

——S. 7 (iv) (c)—Injunction—Interim.

Where in a declaratory suit the plaintiffs obtained an ad interim injunction in the lower Court but there they lost the case and in appeal sought reliefs which they had sought in the first Court,

Held, that the ad interim prayer is a substantial prayer which makes the relief a consequential one bringing the case within S. 7 (iv) (c). 39 Cal. 704, Rel. on. 5 Pat. 211=94 Ind. Cas. 22=A.I.R. 1926 Pat. 249.

——S. 7 (iv) (c)—Injunction.

—Suit for declaring plaintiff to be rightful manager of trust properties and for injunction against defendants—S. 7 (iv) (c) applies though plaintiff is in possession of properties as the relief claimed was consequential. 87 Ind. Cas. 190=47 All. 501=23 A.L.J. 344=6 L.R.A. Civ. 258=A.I.R. 1925 All. 602

——S. 7. (iv) (c)—Injunction.—immovable property—Portion in dispute.

A suit for declaration and injunction ought to be valued and court-fee paid, as is required by S. 7, cl. (iv) of the Court Fees Act. The proviso to the cl. (c) is applicable to immoveable property and it is not necessary in such cases to have the whole of the property valued. It is sufficient if only such portion of the property, as is the subject-matter of dispute is valued. But that if the whole of the property is likely to be in dispute, then the court-fee will have to be paid on half the value of the whole property. 89 Ind. Cas. 930=21 M.L.W. 699=A.I.R. 1925 Mad. 1143.

——S. 7 (iv) (c)—Injunction—Declaration as to invalidity of a document.

A suit to have it declared that a document to which plaintiff was not a party is not binding on the Devaswam of which he alleges he is one of the trustees and for injunction and accounts, consequential on the declaration, can be valued at plaintiff's choice

on the reliefs under S. 7 (iv) (c) but plaintiff must not put one value for purposes of jurisdiction and another for purposes of court-fee. 78 Ind. Cas. 118=19 M.L.W. 249=34 M.L.T. 22=1924 M.W.N. 210=A.I.R.1924 Mad. 611.

——S. 7 (iv) (c)—Injunction—Declaration to avoid an award.

In a suit for a declaration that a certain award is invalid there being no contract at all between the parties, and for an injunction by away of consequential relief, the plaintiff has the right to value his claim for the purposes of the court-fees and the value for the purposes of the jurisdiction is the same. 44 Bom. 331, Foll. 80 Ind. Cas. 969=17 S.L.R. 15=A.I.R. 1924 Sind 105.

——S. 7 (iv) (c) Injunction — Declaration and injunction.

In a suit where the claim was only for a declaration that the decree and sale were fraudulent and for an injunction, the suit being valued at the amount recoverable under the decree,

Held, the party could put his own value on the plaint. 35 C.L.J. 144=A.I.R. 1922 Cal. 242.

——S. 7 (iv) (c) — Injunction— Declaration— Plaintiff's Valuation—Jurisdiction.

Where the plaintiff sued for a declaration that he is the owner of certain property and that he is not bound by an ejectment decree fraudulently obtained against him and for an injunction that the defendants shall not interfere with his possession,

Held, the suit falls within cl. (c) of sub. S. (iv) of S. 7 of the Court Fees Act. In a suit under S. 7, cl. (4) (c) of the Court Fees Act the Courts are bound to accept the valuation placed by the plaintiff upon the relief sougt by him, even though such valuation is arbitrary and inadequately represents the value of the property. In regard to the jurisdictional value of suits falling under S. 7, cl. (4) (c) of the Court Fees Act, as a general rule the value as determinable for the purposes of court-fee and the value for purposes of jurisdiction are the same under S. 8 of the Suits Valuation Act. 66 Ind. Cas. 34=A.I.R. 1922 Lah. 236.

——S. 7 (iv) (c)—Injunction.

In a suit for declaration as well as for an injunction where consequential relief was prayed for, **ad valorem** fee is payable on the amount at which the relief sought is valued. **Per Richards**, O.C.J. Plff. must truly state the amount at which he values the relief. 36 All. 500=12 A.L.J. 844 =24 Ind. Cas. 679.

——S. 7 (iv) (e) Injunction.

Under S. 7 (iv) (c) the plff. can in a suit falling thereunder, value the relief sought at any amount which he thinks fit and Courts cannot object to it though such valuation is arbitrary. 228 P.W.R. 1913=111P.R. 1913 =23 P.L.R. 1914=22 Ind. Cas. 503.

——S. 7 (iv) (c)—Injunction.

A suit for a declaration that plff. is the sole shebait, and for an injunction restraining the deft. from interfering with his possession of the endowed properties, falls within **S. 7 (iv) (c)**. 40 Cal. 245= 16 C.L.J. 194=17 C.W.N. 591=17 Ind. Cas. 162.

——S. 7 (iv) (c) and (d)—Injunction.

In a suit for declaration and injunction, the value for purposes of Court-fees and jurisdiction, is the amount at which the plff. values the relief, between Rs. 100 and 500; 63 P.R. 1902, Fol. 17 Bom. 56, Rel. on. 30 Mad; 18 Dist. 52 P.W.R. 1912=93 P.L.R. 1912=13 Ind. Cas. 408.

——S. 7 (iv) (c) and (d) Injunction.— Suit for declaration of invalidity of mortgage, for cancellation and injunction—Valuation.

The value for purposes of Court-fees and jurisdiction of a suit for declaration of the invalidity of a mortgage deed, for cancellation and for an injunction restraining the deft. from enforcing its terms, is the amount of liability under the deed, as stated in the plaint. 6 C.L.J. 427, Foll. 7 N.L.R 190=13 Ind. Cas. 864.

——S. 7 (iv) (c) and (d)—Injunction.

In a suit for a declaration of title to immoveable property and for an injunction as a cansequential relief, the Court must accept the value of the relief stated in the plaint for the purpose of both Court-fee and jurisdiction. 32 Cal. 734, Foll. 33 Bom. 307=11 Bom. L.R. 30=5 M.L.T. 230=1 Ind. Cas. 108.

——S. 7 (iv) (c) and (d) — Injunction — Suit for injunction and damages on allegation of possession:— A suit for a declaration of plaintiff's title to a jungle (plaintiff alleging that he is in possession) and for damages for trees cut and an injunction restraining the defendant from cutting any more trees, falls within **S. 7 (iv) (c) and (d)** and the court is bound to accept the value of the reliefs as fixed in the plaint. 9 C.W.N. 690=32 C. 734.

10. Interpretation.

S. 7 (iv) (c) Interpretation.

——In considering the meaning of S. 7 (iv) (c), Court-fees Act, it is necessary to consider S. 8 Suits valuation Act, and O. 7, R. 11, Civil P.C., for in construing a statute, one should endeavour to give it a meaning, in all cases of ambiguity which will make it consonant to, rather than in disagreement with other Acts. A.I.R. 1939 Nag. 50=I.L.R. (1938.) Nag. 558=1938 N.L.J. 327=180 Ind. Cas. 271. (F.B.)

11. Joint Hindu Family.

——S. 7 (iv) (c) and Sch. II, Art. 17 (vi) Joint Hindu family.

——Son's suit for declaration impeaching decree against father—Implied consequential relief—Court-fee.

A Suit for declaration by a Hindu that a decree passed against his father or grandfather on the basis of a mortgage was bad for want of consideration and necessity an also on the ground of immorality and illegality of the debt is a suit for declaration with injunction as a consequential relief, as a decree for declaration pure and simple cannot stop the execution of the decree. A. I. R. 1945 Lah. 13 =46 P. L. R. 346=218 Ind. Cas. 57.

——S. 7 (iv) (c) **Joint Hindu family—Decree against manager—Suit for declaration that the manager did not represent family, hence decree is not binding, whether lies.**

(**Quoere**). Where a member of the family says in his plaint that the person impleaded in the former suit was not the manager of the family whether he can ask for a declaration that as the decree was obtained against a person who did not represent the family, it would not be binding on the family. A.I.R. 1944 Mad. 19=56 L.W. 549=1943 M.W.N. 571=(1943) 2 M.L.J. 396= I.L.R. (1944) Mad. 430=217 Ind. Cas. 26.

——S. 7 (iv) (c)—Joint Hindu family.

——**Son's suit against decree-holder of father** for declaration that decree does not bind plaintiffs' interest in joint family property.—In such a suit, **ad valorem** court-fee is payable on the plaint. A.I.R. 1943 Nag. 70=I.L.R. (1943) Nag. 440=1942 N.L.J. 466=202 Ind. Cas. 643.

——Ss. 7 (iv) (c) and 7 (v)—Joint Hindu family.

Suit by son for declaration that sale by father was not for family necessity and as such not binding on him and for joint possession of property sold, with his father falls under S. 7 (iv) (c)—It cannot be regarded as for cancellation of sale-deed. A.I.R. 1942 Lah. 209=44 P.L.R. 162=202 Ind. Cas. 174.

——S. 7 (iv) (c), Sch, II. Art. 17 (iii)—Joint Hindu family—Mortgage decree against father—Ancestral house put to sale— Sons suit for declaration that it cannot be sold being ancestral—Art. 17 (iii) applies.

A Hindu son's suit for a declaration that certain property which had been mortgaged by his father, and which is about to be sold in execution of the mortgage decree obtained against the father cannot be sold, being ancestral property and on the ground that the mortgage is not for a legal necessity and not binding on him (the son not being a party to the mortgage suit) is governed by Art 17 (iii) and not by S. 7 (iv) (c) of Court-fees Act. Such a suit is not for a declaration with consequential relief but one for mere declaration. 163 Ind. Cas. 678=16 Lah. 752=37 P.L.R. 860.

—S. 7 (iv) (c) Joint Hindu family.

—Father refering matter to arbitration—Decree in terms of award—Suit by son for mere declaration that father had no authority to agree to refer matter to arbitration and that proceedings subsequent to reference are null and void:

Held, that the suit was not maintainable. The plaintiff must have asked for consequential relief and such a relief can only be for setting aside the decree which had already been passed, and should have paid **ad valorem** court-fee according to S. 7 (iv) (c).

[Held, also that the frame of the suit could not be allowed to be altered at the stage of the hearing of the appeal.] A.I.R. 1934 Lah. 235=35 P L.R. 136=155 Ind. Cas. 209.

—S. 7 (iv) (c) -- Joint Hindu family.

—Decree against deceased father—Suit by son for declaration that decree is not binding on him and the joint family property— Court-fees payable, whether ad valorem.

Where a plaintiff brought a suit for declaration that the simple money-decree obtained by the defendant against the deceased father of the plaintiff is not binding on him and the joint family property in his hands is not attachable:

Held, that the obvious result of the decree asked for by the plaintiffs would be to save them from payment of the decretal money for which the joint family property in their hands is liable under S. 53 of the Civil P. C. and the consequential relief is implicit in the declaration asked for and, therefore, **ad valorem** court-fee is payable on such a suit. A.I.R. 1934 Oudh 212 (1)= 11 O.W.N. 488=8 Luck. 668=150 Ind. Cas. 722.

——S. 7. (iv) (c) Joint Hindu family—Prayer for mere declaration.

Where in a plaint it was alleged that the defendant obtained a decree **inter alia** against the plaintiff on the basis of a mortgage executed by the plaintiff's father and prayed for a declaration that the decree was not binding on his share of the property:

Held, that though the relief had been so worded as to bring the case within S. 7 (iv) (c) Court-fee Act, the Court must look to the substance of the relief claimed and not the mere form of the plaint and S. 7 (iv) (a) applied to the case. A.I.R. 1933 Mad. 430=64 M.L.J. 24=1933 M.W.N, 144=37 L.W. 806=141 Ind. Cas. 80.

12. Partition Suits.

——Ss. 7 (iv) (c), 7 (iii) and 7 (v)—Partition suit actually in nature of title suit.

In a suit purporting to be for partition but actually in the nature of a title suit, **ad valorem** court-fees are payable whether the suit is regarded as governed by Ss. 7 (iv) (c) 7 (iii) or 7 (v) Court-fees Act. A.I.R. 1942 Pat. 60=20 Pat. 780=8 B.R. 471=23 P.L.T. 218=198 Ind. Cas. 866.

——S. 7 (iv) (c) Partition suit—Alienations to which minor was not eo nomine party, challenged—Alienees and creditors made parties to suit—Prayer for declaration and cancellation, if necessary—Payment of court-fees on such relief—Prayer for appointment of Receiver—Court-fee in respect of such prayer.

Per Full Bench (Abdur Rahman, J., dissenting).—In a suit for partition by a minor son against his father, the plaint need not contain a prayer for a declaration or cancellation in respect of alienations by the father to which the plaintiff was not eo nomine a party and which are challenged by him. Such a prayer is a purely incidental but unnecessary relief. When there is no such prayer in the plaint, there is no justification for implying them and then demanding a fee for it. The position is not altered by the joinder in the suit of the parties to the transactions who are interested in supporting them. Whether they are before the Court or not, the court is bound as between the members of the family to decide

which are the debts binding on the family before directing a division. The presence of the third parties would no doubt invest the decision with a finality but this is scarcely a ground for reading into the plaint a prayer which the member suing is not obliged to seek under the law in the face of the provision in O. 1, R. 10 (2), Civil P. C. Hence merely by reason of his impleading the several creditors, the plaintiff cannot be deemed to have asked for declaration in respect of each of the transactions impugned, and a separate court-fee as regards each one of them is not necessary. A.I.R. 1940 Mad. 113=(1940) 1 M.L.J. 32=51 L.W. 11=1940 M.W.N. 126=I.L.R. (1940) Mad. 259=186 Ind. Cas. 494 (FB).

——S. 7 (iv) (c)—Partition suit—Preliminary decree based on Compromise— Suit by party for rectification of compromise deed on ground of mutual mistake—Valuation.

It is true that after the recent amendment of the Court-fees Act, the Court has power to determine whether the valuation made by the plaintiff in suit under S. 7 (iv) (c) is arbitrary or not. But the difficulty in the exercise of that power is the absence of any objective standard laid down either by the Legislature in the Court-fees Act or by the High Court under the Suits Valuation Act.

In the partition suit, the properties which were the subject-matter of partition were valued at Rs. 24,000. A preliminary decree was made in that suit on the basis of a petition of compromise. There after the plaintiff instituted a suit for rectification of the said solenama upon which the preliminary decree was made on the ground of fraud or mutual mistake of the parties. The contention of the defendant was that the value which the plaintiff had put upon the relief in this suit was arbitrary and was too low inasmuch as the value given in the plaint of the suit was only Rs. 101 although the plaintiff would be entitled to have her title and joint possession declared in properties worth about Rs. 8,000 if the suit be decreed. The substance of the suit, therefore, was to have the adjustment of the suit, by mutual agreement of the parties set aside:

Held, that the value of the property which would be affected by the preliminary decree could not be taken as an objective standard for the purpose of determining the value of the relief in the suit. In the absence of any other satisfactory objective standard, the plaintiff's valuation must be taken as correct and final for the purpose of the present suit. A.I.R. 1939 Cal. 265=42 C.W.N. 614=68 C.L.J. 413=181 Ind. Cas. 500.

——S. 7 (iv) (c) Partition suit—Prayer that certain debts are not binding on joint family property—consequential relief if prayed for.

Obiter.—It cannot be said that a prayer in a partition suit relating to the binding character of particular debts can be regarded as a prayer in a suit where consequential relief is not prayed for because in a partition suit, it is proper to make provision for the discharge of family debts before effecting partition. Once it is recognized that it is the duty of the Court to make provision for discharge of binding debts before partition is decreed, the suit should be dealt with as one in which consequential relief is prayed for. A.I.R. 1938 Mad. 474=1938 M.W.N. 131=181 Ind. Cas. 905.

13. Possession.

——S. 7 (iv) (c)—Possession—Court-fee—Valuation—Right of plaintiff—Gross under-valuation by party— Power of Courts to correct.

A suit for declaration and possession must, according to the prevailing practice of the Patna High Court, be treated as one for declaration and consequential relief. Though under S. 7 (iv) (c) of the Court-Fees Act the plaintiff is entitled to value the relief at his option, he cannot be allowed to place an arbitrary valuation on the relief claimed; and where the valuation made by the party is grossly dis-proportionate to the market-value of the property, the Court may require ad valorem court-fee to be paid on the market-value. A.I.R. 1932 Mad. 605; 1935 Mad. 66; 1920 Pat. 656; 1923 Pat. 137; 1939 Pat. 274, ref. 16 Cut. L.T. 172.

——S. 7 (iv) (c), 7 (v) and 8-C—Possession—Suit for declaration and khas possession—Court-fee payable—Plaintiff's valuation—Power of Court to correct.

A suit for a declaratory decree in which khas possession is claimed as a consequential relief, is governed by S. 7 (iv) (c) and not by S. 7 (v) of the Court-Fees Act. S. 7 (v) applies to a suit where the principal claim is for possession of land, and has no application to a suit where claim for possession is merely ancillary.

The words "any suit" in S. 8-C of the Act include a suit governed by S. 7 (iv) (c) of the Act, and the Court is not, therefore, bound by the valuation put by the plaintiff on such a suit. If there is an ojbective standard available, the Court can make an enquiry under S. 8—C of the Act and correct the valuation of the plaintiff in accordance with this objective standard. The relief for khas possession is capable of being determined on the objective basis and the value of a claim for khas possession of property is the value of the property which is the subject-matter of the claim. As to how such subject-matter is to be valued is laid down in the provisions of S. 7 (v) of the Act.

If both the reliefs for a declaration and for khas possession are based on the same cause of action, the Court has to determine under S. 17 (2) of the Act what the fees payable are in respect of each cause of action and then compel the plaintiff to pay the court-fees on the value of the relief in respect of which the largest fee is payable. 42 C. W.N. 315, foll.; 58 C. 231; 11C.W.N 705, referred to. 53 C.W.N. 340.

——S. 7 (iv) (c)—Possession.

—Suit by Hindu widow, for possession of husband's property, against his relatives, whether for declaration and consequential relief.

On the death of a Hindu leaving his property in possession of members of another branch of his family, his widows brought a suit on the

allegation that he died in a state of separation and that they, as his widows were entitled to possession of the property left by him:

Held, that the suit was one for possession and not for a declaration and consequential relief, namely, possession of the property following the declaration. A.I.R. 1941 Pat. 167=21 P.L.T. 1063=7 B.R. 557=193 Ind. Cas. 538.

——S. 7 (iv) (c) Possession.

—Declaratory suit praying for confirmation of possession of land as consequential relief—Such suit to be regarded as suit for possession.

A suit for a declaration that the decree was obtained by fraud and for the consequential relief that the sale in execution may be set aside and the plaintiff's possession confirmed is to be regarded as a suit for possession, that is to say, for purposes of classification under S. 7 (iv) (c) of the Court-fees Act, no distinction is it be drawn between a suit for confirmation of possession and a suit for recovery of possession. In such a suit, the value of the suit is the value of the land. A.I.R. 1939 Pat. 254=5 B.R. 247=179 Ind. Cas. 586.

——S. 7 (iv) (c), (v). Sch. I, Art. 1, Sch. II. Art. 17(3)—Possession—Suit for partition and possession of joint property—Alternative relief for declaration that certain property was acquired with joint family funds and for joint possession also—Relief, if falls under S. 7 (iv) (c)—Court-fee payable.

A plaintiff instituted a suit for partition and possession of half share in the joint family property on the ground that he along with the defendants was joint and that the alleged partition deed was fraudulent. There was a prayer in alternative, that if the plaintiff be found not entitled to this relief, then a declaration that the property mentioned in list **B** was acquired with the joint funds of the parties and that they were in joint possession and occupation be granted and that the plaintiff should be put in possession of the half-share jointly with the defendants:

Held, that the alternative relief claimed by the plaintiff was not one that could come under S. 7 (iv) (c) of the Court-fees Act.

Per **Niamat Ullah** and **Allsop, JJ., Sulaiman, C. J. contra**:—There was a substantial claim, in the alternative, relief for possession of the property. The relief for declaration could be ignored; Art 1. Sch. 1, therefore, applied but it must be applied in connection with S. 7 (v) of the Act and the court-fees payable were those that would be payable, if the suit had been one for possession without any mention of a declaration.

Per **Sulaiman, C. J.**—The Court-fee payable on the alternate relief should be assessed on the language of that relief, quite irrespective of the question whether it was wholly unnecessary for the plaintiffs to ask for any part of it or whether any lawyer in drafting the plaint might have omitted that part of it. The plaintiffs asked: (i) the Court to declare that the property in list **B** was acquired with the joint funds of the parties, and (ii) that they are in joint possession of it, and (iii) also asked for actual possession over a half share. It was impossible to treat the relief as a simple relief for recovery of possession only, and nothing else so as to come under S. 7 (v). They must therefore, pay an ad valorem court fee on this composite relief as prescribed by Sch. I, Art. 1, because such a relief is not specifically provided for anywhere. A.I.R. 1937 All. 148=1937 A.L.J. 308=1937 A.W.R. 218=I.L.R. (1937) All. 443=175 Ind. Cas. 385.

——S. 7—(iv) (c), (v) (a) Possession—Suit for possession upon declaration that certain alienation by de facto guardian of Hindu minors does not affect plaintiffs' title—Determination of latter question essential for giving decree for possession—Court-fees required.

Where from the plaint it is clear that the suit of the plaintiffs-appellants was framed as a suit for recovey of possession upon a declaration or "determination" that their title was not affected by a certain alienation made by a de facto guardian of the Hindu minors, the court-fee to be paid is not under cl. (v) (a) but under cl. (iv) (c) of S. 7 of the court-fees Act, for the plaintiffs cannot get any relief until that alienation is set aside. A.I.R. 1937 Pat. 141=17 P.L.T. 667=3 B.R. 14=165 Ind. Cas. 213.

——S. 7 (iv) (c)—Possession.

—Suit for declaration that certain leases of debuttar property are illegal and invalid and for possession of property—Value of subject-matter is value of lease hold interest created by leases.

Where the primary relief claimed in the suit is the cancellation of leases in respect of certain debutter properties, and possession is sought to be obtained by the plaintiff of the leaseholds created by the documents alleged by the plaintiff to be illegal, invalid and inoperative, the valuation required to be put on the properties covered by the plaint is the valuation of the leasehold interests created by the different leases, and not the valuation of the properties irrespective of the leases. In such a case, the plaintiff can put his own valuation on the lessee's interest, the subject-matter of the suit, as it cannot be said that the lease-hold is capable of strictly accurate valuation. A.I.R. 1935 Cal. 279=60 C.L.J. 469=39 C.W N. 248=62 Cal. 417=156 Ind. Cas. 431.

——Ss. 7 (iv) (c) and 7 (v)—Possession—Suit for declaration of invalidity of alienation and possession—Mode of valuation—Necessity of separately valuing declaration.

The plaintiff claiming to be reversionary heir of the last male holder, S, had filed the suit against S's widow and certain alienees who claimed under alienations made by **S** attacking the alienations on the ground that they were nominal. After the filing of the suit, he obtained a surrender from the widow and with the leave of the Court, converted his suit into one for possession. On the question of court-fee:

Held (i) that the plaintiff was bound to value the relief of declaration separately from the prayer for possession and pay court-fee on it;

(ii) that the relief of possession was not governed by S. 7 (iv) (c) of the Court-fees Act but by S. 7 (v) and the Plaintiff was bound to value it in accordance with S. 7 (v).

If the consequential relief prayed for in a suit for declaration is possession, the mode of valuation is that prescribed is S. 7 (v). There being a special provision in S. 7 (v), the general provision in S. 7 (iv) (c) is excluded. A.I.R. 1935 Mad. 346=68 M.L.J. 369=41 L.W. 488=1935 M.W.N. 406=156 Ind. Cas. 840.

——S. 7 (iv) (c) Possession.

——Suit for recovery of possession of property sold for arrears—Court-fees, computation of—Amount fetched at sale, if can be taken into account—Suit in respect of share of plaintiff in property—Court-fee payable.

The plaintiff who held a fourteen annas share in a mahal which was sold for arrears of Government revenue filed a suit to set asaide the sale on the ground of fraud and irregularity and for confirmation of his possession in respect of his share or in the alternative to recover possession of that share:

Held, that the sum which the property fetched at the sale should not be taken into account in computing the court-fee for the suit. That could be taken into account if the suit had been instituted to recover the difference between the value of the property and the amount fetched at the sale. In the case, the plaintiff had to pay court-fee only upon 14-16th of the value of the property. The plaintiff could be required to pay the court-fee only upon his share of the property and the value of the share was the measure of his loss. A.I.R. 1935 Pat. 459=2 B.R. 110=16 P.L.T. 845=159 Ind. Cas. 728.

——S. 7 (iv) (c), (v) — Possession — Suit for possession as mahant—Declaration of right to mahantship essential to success of suit.

The plaintiff alleged that he was the chela of a certain former mahant of a certain math, that the defendant had become the mahant of the math, but had taken a wife and on the contention of the plaintiff, he thereby vacated the office of mahant. He sought a declaration that he (the plaintiff) was the mahant of the math and was entitled to get possession of all the properties and he further asked that after declaring the plaintiff's title, the court should give him possession of the properties of the math which were specified in the plaint. He paid court-fees upon the plaint on the basis of S. 7, cl. (v), Court-fees Act:

Held, that the plaintiff, before he could get his possession, which he asked for, must have it decided in his favour that the defendant had vacated the office of mahant and, secondly, that he (the plaintiff) had succeeded to that office and a finding and a declaration to that effect was essential to his success. It was, therefore, a suit for a declaration with consequential relief, and not merely a suit for possession with incidental preliminary determination of title and hence court-fee was payable under S. 7 (iv) (c) and (v). A.I.R. 1934 Pat. 641=1 B.R. 192=16 P.L.T. 69=14 Pat. 220=152 Ind. Cas. 1003

—S. 7(iv)(c)—Possession—Mortgage of property in excess of mortgagor's share—Suit by real owners for possession and declaration—Principal relief one for possession.

If the principal relief claimed is one for possession, and the relief for declaration is merely ancillary to it, it is enough to pay the court-fee on the relief for possession. On the other hand, if the principal relief is for declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the court-fee would be payable according to the amount at which the relief sought is valued in the plaint or the memorandum of appeal.

Plaintiffs sued for possession of property and also for declaration claiming that the mortgagor who had no ownership in it had mortgaged the same and mortgagee after getting a mortgage decree had become an ostensible owner of it:

Held, that the principal relief claimed by the plaintiffs must be regarded as the relief for possession, and that the relief for declaration was merely ancillary. That being so, the court-fees need be paid only on the relief for possession. A.I.R. 1933 Oudh 505=10 O.W.N. 1322=149 Ind. Cas. 1138.

—S. 7 (iv) (c)—Possession—Trusts—Beneficiary suing to recover trust properties improperly alienated by trustees—S. 7 (iv) (c) applies—Person suing as beneficiary under certain trust to recover certain properties forming subject-matter of trust which had been alienated by certain trustees—Case comes under S. 7 (c) and not under Art. 17-B.

A person brought a suit as benificiary under a certain trust, the primary object of which was to provide for the wants of Bhairagis but in which he possessed a beneficiary interest in the surplus income in order to recover certain properties forming the subject-matter of the trust which had been alienated by the trustees, the alienations were made one by sale, one by mortgage and the remainder by leave.

Held, that the case did not fall under Art. 17-B but the court-fee must be paid under S. 7(iv)(c)read with the proviso added to it by the Madras Court-fees Amendment Act (V of 1920) and should be calculated in the manner provided by para. 5 of the section. 28 All. 112; 41 Mad. 124 and 5 Ind. Cas. 901. Rel. on; A.I.R. 1925 Mad. 722 and 7 Ind. Cas. 92. Expl. and Dist. A.I.R. 1931 Mad. 24=33 M.L.W. 206=130 Ind. Cas. 449=61 M.L.J. 39.

S. 7 (iv) (c) Possession.

——Suit for—by adopted son.

S. 7 (iv) (c), Court-fees Act, is applicable to a suit in which, having regard to the substance of the plaint, it is incumbent upon the plaintiff to obtain a declaratory decree or order to perfect his right to the consequential relief that the claims; for instance, where the plaintiff seeks relief to which he is not entitled unless and until some decree, or document, or alienation of property is avoided.

Further, if the plaintiff elects to claim a declaratory decree or order, although it is not necessary for the plaintiff to obtain such a declaration in the particular case to enable him to obtain the relief for which the suit is really brought, in such circumstances, unless his plaint is amended by striking out the prayer for a declaration, the plaintiff cannot complain if he is held liable to pay [an **ad volorem** court-fee under S. 7. (iv) (c).

But where a declaration that a valid adoption of the plaintiffs had taken place is neither claimed in the plaint, nor a necessary preliminary to their right to recover possession of the land in suit, S. 7 (iv) (c) does not apply. A.I,R. 1931 Rang. 319=9 Rang. 401=134 Ind. Cas. 1263.

—S. 7 (iv) (c)—Possession.

——When a party asks for a declaration as his first relief and possession as a second relief, it must be taken that in the opinion of the party, or at least of his legal adviser, the declaration is a necessary relief and so the suit would clearly fall within the purview of S. 7 (iv) (c), Court Fees Act, and ad valorem Court-fee is payable as required by S. 8, Suits Valuation Act. A.I.R. 1924 All. 612. Foll., A.I.R. 1922 Pat. 615 Dist; 18 A.L.J. 903, Diss. from. 50 All. 610 =26 A.L.J. 316=115 Ind. Cas. 655= A.I.R. 1928 All. 248.

S. 7. (iv) (c) — Possession.

——Magistrate's order under S. 146, Cr. P. Code.

Where a Magistrate passes an order under S. 146, Cr. P. Code a person claiming the property need only sue for a declaration. But where the Magistrate interfered with the possession of the defendants because an emergency had arisen and decided that retention of the sale proceeds was unnecessary, and ordered them to be handed over to the defendants,

Held, the Magistrate was holding the same on behalf of the defendants, the plaintiff's suit must be one for possession and ad valorem fees calculated on the value of the subject-matter in dispute must be paid. 103 Ind. Cas. 351=A.I.R. 1927 Nag. 316.

—S. 7. (iv) (c)—Possession—Declaration as to title incidental.

Where the plaintiff claims possession of a certain property and states in his plaint that he claims for possession by cancellation of a sale in favour of the defendant, he cannot be considered to be asking for two reliefs and thus be liable to pay court-fee on each of these two reliefs. He is practically claiming one relief and that relief is a relief for possession, and if in order to give him that relief it is necessary to consider along with that the title of the defendant and to declare that title to be ineffective the suit must, still for the purposes of the payment of the court-fee, be treated as one for possession. 36 All. 322, Rel. on. 13 O.L.J. 124 =94 Ind. Cas. 179=A.I.R. 1926 Oudh. 380.

—S. 7 (iv) (c) Possession—Frame of suit.

Where the suit as framed is clearly one for a declaration with consequential relief, though the suit might have been framed purely as a suit for possession,

Held, the plaintiff has to pay court-fees on the relief which he seeks to obtain by the suit. The relief which he claimed being a declaration that the deed of gift is invalid against her with consequential relief of possession of the property conveyed by the deed, the fee is payable under S. 7 (iv) (c). 44 A. 629, Foll. 84 Ind. Cas. 624=5 L.R.A. Civ. 618=22 A.L.J. 945=47 All. 78=A.I.R. 1924 All. 612.

—S. 7 (iv) (c) Possession—Confirmation of.

The words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession. It is for this reason that such a relief has been held to be consequential relief within S. 7 (iv) (c) of the Court-Fees Act. 73 Ind. Cas. 43= 68 Ind. Cas. 316=2 Pat. 198=4 P.L.T. 71=1922 P.H.C.C. 337=1 P.L.R. 25=A.I.R. 1923 Pat. 137.

—S. 7 (iv) (c) Possession—Title in dispute.

A Challenge having been directly thrown upon the title a suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, (iv) (c) Court Fees Act. 1922 P.H.C.C. 6=A.I.R. 1923 Pat. 100.

—S. 7 (iv) (a)—Possession.

Where in contravention of an adjustment of a decree it was fraudulently executed with the result that the mortgaged properties were brought to sale and purchased by the decree-holders and subsequently a personal decree was made in due course and the plaintiffs sued for possession, after a two-fold declaration, viz., first, that their title to the mortgaged properties had not been affected by the execution proceedings which they contended were void and no better than a nullity; and secondly, that, if this view be correct, no personal decree could have been made against them.

Held, the suit was substantially a suit for possession of land within the meaning of S. 7 (v) (a) and not one under S. 7 (iv) (c). 70 Ind. Cas. 101=49 Cal. 880=27 C.W.N. 566=38 C.L.J. 74=A.I.R. 1922 Cal. 506.

—S. 7 (iv) (c)—Possession—Real relief—Declaration not necessary —S. 7 (v).

Where the real relief which the the plaintiff seeks is delivery of possession of the property by dispossession of the defendant and he is not bound first to ask for a declaration before such relief can be granted, there is no reason to think that merely because he asks the Court to adjudicate upon the matters in issue, the suit should be treated as a suit to obtain a declaratory decree with consequential relief. There is no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession, should be interpreted as asking for a declaratory decree. Where a declaration is neither necessary nor in terms asked for the suit should not be treated as one coming under cl. (iv) (c) but under cl. (v) of S. 7. A.I.R. 1921 Pat. 57, F.A. 242 of 1917, Ref. 68 Ind. Cas. 700=2 Pat. 125= 1 P.L.R. 1=3 P.L.T. 704=1922 P.H.C.C. 281=A.I.R. 1922 Pat. 615 (S.B.).

——S. 7 (iv) (c) Possession—Partition suit.

In a suit for partition, pure and simple, where the plaintiff is in possession of his share of the property and simply wants to alter the mode of its enjoyment by claiming to hold his proportionate share in the properties separately from the other joint holders, the court-fee payable will be Rs. 10 only under Sch. II, Art. 17, cl. (6) of the Court Fees Act. Where the plaintiff is out of possession of his share in the joint property, he is required to pay ad valorem court-fee under S. 7, cl. (4) of the Court Fees Act inasmuch as it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay court-fee upon the valuation of his share in the property. A prayer, in a partition suit, asking for a declaration that certain decrees are void, comes under S. 7, cl. (4) (c) of the Court Fees Act and

the court-fee payable thereon is ad valorem on the loss to the plaintiff. The valuation of the relief made by the plaintiff should be the criterion of the purpose of determining jurisdiction unless the said valuation is wrong or arbitrary.

Obiter:—In a partition suit the value of the plaintiff's share determines the valuation for jurisdiction. A.I.R. 1917 Pat. 301, Ref. 1921 P.H.C.C. 89=A.I.R. 1921 Pat. 78.

——**S. 7 (iv) (c) Possession**—Suit by Reversioner.

Where the widow of the previous male holder died having made certain alienations and reversioner sued for declaration that the alienee had no title to the lands and for possession,

Held, that the case came within the purview of S. 7, (iv) (c), and **ad valorem** court-fee upon the valuation of the property stated in the plaint must be paid. 61 Ind. Cas. 565=6 P. L. J. 101=2 P. L. T. 607=A. I. R. 1921 Pat. 57.

——**S. 7 (iv) (c) and** (v) **(b)—Possession**—Suit for declaration and possession—Suit by Hindu reversioner —Alienation by widow.

A Hindu widow executed a sale of her husband's estate and the vendees were in possession. In a suit brought by the reversioners praying for a declaration that the sale was void and ineffectual as against them and for possession, **held**, it was unnecessary for the plff. to ask for any declaration in respect of the sale-deed, that the suit was not one for a declaration with a consequential relief, and that the Court-fee paid on five times the Government revenue was correct. 18 A. L. J. 903=2 U. P. L. R. (A) 216=57 Ind. Cas. 494.

——**S. 7 (4) (c) and** (v)—**Possession**—Suit for possession of properties as adopted son—Contest as to validity of adoption.

A suit for possession of an estate by plff. as having been adopted by the widow of the last male owner under the authority of the latter is in effect a suit for declaration that the plff. was the adopted son of the male owner and for consequential relief, namely, possession. Therefore **ad valorem** Court-fees were payable under S. 7 (iv) (c). 5 Pat. L. J. 339=56 Ind. Cas. 422.

——**S. 7 (iv) (c) and** (v)—Possession — Incidental declaration that document is void or in-operative—Valuation.

Where, in order to succeed in a suit for possession, it is necessary for the plff. to obtain a declaration that a document or a decree is void or in-operative, the Court-fee to be paid must be calculated on the actual value of the property. 3 Pat. L. J. 92=43 Ind. Cas. 962.

——**S. 7 (iv) (c)—Possession**—Suit for removal of manager.

A plaint praying for the removal of the manager of the religious institution based on the allegation that the institution is a private one and is founded and maintained by plff's. ancestors and that the plff. alone has the power to appoint and dismiss the manager is really one for possession. 58 P.R. 1893, 56 P.R. 1895, Foll. 181 P.W.R. 1912=216 P.L.R. 1912= 17 Ind. Cas. 270.

——**S. 7 Cls. (iv), (c) (v), (x) (xi) (c)—Possession**—Suit by grantee of mine for possession.

An owner leased out a certain mine for a term of years to the plff. Subsequently he entered into an agreement with the other persons to grant them a lease. The plff. unable to obtain possession sued the owner and the other persons for possession of the mine, mesne profits, damages, costs and interest: **Held**, that the suit did not fall within (XI) (c) of S. 7 of the Court-fees Act, in as much as it was one not merely between the tenant and the landlord, but also between the tenant and other persons who claimed to have acquired an interest from the landlord. 32 Cal. 268; 31 Mad. 14, Foll. The suit did not fall within (v) (c) but it was a suit for possession of land within meaning of Cl. V and must be valued according to value of the subject-matter. 16 C. L. J. 375=16 Ind. Cas. 963.

14. Setting aside decree.

——**S. 7 (iv) (c)—Setting aside decree on mortgage to the extent of the plff.'s share**—Valuation—Court-fee.

Plff. sued to set aside a compromise decree on a mortgage executed by their father. The value of the entire property was Rs. 2,000 and that of the plff.'s share was two-thirds. **Held**, that the plffs. were not bound to pay Court-fee on the whole amount of the decree but only on the value of their share of the property in suit. (1918) Pat. 223=4 Pat. L.W. 281=4 Pat. L.J. 191=44 Ind. Cas. 891.

——**S. 7 (iv) (c), Proviso and 7 (iv) (a)—Setting aside decree**—Suit for declaration that earlier decree obtained against the plaintiffs and their deceased elder brother was a nullity and for injunction restraining the defendant from executing that decree and recovering possession of the lands from plaintiffs—Proper Court-fee.

The plaintiffs sued for a declaration that the decree in O. S. No. 456 of 1938, in which they and their deceased elder brother were parties, was a nullity and not binding on them and for an injunction restraining the defendant (the plaintiff in that suit which was a temple) from executing that decree against them. That suit was one to recover possession of some lands of which it was averred the present plaintiffs were still in possession.

The plaintiffs paid **ad valorem** Court-fee on half the value of the immovable property under the proviso to S. 7 (iv) (c) of the Court-Fees Act. The suit was dismissed and an appeal was filed paying the same court-fee. The District Judge held that the correct court-fee payable on the plaintiff as well as the appeal memorandum was under S. 7 (iv) (a) on the full value as one for cancellation of the decree. The plaintiffs though they were minors at the time of the decree in O.S. No. 456 of 1938 were impleaded as majors in the appeal and second appeal. In the present plaint it was alleged that the elder brother was negligent in not filing documents showing the plaintiffs' occupancy rights in the land.

Held: This is a case rather on the border line and midway between that on which court-fee of only Rs. 100 is payable under Art. 17-A of Sch. II, namely, one for a pure declaration without consequential relief, and a suit for cancellation of a decree which should be governed by S. 7 (iv) (a). The **Via media** adapted in the

present case for court-fee valuation namely S. 7 (iv) (c) cannot be said, in the circumstances, to be incorrect or inappropriate. 1949 M.W.N. 381=A.I.R. 1949 Mad. 746=(1949) 1 M.L.J. 615.

——S. 7. (iv) (c) and Art. 17 (3)—Setting aside decree—Allegation that it is outcome of fraud practised on Court—Court-fee payable.

A suit was instituted for a declaration that a certain decree passed against the plaintiff was null and void on the ground that, although the Court had no jurisdiction, the defendant had the controversy determined by that Court, by misrepresentiug facts as to the place where the contract was entered and where it was to be performed, and by a deliberate suppression of the arbitration proceedings.

Held, that the allegations, if proved in the suit, would not make the decree passed by the Court void ab initio but only void from the date on which it is set aside. In Cases such as this the plaintiff will get nothing by a mere declaration as to the validity of the decree but he should be given such consequential relief as will naturally flow from that declaration. That additional relief could be no other than that of cancellation or setting aside of the decree. The suit would therefore fall under S. 7 (iv) (c) of the Court-Fees Act, and ad volorem court-fees would have to be paid on the plaint. I.L.R. (1946) Nag. 578=226 Ind. Cas. 68=1946 N.L.J. 246=A.I.R. 1946 Nag. 251.

——S. 7 (iv) (c) and Sch. II. Art. 17 (iii)—Setting aside decree—Agreement registered under Debt Conciliation Act — Suit by legal representative of deceased debtor to have the decree made un-enforceable.

A suit brought by the legal representative of a deceased debtor who was a party to an agreement registered under the C. P. Debt Conciliation Act having the force of a decree, to have that "decree" made un-enforceable against him requires an ad valorem court-fee under S. 7 (iv) (c) and not under Art. 17 (iii), Sch. II. A.I.R. 1946 Nag. 30=1945 N.L.J. 431=I.L.R. (1945) Nag. 975. [Overrules A.I.R. 1941 Nag. 243=199 Ind. Cas. 765.]

——S. 7 (iv) (c)—Setting aside decree.

——Decree against tavazi with A as karnavan—Suit by junior members for declaration that decree did not bind them as A was not karnavan—Ad valorem court-fee on decretal amount held was not necessary. A.I.R. 1943 Mad. 474=1943 M.W.N. 265=56 L.W. 255=(1943) 1 M.L.J. 296=210 Ind. Cas. 477.

——S. 7 (iv) (c)—Setting aside decree--Suit for declaration that previous partition decree were void and for re-partition of entire property.

A suit for setting aside previous partition decrees and for declaring them to be void and not binding on the plaintiff with a further prayer for a re-partition of the entire property, brought by the plaintiff who is not in joint possession, is a suit for declaration with a consequential relief and falls within the purview of S. 7 (iv) (c), Court-fees Act. A.I.R. 1941 Sind 154=I.L.R. (1941) Kar. 102=197 Ind. Cas. 590.

—S. 7 (iv) (c) — Setting aside decree.

—Suit for restraining decree-holder from executing his decree on ground that decree was obtained by fraud and collusion and was void—Court-fee must be paid ad valorem on amount of decree sought to be avoided.

Where a person brings a suit with the prayer that the defendant—decree-holder be restrained by a permanent injunction from executing the decree, on the ground that the decree, was obtained by fraud and collusion and was, therefore, void and incapable of execution, he must be required to value his suit according the amount of the decree which he seeks to avoid; and he must pay the court-fee ad valorem on this amount before he can be permitted to proceed further with the suit. A.I.R. 1939 Pat. 572=5 B.R. 730=182 Ind. Cas. 188.

—S. 7 (iv) (c)—Setting aside decree.

—Claim for declaration that mortgage decree is null and void—Perusal of plaint showing that mortgage-deed is sought to be avoided—Ad valorem court-fee must be paid.

Whereas it is not permissible to a Court to insist on the plaintiff claiming a consequential relief when the plaintiff has deliberately omitted to claim it and has confined himself to claiming a declaratory relief only and thus insist on the payment of ad valorem court-fee it is also clear that the question of court-fee has got to be decided on the allegations contained in the plaint and not necessarily by looking at the relief only and the manner in which it has been clothed. If the allegations contained in the plaint are such as to make it possible to hold that the suit is one for a declaration only, the plaintiff undoubtedly is entitled to have it treated as such. A.I.R. 1938 All. 481=1938 A.W.R. 426=I.L.R. (1938) All. 470=1938 A.L.J. 578=177 Ind. Cas. 85.

——S. 7 (iv) (c) Setting aside decree—Party to partition suit asking for declaration that decree is void and collusive and as a result thereof he got less share—Whether asking in effect setting aside decree.

When a person who is a party to a partition decree asks for a declaration about the partition decree being illegal and void, and it is alleged in the plaint that due to this collusive decree, he got less than kis proper share, the grant of such a declaration in his favour necessarily has the effect of setting aside the decree and relieving him of the obligation under it. A consequential relief should be deemed to be implied in the prayer for the declaration claimed in such a suit, and the plaint should, therefore, bear an ad valorem court-fee under S. 7 (iv) (c) of the Court-fees Act. A.I.R. 1938 Oudh 1=1937 O.W.N. 1186=13 Luck. 628=172 Ind. Cas. 81 (F.B.)

——S. 7 (iv) (c)—Setting aside decree—Suit for declaration that decree to which plaintiff was not party was null and void and for refund of money obtained by defendant by rateable distribution.

A suit for a declaration that a certain decree to which the plaintiff was not a party is null and void as against him and for a refund of the amount obtained by the defendant by rateable distribution in respect of the same decree is a suit for a declaratory decree with consequential relief anda therefore, would fall within S. 7 (iv) (c) of the Court-Fees Act. Where the plaintiff pays an ad

valorem fee on the amount claimed as refund, the value is not an un-reasonable one and must be accepted. A.I.R. 1937 Nag. 316=I.L.R. (1938) Nag. 302=174 Ind. Cas. 90.

——S. 7 (iv) (c)—Setting aside decree—Ex-parte decree against plaintiff for loss in new business started by father—Suit for declaration that he is not liable for such loss—No relief of cancellation of ex-parte decree—Suit, held was for further relief of cancellation of ex parte decree, so far as plaintiff was concerned. A.I.R. 1937 All. 411=1937 A.L.J. 562=1937 A.W.R. 480=I.L.R (1937) All. 259=170 Ind. Cas. 459.

——S. 7 (iv) (c) Setting aside decree.

——Mortgage decree and property sold—Suit for declaration by minor son that mortgage decree and the sale thereof are invalid involves consequential relief and the suit falls under S. 7 (4) (c). A.I.R. 1936 Lah. 166.

——S. 7 (iv) (c)—Setting aside decree—Suit for declaration that decree against plaintiff was invalid and liable to be cancelled.

A suit for a declaration that a simple money-decree was obtained by fraud and was not binding on the plaintiff and that it was liable to be cancelled is one involving consequential relief and cannot be held to be a mere declaratory suit and, therefore, the stamp upon it should be assessed ad valorem. A.I.R. 1936 Pesh. 180=164 Ind. Cas. 1029.

——S. 7 (iv) (c)—Setting aside decree.

—Suit for deduction of maintenance awarded by decree owing to change in circumstances is not one to set aside decree for purposes of court-fees. A.I.R. 1935 Mad. 655=1935 M.W.N. 707=42 L.W. 42=69 M.L.J. 202=59 Mad. 159=157 Ind. Cas. 1033.

——S. 7 (iv) (c)—Setting aside decree—Suit for declaration that a decree could not be executed against plaintiffs who were not parties to it.

The plaint in a suit for a declaration that a decree could not be executed against the plaintiffs on the ground that they were no parties to the decree must bear ad valorem court-fee.

Where a suit is purely for a declaratory decree and does not involve any consequential relief the Court has to look at the substance, and not merely at the language of the plaint and where the plaintiff's object in bringing such a suit is to get rid of a decree passed against him in a previous suit, the plaint must bear an ad valorem court-fee. 152 Ind. Cas. 847 (1).

——S. 7 (iv) (c)—Setting aside decree—Suit for declaration that ex-parte mortgage decree was null and void and for injunction—Court-fee payable.

The plaintiff sued for a declaration that an ex-parte mortgage-decree obtained by the defendant was null and void as against him and for an injunction to stay the further progress of the case and the execution of the mortgage-decree in the said suit until the decision of the suit then brought. The suit was valued for purposes of jurisdiction at Rs. 25,550 which was the amount of the exparte mortgage-decree which the plaintiff sought to have declared null and void, and for Court-fees it was stamped at Rs. 10 for the declaration, under the provisions of Sch. II, Art. 17 (iii) of the Court-fees Act, and at Rs. 7-8-0 for the injunction which was valued at Rs. 100. It was contended for the plaintiff that the prayer in the plaint for an injunction was an unnecessary prayer, that it was included in the plaint by an error, that the suit was one for a bare declaration, and that, therefore, it was sufficiently stamped, under Sch. II, Art. (iii) of the Court-fees Act, with a stamp of Rs. 10:

Held, that the question of court-fee must be decided in accordance with the prayer which is made in the plaint, and the prayer in the plaint is plainly of two parts, namely, first for a declaration, and secondly for an injunction. The fact that the injunction which is actually prayed for is a temporary injunction until the decision of the suit is a matter of no moment what ever. As the plaint stood, the suit was plainly a suit for declaration plus a consequential relief by injunction:

Held, also that under S 8. of the Suits Valuation Act, the valuation of the suit for the purpose of jurisdiction and for the purpose of court-fees must be the same, and that, therefore, as the valuation for the purpose of jurisdiction has been fixed at Rs. 25,559, the valuation for the purpose of court-fees must be fixed at the same amount. A.I.R. 1934 Rang. 152 =150 Ind. Cas. 1030.

——S. 7 (iv) (c)—Setting aside decree.

——Amended relief to declare plaintiff as owner on account of the fact that decree in a certain suit is ineffectual.

In a plaint for a declaration that the plaintiff was the owner in possession of the property in suit, a court-fee of Rs. 10 was paid. The plaint was amended and as amended, the prayer was to the effect that "on account of the fact that the decree in the suit ..... is according to law null and void, illegal and ineffectual, it may be declared" etc.:

Held, that the effect of the amendment was to add to the relief originally prayed for a further declaration that the decree in the suit was ineffectual against the plaintiff, for which he must pay a further court-fee of Rs. 10. A.I.R. 1933 All. 350=1933 A.L.J. 311=55 All. 274=148 Ind. Cas. 152.

——S. 7 (iv) (c)—Setting aside decree—Suit for declaration that decree is not binding and for injunction — Valuation and court-fees—Arbitrary valuation by plaintiff — Power of Court to revise such valuation.

A suit for a declaration that a decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the decree, is a suit to obtain a declaratory decree where consequential relief is prayed for, and falls under S. 7 (iv) (c) of the Court-fees Act, according to which the value of the suit for

computation of court-fee is the amount at which the relief sought is valued in the plaint and in a suit of this nature the plaintiff is entitled to put his own valuation for purposes of payment of court-fee, however arbitrary, fanciful or inadequate such valuation might be.

As regards the jurisdictional value of such suits, it must be the same as the value for purposes of Court-fee. A.I.R. 1933 Lah. 246=33 P.L.R. 488=13 L. 788=137 Ind. Cas. 240.

S. 7 (iv) (c) Setting aside decree.

——Suit to declare a person's decree against judgment-debtor fraudulent and to set aside decree.

A obtained a simple money decree against B and with the intention of defeating A's claim, B acting in collusion with C executed a bogus promissory note in his favour on the basis of which C obtained a decree and attached the same property as was attached by A. A then filed a suit for a declaration that the promissory note was bogus and fraudulent and the decree void against him and for an injunction to restrain C from executing his decree against B's property:

Held, that ad valorem court-fees calculated on the amount of the decree in favour of C, which was sought to be declared void should be paid by the plaintiff. A.I.R. 1933 Nag. 214=145 Ind. Cas. 206.

——S. 7 (iv) (c)—Setting aside—Partition suit—Consent decree.

Where a suit is filed to set aside a consent decree in a partition suit, a prayer for partition or possession is unnecessary and it is enough if court-fee for setting aside the decree alone is paid. A.I.R. 1933 Sind 53=145 Ind. Cas. 777.

——S. 7 (iv) (c) Setting aside decree—Suit for declaration that mortgage by guardian and decree obtained thereupon are null and void.

A suit by a minor for a declaration that certain mortgages executed by his guardian are unlawful and void and that on account of collusion and gross negligence of the guardian, the decree obtained on the mortgages is also null and void against the plaintiff, is a suit for declaration with a consequential relief within the meaning of S. 7 (iv) (c) of the Court-fees Act.

Where a plaintiff brings a suit for declaration and values the relief for purposes of jurisdiction, but the Court holds that the suit is not one for mere declaration but a suit for declaration with consequential relief and requires him to pay an avlorem court-fee, it is not open to him to vary the value of the suit and fix another value.

It is the substance and not the language of the plaint that has to be looked at in deciding whether or not a case falls within the ambit of S. 7 (iv) (c), Court-fees Act. A.I.R. 1932 Lah. 132=32 P.L.R. 729=13 L. 391=135 Ind. Cas. 499.

——S. 7 (iv) (c) Setting aside decree—Decree directing charge to be sold—Appeal for declaration that such right is not saleable.

A mortgage decree was passed with a direction that a charge on the mortgaged property held by one of the defendants was liable to be sold in execution of the decree. This defendant preferred an appeal praying for modification of the decree by granting a declaration that the plaintiffs were not entitled to get his right sold. The appeal was valued at Rs. 7,970, the decretal amount and a court-fee of Rs. 10 only was paid on the memorandum of appeal as for declaration:

Held, (i) the prayer in appeal clearly amounted to a claim for a declaration where consequential relief was prayed for;

(ii) that the question whether the matter in dispute was capable of being estimated at a money value did not arise since court-fee was to be paid according to the amount at which the relief was sought, namely, on Rs. 7,970. A.I.R. 1931 All. 251=1931 A.L.J. 150=131 Ind. Cas. 39.

——S. 7 (iv) (c), (v)—Setting aside decree—Suit by member of Malabar tarwad to set aside decree against karnavan and for possession of property sold under decree—Valuation and court-fee.

A suit by some of the members of a Malabar tarwad for a declaration that a certain decree obtained against the karnavan and other minor members represented by karnavan as guardian is not binding on them and for recovery of the tarwad properties sold in execution of that decree is a suit for declaration with consequential relief and in such a suit, the plaintiffs have got the right to value the consequential relief in any way they choose, subject to the proviso that in the case of immovable properties, the value should be at least half the value as arrived at by applying the rules of S. 7 (v), Court-fees Act. A.I.R 1931 Mad. 375=1930 M.W.N. 509=132 Ind. Cas. 129.

——S. 7 (iv) (c)—Setting aside decree—Sale of zarpeshgi under decree for rent—Suit by zarpeshgidar for declaration that decree and sale are not binding on him and for injunction restraining purchaser from taking possession.

The plaintiff, a zarpeshgidar, instituted a suit for declaration (1) that a decree for arrears of rent obtained by the landlord and the sale in execution thereof were not binding on him and that by the said sale, the purchaser did not acquire any interest in the property, and (2) for setting aside the decree and the sale and for an injunction restraining the purchaser from taking possession of the property. It was alleged in the plaint that property worth Rs. 1,200 was sold for the nominal price of Rs. 40. The plaintiff paid court-fee upon Rs. 40 only though the value of the plaintiff's zarpeshgi was Rs. 300:

Held, that inasmch as the sale had already taken place and the plaintiff was seeking an injunction against the defendant taking possession of property which would deprive him of the mortgage of Rs. 300, court-fee was payable on Rs. 300.

Though it is for the plaintiff in cases falling within S. 7 (iv) (c), Court-fees Act, to state the amount at which he values the relief sought and although the amount of court-fee varies with the amount at which the relief sought is valued in the plaint, it is open to the Court, if the question is raised as to the true valuation of the suit, to determine such question. A.I.R. 1931 Pat. 195=12 P.L.T. 550=131 Ind. Cas. 808.

——S. 7 (iv) (c)—Setting aside decree for which plaintiff was not a party.

Where a suit is by a person who was not a party to the decree in execution of which the properties had been attached and is substantially one for a mere declaration that the properties attached are joint, the additional prayer that the order of attachment and sale is void being merely a surplusage, such suit does not fall under S. 7 (4) (c) and a court-fee stamp of Rs. 10 is sufficient. A.I.R. 1923 Lah. 373 and 1 P.R 1911, Ref. 31 P.L.R. 383=A.I.R. 1930 Lah. 755.

——S. 7 (iv) (c)—Setting aside decree.

Where the plaintiff's object in bringing a declaratory suit is to get rid of a decree passed against him in a previous suit, whether the suit is one involving a prayer for an injunction restraining the decree holder from executing the decree, or as one involving a prayer for setting aside that decree the plaint must bear an ad valorem court-fee. A.I.R 1927 Lah. 499 and 38 Mad. 922, Rel. on. 116 Ind. Cas. 895=30 P.L.R. 176=A.I.R. 1929 Lah. 463.

——S. 7 (iv) (c)—Setting aside a decree for which plaintiff was not a party.

A suit for a declaration that a mortgage-decree, to which the plaintiff was not a party, is not binding on the plaintiff is merely a declaratory suit without consequential relief; the value for purposes of jurisdiction is the value of the property mortgaged. A.I.R. 1927 Lah. 499, Dist.; 38 Mad. 922, Rel. on. 113 Ind. Cas. 908=A.I.R. 1929 Lah. 446.

——S. 7 (iv) (c)—Setting aside a decree.

A suit to set aside a decree on the ground of fraud is not a mere declaratory one but it is one in which consequential relief is prayed. In such cases the substance and not the language of the plaint is to be looked to. 38 Mad. 922 (F.B.) and 39 Cal. 704, Foll. 8 Lah. 531=102 Ind. Cas. 46=9 Lah. L.J. 400=A.I.R 1927 Lah. 499.

——S. 7 (iv) (c)—Setting aside decree for which plaintiff is not a party.

A person who was no party to the decree may sue to have it declared void without asking for any consequential relief and the suit is not governed by S. 7 (iv) (c). 73 Ind. Cas. 767=5 Lah. L.J. 357=A.I.R. 1923 Lah. 373.

——S. 7 (iv) (c) Setting aside decree—Preliminary and final decrees.

Where the plaintiff sued to set aside both the preliminary and the final decrees for foreclosure on two grounds, first that they were obtained by fraud, and secondly, that he was a minor and was not properly represented in the foreclosure suit.

Held, that the suit was one involoving consequential relief and that an ad valorem fee was payable under S. 7 (iv) (c). 65 Ind. Cas. 980=24 O.C. 361=A.I.R. 1921 Oudh 217.

——S. 7. cl. 4 (c)—Setting aside decree—Suit for declaration with consequential relief—Suit by sons for recovery of possession of properties sold in execution of decree against father.

When consequential relief is sought in addition to a declaration, the plaintiff, is bound to fix a reasonable valuation upon the consequential relief. If he puts a ridiculous value upon it the Court must fix a reasonable value for him, dealing with each case on its own merits. 6 C.L.J. 427, Foll., 35 Cal. 202; 42 Cal. 370, Ref to. In a suit by sons to set aside decrees made upon mortgages executed by their father and sales held under such decrees, and to obtain possession of their individual shares in the joint family property. Held, that in effect the suits were not for recovery of possession but for declarations with consequential relief. The Court-fee payable in each case was not a sum equal to ten times the Government revenue but ad valorem calculated on the value of the plaintiff's share in the joint family property. 5 Pat. L.J. 394=2 P.L.W. 173=41 Ind. Cas. 95.

—S. 7 (iv) (c)—Setting aside decree.

A suit for a declaration that a decree is nullity and that it should be set aside is one for a declaration with consequential relief and is governed by S. 7 (iv) (c). 526 Ind. Cas. 550. (Nag.)

—S. 7 (iv) (c) Setting aside decree.

The valuation for the purposes of Court-fee under S. 7 (iv) (c) must be in accord with the value of the subject-matter and not an arbitrary valuation. In a suit for a declaration and consequential relief the plaintiff. is bound to pay ad valorem fees in proportion to the loss from which he seeks to be relieved. In a suit for a declaration that a decree obtained against them are void on the ground of fraud, plaintiffs are bound to pay an ad valorem Court-fees on the value of their share of the property sold and not merely an ad valorem fee on the amount of the decree. 4 Pat. L.J. 703=56 Ind. Cas. 316.

—S. 7 (iv) (c)—Setting aside decree.

A suit for a declaration that a decree is not binding as having been obtained by fraud comes within S. 7 (iv) (c) and the Court-fee payable thereon is an ad valorem fee on the value at which the suit is valued in the plaint. 38 Mad. 922, Foll. (1918) M.W.N. 562=24 M.L.T. 254=51 Ind. Cas. 536.

—S. 7 (iv) (c) Setting aside decree.

A suit to declare a decree or document to which plaintiff was a party is not binding on him is a suit for consequential relief within S. 7. Cl. (iv) (c) and ad valorem Court-fee is payable. A suit for declaration and consequential relief prima facie comes within S. 7, Cl. 4 (c) but if at the same time it comes within any of the other classes of suits specified in the section, it must be so treated. 38 Mad. 922=28 M.L.J. 118=17 M.L.T. 154=(1915) M.W.N. 118=28 Ind. Cas. 79.

15. Valuation.

—S. 7 (iv) (c)—Valuation—Right of plaintiff to value relief sought—Separate value for jurisdiction—Necessity—Separate value, at value of property, given by plaintiff for jurisdiction--If governs Court-fee or has to be ignored as unnecessary,

In a suit falling under S. 7 (iv) (c) of the Court-Fees Act, the plaintiff is entitled to value the relief sought by him, and when he has done it, he has to pay Court-fee only on that valuation. A further statement as to the value for purposes of jurisdiction is unnecessary, because the value for jurisdiction will, under S. 7 of the Act, read with S. 8, Suits Valuation Act, follow the valuation determined for purposes of Court-fee. If the plaintiff, however, states that the value for purposes of jurisdiction is a figure higher than that stated for purposes of Court-fee (at the value of the property) that is unnecessary and has to be ignored altogether. 47 All. 501, cons. 45 Bom. 567, foll. 29 Pat. 226=A.I.R. 1950 Pat. 316.

——S. 7 (iv) (c)—Valuation of plaintiff, if can be revised by Court.

Court has power to revise the valuation of the plaintiff in case it is arbitrary or capricious. Tests to determine whether court-fee is payable under S. 7 (iv) (c) or Art 17 (iii) formulated. A.I.R. 1946 Nag. 30 = 1945 N.L.J. 431=I.L.R. (1945) Nag. 975. [Overrules A.I.R 1941 Nag.243=1941 N.L.J. 254= I.L.R. (1942) Nag. 636=199 Ind. Cas. 765.]

——S. 7 (iv) (c)—Valuation to be put up by plaintiff—Court if can revise—Exceptional circumstances, if can be brought to the notice of Court

In suits coming under S. 7 (iv) (c), the plaintiff shall initially value the relief which he claims. If valuation is arbitrary and unreasonable, the Court can revise it. If the plaintiff is out of possession, the proper value should be the value of the property. In standing that value, it will be open to the plaintiff to bring to the notice of the Court any exceptional circumstances which may exist and affect temporarily the value of the properties. A.I.R 1945 Pat. 421=24 Pat. 334=27 Pat. L.T. 67.

——S. 7 (iv) (c) and Sch. I, Art. 1—Valuation —Distinction.

Though both under S. 7 (iv) (c) and Art. 1, Sch. I, **ad valorem** court-fee is required to be paid, the basis of valuation is not the same. Under the former provision, **ad valorem** court-fee has to be paid on the amount at which the relief sought is valued in the plaint or memorandum of appeal; under the latter provision, **ad valorem** court-fee has to be paid on the amount or value of the subject matter in dispute. In other words, under the former provision,the plaintiff can put his own valuation on the relief sought by him, whereas under the latter provision the value of the subject-matter must necessarily mean the market value. A.I.R. 1944 Pat. 17=22 Pat. 783=24 P.L.T. 446=11 B.R. 111= 216 Ind. Cas. 132 (FB).

——S. 7 (iv) (c)—Valuation — Court can revise valuation.

In a suit to obtain a declaratory decree with consequential relief, the Court can, under the law, revise the valuation put by the plaintiff and if on such revision the court is of opinion that the valuation is insufficient or arbitrary, it has jurisdiction to fix a right value. A.I.R. 1944 Pat. 17=22 Pat. 783=24 P.L.T. 446=11 B.R. 111=216 Ind. Cas. 132 (F.B.)

——S. 7 (iv) (c)—Valuation—Relief valued in accordance with Court-fees Act—Court, if can decide that it is under-valued.

A Court cannot decide that a relief claimed is undervalued if it is valued in accordance with the provisions of the Court-fees Act. A.I.R. 1942 Pesh. 4=197 Ind. Cas. 782.

——Ss. 7 (iv) (c), 8-C (Bengal), 12 Valuation—Power of Court to revise under S. 8-C,—Revised valuation, when open to revision.

It is open to the trial Court to revise under S. 8-C, Court-fees Act, the valuation of a relief under S. 7 (iv) (c), and its valuation cannot be interfered with in revision unless it is shown that the Court applied a wrong principle or a wrong objective standard. A.I.R. 1941 Cal. 509=197 Ind. Cas. 128.

——S. 7 (iv) (c) — Valuation — Plaintiff in possession of several parcels of land—Suit for declaration of his title thereto and for injunction restraining defendant from interfering—Court-fee payable—Value for purposes of jurisdiction.

A suit by plaintiffs who claim to be in possession of several parcels of land, for a declaration of their title and for an injunction restraining the defendant from interfering with their possession, is one for declaration and consequential relief and consequently under S. 7 (iv) (c) the plaintiffs are entitled to put their own valuation for purposes of court-fee and under S. 8, Suits Valuation Act, the value so fixed automatically becomes the value for jurisdiction. A.I.R. 1941 Lah. 307=43 P.L.R. 337=197 Ind. Cas. 609.

—S. 7 (iv) (c) Valuation—order passed by Liquidator of co-operative society—Suit for declaration by plaintiff, party to such order that it is null and void and for restraining defendant from executing it falls under S. 7 (iv) (c)— Plaintiff can fix any value on plaint. A.I.R. 1941 Lah. 254=43 P.L.R. 305=I.L.R. (1942) Lah. 379=195 Ind. Cas. 688.

S. 7 (iv) (c) Valuation.

—Declaratory relief found to involve consequential relief within meaning of S. 7 (iv) (c) —Plaintiff can state his valuation of relief.

If it is held that the declaration asked for cannot be granted because it does not fall under S. 42, Specific Relief Act, the result should be dismissal of the suit on that ground, and not assessment of a higher court-fee. If, on the other hand, it is found that declaratory relief claimed involves a consequential relief within the meaning of S. 7 (iv) (c), Court-fees Act, it will be for the plaintiff to state the amount at which he values the relief as provided in that section. A.I.R. 1941 Lah. 97=43 P.L.R. 106= I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.)

S. 7 (iv) (c) Valuation.

All that S. 7 (iv) (c), Courts-fees Act, requires is that the plaintiff should state the value of the relief in the plaint. It could scarcely have been intended that the plaintiff should value the relief at one figure for juris-

diction and at another for court-fee. A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.).

——S. 7 (iv) (c)—Valuation of relief.

In suits coming within S. 7 (iv) (c), Court-fees Act, that is, suits to obtain a declaratory decree where consequential relief is prayed for, the plaintiff has not an absoluate right to value the relief at any sum he pleases but the Court may inquire into the matter and raise the valuation if it finds that the relief claimed is undervalued. A.I.R. 1941 Sind 154=I.L.R. (1941) Kar. 102=197 Ind. Cas. 590.

——S. 7 (iv) (c)—Valuation — Trade - mark — Infringement of—Suit for permanent injunction and for decree for amount of loss suffered by plaintiff with prayer for destruction of copied labels—No court-fee paid on relief for injunction—Suit decreed—Non-payment of court-fee is not fatal to suit—plaintiff should not be allowed to execute decree in respect of injunction without payment of court-fees—No court-fee in respect of prayer for destruction of labels is necessary.

Where in a suit for permanent injunction by the plaintiff against defendant for infringement of copy right with prayers for a decree for certain amount on account of loss suffered by the plaintiff due to defendant's action and for the destruction of the copies and labels, the court-fee in respect of relief for the injunction is not paid, the defect is not fatal to the suit but where the decree has been passed, the plaintiff should not be allowed to execute it respect of the injunction without paying the court-fees. A prayer for the destruction of the copied labels is not really a prayer for any new relief. It is only ancillary to the relief of permanent injunction and as such has no separate value. Therefore, no court-fee is due thereon. 188 Ind. Cas. 462 (Bhopal).

——S. 7 (iv) (c)—Valuation.—Power of Court to raise—when can be exercised.

In a suit coming within S. 7 (iv) (c), Court-fees Act, being a suit to obtain a declaratory decree where consequential relief is prayed for, the plaintiff is bound to pay ad valorem court-fee according to the amount at which the relief sought is valued in the plaint. The plaintiff has not an absolute right to value the relief at any sum he pleases, but the court may enquire into the matter and raise the valuation if it finds the relief claimed as under-valued. A.I.R. 1939 Cal. 627=70 C.L.J. 158=43 C.W.N. 1116=185 Ind. Cas. 648.

S. 7 (iv) (c)—Valuation by plaintiff—Court, can interfere and exercise powers under O. 7, R. 11, Civil P.C.

Though under S. 7 (iv) (c), Court-fees Act, the plaintiff can put any valuation on the relief, yet such value is not binding on the Court and it can refuse to accept that value. Where the plaintiff's valuation is arbitrary and unreasonable, or in other words, if the disparity is so great as to show that he has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated, the Court can interfere and exercise its powers under O. 7, R. 11, Civil P.C. A.I.R. 1939 Nag. 50=I.L.R. (1938) Nag. 558=1938 N.L.J. 327=180 Ind. Cas. 271 (F.B.)

——S. 7 (iv) (c) Valuation.

——Different valuation for Court-fees and jurisdiction—Court can challenge one of them.

The value for Court-fee purposes and the value for jurisdiction must be the same, and if the plaintiff values the suit at one figure for the purposes of jurisdiction and at another figure for court-fee purposes in a suit coming under S. 7 (iv) (c), Court-fees Act, the Court is at liberty to challenge one of those values at any rate. A.I.R. 1939 Nag. 50= I.L.R. (1938) Nag. 558=1938 N.L.J. 327=180 Ind. Cas. 271 (F.B.)

[Overrules A.I.R. 1937 Nag. 14=165 Ind. Cas. 106.]

——S. 7 (iv) (c) Valuation.

——In valuing suits, the principle that value of suit is value of property affected by relief asked, if can be adopted.

The principle that where the subject-matter is so related to things which have a real money value, that the relief asked for will affect these, then the value of the suit for the puposes of jurisdiction is to be taken as the market value of the property affected, cannot be taken as the test for valuing suits of the type coming under S. 7 (iv) (c), Court-fees Act, because it is not the value of the thing affected that settles the value of the relief sought. It is the value of the relief sought which has to be determined. A.I.R. 1939 Nag. 50= I.L.R. (1938) Nag. 558= 1938 N.L.J. 327=180 Ind. Cas. 271 (FB).

——S. 7 (iv) (c)—Valuation—Suit by widow to cancel deed of family settlement executed between her and her husband's brother— Allegation that she was induced to sign it by fraud—She alleging that her husband died separated from his brother and she got possession of entire properties as his heir and that document curtailed her rights—Proper method of valuing suit.

Held, that the proper method of valuing the suit was according to the injury or loss from which the plaintiff sought to be protected and that loss could not be valued at the total value of the properties in suit; such a value would be proper if the plaintiff was out of possession of the properties or if the document denied her any right and title whatsoever and she had to come to Court to change her position from that of a person enjoying no rights to that of a person enjoying the full right. But as the document gave her considerable rights and she came for something better, it was for the plaintiff in the first instance to put a valuation on the relief claimed, and where such valuation was not wholly unreasonable or arbitrary, the Court should not interfere with it. A.I.R. 1939 Pat. 531=5 B.R. 727=20 P.L.T. 638=182 Ind. Cas. 153.

——S. 7. (iv) (c)—Valuation—Court-fee is to be paid on relief available at time of institution of suit—Necessity for further relief due to change in circumstances after instituting suit—It can be added by amendment of plaint and payment of court-fees thereon.

Court-fee is paid on the relief availabe to the plaintiff at the time of the institution of the suit. If, after its institution, circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is always open to him to apply to the Court for amendment of the plaint by adding new relief and to offer to pay court-fee thereon. A.I.R. 1939 Pat. 219=5 B.R. 818=20 P.L.T. 818=182 Ind. Cas. 743.

——**S. 7 (iv) (c) and S. 8-C (Bengl)—Valuation—S. 7 (iv) (c) is controlled by S. 8-C.**

If the plaintiff in a declaratory suit puts an entirely unreasonable valuation on the consequential relief for which he prays, this valuation may be revised by the Court by adopting the procedure laid down under S. 8 C of the Court-fees (Amendment) Act of 1935. 68 C.L J. 144.

——**S. 7 (iv) (c)—Valuation**—in a declaratory suit with consequential relief, the plaintiff has the option to value the relief claimed but where the Court finds it easy to question such valuation, the Court can require the plaintiff to correct the valuation. A.I.R. 1938 Cal. 302 =66 C.L.J. 462 =175 Ind. Cas. 261.

—S. 7 (iv) (c)—Valuation—plaintiff valuing suit for purposes of jurisdiction but failing to value it expressly for court-fee—Valuation fixed for Jurisdiction, whether can be taken as value of relief for purposes of court-fee.

The assessment of Court-fees on a suit falling under any of the clauses of S. 7 (iv) depends on the amount shown in the plaint or memorandum of appeal, as the case may be, as the value of the suit for purposes of court-fee; but this in turn must depend upon a figure to be fixed by the plaintiff himself. If the plaintiff fails to fix such a figure expressly for court-fee purposes on the erroneous supposition that the suit it not covered by S. 7 (iv) (c) and separately values his suit for jurisdictional purposes at a certain figure, he should be taken as having valued the relief sought by him at this amount, and should not be taken as having failed to value his relief within the meaning of the section and so should not be required to fix the value of the relief for the first time. The plaintiffs cannot have the benefit of a higher valuation for selecting a superior forum for the hearing of their case and pay a court-fee on a lower valuation. A.I.R. 1938 Lah. 647=40 P.L.R. 938=I.L.R. (1939) Lah. 172=179 Ind. Cas. 154.

—S. 7 (iv) (c) (v)—Valuation for purposes of court-fees—Test to see if suit is one for possession or for declaration of title.

There is much misunderstanding in India as to the legal meaning of the word "declaration" as applied to a remedy to be granted by a Court. The habit has grown up of describing a suit for possession of property as being a suit "for a declaration of title together with a decree for possession of the property in suit," and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession, the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which he seeks is a decree for delivery of possession. The distinction between the remedy sought and the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the plaintiff obtaining an order for possession but having been refused a formal "declaration" in the decree could come to the Appellate Court with a complaint that he had not received the whole of the remedy for which he had asked. If the Appellate Court is in a position to tell the plaintiff that the remedy of possession is all that the plaintiff is entitled to ask and that the so-called "declaration" claimed in the plaint is merely a finding of the Court set forth in the Judgment as distinct from the decree, the jurisdiction for granting the remedy, then the so-called "declaration" claimed in the plaint is not a declaration at all, If, on the other hand the appellate Court should find that the plaintiff is really making a claim to a declaration properly so-called and that the decree for possession is merely consequential relief, it may, under S. 12 of the court-fees Act, adjust the matter of the court-fee in accordance with S. 7, para. (iv). It is this very difference which is at the basis of the paratice under which the Court will not ordinarily grant a mere declaration and the plaintiff must claim consequential relief also. A.I.R 1938 Pat. 22=18 P.L.T. 977=4 B.R. 178=16 Pat. 766=172 Ind. Cas. 840 (F.B.).

—S. 7 (iv) (c) Valuation—Decree—Value of, for court-fees.

The value of the decree is the value of what can be realized from the assets of the debtor. A.I.R. 1937 Cal. 742=41 C.W.N. 1339=I.L.R. (1938) 1 Cal. 196=174 Ind. Cas. 80.

——**S. 7 (iv) (c)—Revision.**

——**Quoere.**—Lower Court ordering plaintiff to pay ad valorem court-fee under Court-fees Act. S. 7 (iv) (c)—Another remedy by way of appeal open to plaintiff—Revision, whether maintainable —If it is, whether it is, restricted to cases which relate to category only and not merely to quantum of Court-fee. A. I. R. 1936 Pat. 190=16 P.L.T. 889=2 B.R. 230=160 Ind. Cas. 608.

——**S. 7, cl. (iv), (c)—Valuation—Plaintiff, if can give arbitrary valuation.**

In a suit for declaration with prayer for consequential relief, the plaintiff cannot give any arbitrary valuation and the Court is not bound to accept the valuation stated by the plaintiff in his plaint. A. I. R. 1935 All. 849=1935 A. W. R. 1128=158 Ind. Cas. 447.

——**S. 7 (iv) (c)—Valuation by plaintiff should be reasonable—Power of Court to determine, if valuation is reasonable.**

Although it is for the plaintiff to state the amount at which he values the relief sought, yet it is open to the Court, if a question is raised as to the true valuation to determine such question and in any event, the value sought to be put by the plaintiff must be a reasonable one. It cannot, however, be laid down as a universal rule that in all such cases, the plaintiff will have to pay

ad valorem court-fee on the value of the properties. A.I.R. 1935 Pat. 68=1 B. R. 345=154 Ind. Cas. 850,

——S. 7 (iv) (c)—Valuation must be one single and entire sum for purposes of court-fee and jurisdiction.

In a suit for a declaratory decree, where consequential relief is prayed for which really falls under S. 7 (iv) (c) of the Court-fees Act, the plaintiff is entitled to put his own valuation on such a suit, subject to Ss. 4 and 9 of the Suits Valuation Act, and he must do so by putting down one single and entire sum as representing the value of the total relief sought by him. It is not open to him to split up the valuation for purposes of jurisdiction and for purposes of court-fee. 150 Ind. Cas. 732=57 C.L.J. 465.

——S. 7 (iv) (c)—Valuation—Plaint deliberately cast in such a form as to evade payment of court-fee—Plaintiff really seeking declaration of title with consequential relief.

Although the question of court-fee must be decided on the allegations made in the plaint, and the relief actually asked for therein, yet where it is clear that the plaint is delibetately cast in such a form as to evade payment of court-fee, but is nevertheless a plaint for a declaration of title together with a consequential relief, the court-fee payable on such a plaint must be ad valorem on the value of the property in dispute. It is the bounden duty of Courts to look into the substance of the relief claimed.

Where the allegations in the plaint show clearly that the plaintiff virtually seeks the cancellation of a deed of waqf and the will executed by a deceased man in order that he may recover the property as the reversionary heir of the deceased, the plaintiff in substance asks for the cancellation of the deed of "waqf" and the will, and, therefore, his plaint is virtually for a declaration with a consequential relief, and falls under S. 7 (iv) (c) of the Court-fees Act. A.I.R. 1934 Oudh 505=11 O.W.N. 1292=152 Ind. Cas. 312.

——S. 7 (iv) (c)—Valuation—Objection by defendant—Duty of Court to see if valuation is correct.

Although in a suit for declaration with consequential relief, the plaintiff is entitled to put his own valuation on his suit, the defendant is entitled to take objection to the valuation given in the plaint, both as affecting the question of jurisdiction and as affecting the question on court-fees and when objection is taken, the Court is obliged to enter into the question of whether the value is correct. A.I.R. 1934 Pat. 234=149 Ind. Cas. 109

——S. 7 (iv) (c)—Valuation—Suit for declaration and consequential relief — Arbitrary valuation — Court's power to revise.

In a suit to obtain a declaratoy decree with consequential relief falling within S. 7 (iv) (c), Court-fees Act, the plaintiff is bound to fix a reasonable valuation. The Court is empowered under the law to revise the valuation put by the plaintiff and, if on such revision, it is of opinion that the valuation is insufficient or arbitrary; it has jurisdiction to fix a right value.

Where the value fixed by the lower Court is also arbitrary, the High Court can interfere under S. 115, Civil P. C. A.I.R. 1932 Pat. 9=12 P.L.T. 656=11 Pat. 161=133 Ind. Cas. 687.

——S. 7 (iv) (c) and Art. 17—Valuation.

Where a party is doubtful as to whether fixed or ad valorem Court-fee is payable, it is resonable to refuse to pay ad valorem Court-fee until it is decided that that Court-fee is payable. 34 C.W.N. 1129=A.I.R. 1930 Cal. 787.

——S. 7 (iv) (c)—Valuation.

——Even if a plaintiff ought not to be permitted to have his relief without paying adequate court-fees, yet, he in a suit coming under sub--cl. (c) or sub-cl. (d), S. 7 (iv) may justly say that his valuation of the relief is what he has to pay for. 34 C.W.N. 321=A.I.R. 1930 Cal. 473.

——S. 7 (iv) (c)—Valuation—Altering of.

Where it is open to the plaintiff to place his own valuation on the suit, and he elects to value it at an amount which is within the jurisdiction of a Subordinate Judge of the Second Class it is not open to him afterwards to say that it is of the value of Rs. 10,000 or upwards so as to fulfil the requirements of S. 110. 119. Ind. Cas. 782= 53 Bom. 552=31 Bom. L.R. 632=A.I.R. 1929 Bom. 341.

——S. 7 (iv) (c)—Valuation—When Court can interfere.

There is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under S. 7, (iv) (c) or (d) of the Court-fees Act, unless the Court can take advantage of S. 151 of the C. P. Code. That section may be brought into use if a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by some particular Court. 107 Ind. Cas. 330=A. I. R. 1928 Oudh. 260.

——S. 7 (iv) (c)—Valuation—Reasonable.

Where plaintiff valued his suit for injunction at Rs. 150, the value of the property involved being Rs. 300 and lower appellate Court held that under S. 7. (iv) (c) Court Fees Act the valuation was reasonable.

Held, that the lower appellate Court had jurisdiction to decide the matter and High Court will not interfere. 94 Ind. Cas. 103=1926 P. H. C. C. 102= A. I. R. 1926 Pat. 334.

——S. 7 (iv) (c)—Valuation.

The "relief sought" on which the court-fee must be levied, is the sum total of the two reliefs, viz., declaration of right and consequential relief and not the consequential relief alone. 36 All. 500, Foll. 87 Ind Cas. 190=47 All. 501=23 A. L J. 344=6 L.R.A. Civ. 258= A. I. R. 1925 All. 602.

——**S. 7 (iv) (c)—Valuation**—Value of subject-matter.

For the purpose of court-fees, the valuation put by the plaintiff in a suit under S. 7, (iv) (c), is not to be an arbitrary valuation, but is to accord with the value of the subject-matter of the suit and in case of dispute is to be determined by the Court. To hold otherwise is to allow the plaintiff in the suit to choose his own forum. 7 N. L. R. 190, Foll. 79 Ind. Cas. 113=A. I. R. 1924 Nag. 295.

——**S. 7 (iv) (c)—Valuation**—Power of Court.

Plaintiff's valuation if arbitrary and incorrect can be corrected by Taxing Officer. The section must be held to mean that the valuation for purposes of court-fee is to be made in the first instance by the party concerned but is finally determinable by the Court. 68 Ind. Cas. 316=73 Ind. Cas. 43=2 Pat. 198=1922 P. H. C. C. 337=4 P. L. T. 71=1 Pat. L. R. 25=A. I. R. 1923 Pat. 137.

——**S. 7 (iv) (c)—Valuation**—Declaration and injunction.

The plaintiff has the right to put his own valuation on his claim for the purposes of Court-fees in a suit for a declaration and for an injunction by way of consequential relief; and the same is the value for the purpose of jurisdiction. 44 Bom. 331=22 Bom. L.R. 289=56 Ind. Cas. 340.

——**S. 7 (iv) (c)**—Valuation of suit—Court-fees—Declaratory decree—Injunction—Court-fees Act, Sch. II, Art. 17—Objection to jurisdiction not raised in first Court—Suits Valuation Act, S. 8.

The Court-fees Act has no other object than to secure revenue and its provisions should be construed accordingly. A suit, the subject-matter of which exceeded Rs. 5,000 was instituted in the first class Subordinate Judge's Court, the only Court competent to hear it. The prayer was for a declaration in respect of the bulk of the properties and for an injunction regarding a house. The prayer for declaration was valued at Rs. 130 and that for injunction at Rs. 5 and Court-fee of Rs. 10—6—0 was paid. The suit was decided without any objection to jurisdiction by deft. On appeal to the High Court by plff. the deft. contended that under S. 7 (iv) (c) the subject-matter was less than Rs. 5,000 and the appeal lay to the Dist. Court only. **Held**, that by Sch. II Art. 17 a fixed fee of Rs. 10 has to be paid on a plaint for a declaratory decree where no consequential relief is prayed for; the Bombay practice of stating a value of Rs. 130 upon a plaint of that description is not warranted by law and is misleading. 43 Bom. 507=46 I. A. 24=17 A. L. J. 418=25 M. L. T. 298 =36 M. L. J. 437=29 C. L. J. 452=21 Bom. L. R. 489=10 L. W. 274=24 C. W. N. 33=50 Ind. Cas. 280 (P. C.).

——**S. 7 (iv) (c) — Valuation of suit — Plaint — Court-fee.**

In a suit for a declaration that a decree for over Rs. 22,000 was bad, and might be set aside, the plaintiffs were interested only in three annas share of the property valued at Rs. 9,000. **Held**, that the plaintiffs must value their suit according to the extent of their claim, and the Court-fee need therefore be paid only upon that amount. 85 Cal. 202; 40 Cal. 615; Ref. 42 Cal. 370=19 C.W.N. 895=30 Ind. Cas. 111.

16. Miscellaneous.

——**S. 7 (iv) (c)—Miscellaneous.**

——**Procedure—party doubtful as to Court-fee.**

Where a party is doubtful as to whether fixed or ad valorem court-fee is payable, it is resonable to refuse to pay ad valorem court-fee until it is decided that that court-fee is payable. 34 C.W.N. 1129=A.I.R. 1930 Cal. 787.

——**S. 7 (iv) (c) Miscellaneous.**

——As a claim before a survey officer or an entry made in the survey records amounts to an assertion of adverse title, the plaintiff in a partition suit, must clear up his title and possession over the plots recorded adversley to him in the survey records and pay ad valorem fee with respect to the property. 63 Ind. Cas. 203 (Pat.)

——**S. 7. (iv) (c)—Miscellaneous—Plaint—Insufficiently stamped giving no valuation of relief sought—Computation according to jurisdictional vaue—Amendment of plaint.**

A suit under S. 7, cl. (iv) with a plaint containing no valuation of relief sought but giving a valuation for purposes of jurisdiction is valued for purposes of Court-fees according to jurisdictional value, unless plaintiff amends the plaint with the leave of the Court. 31. Ind. Cas. 807 (Cal.).

——**S. 7. (iv) (d)—Declaratory Suit—Injunction ——Valuation—Suits Valuation Act, S. 8.**

Where in a declaratory suits, the plaintiff asked for injunction, the suit falls under S. 7. (iv) (d) and must be valued alike for purposes of Court fees and jurisdiction under S. 8 of the Suits Valuation Act. 19 C.L.J. 15=21 Ind. Cas. 771.

——**S. 7 (iv) (d)—Declaratory suit.**

In a declaratory suit, the value of the property is the value of the relief claimed. And the value of the relief cannot be arbitrarily fixed. 14 C.L.J. 47 =15 C.W.N. 823=10 Ind. Cas. 865.

——**S. 7 (iv) (d) and (v)—Injunction—Suit for—Valuation of relief.**

According to the definition of 'immoveable property' in the General Clauses Act, as things attached to the earth, trees must be regarded as immovable property within the meaning of that definition. Hence, the plaintiff in a suit for an injunction restraining the defendants from felling certain trees and shrubs in certain lands has to value his relief by way of injunction at not less than half the value of the trees, calculated in the manner provided by S. 7 (v) of the Court-Fees Act, namely, that of taking the market value of the property, the trees. 60 L.W. 492=1947 M.W.N. 495=A.I.R. 1948 Mad. 44=(1947) 2 M.L.J. 182.

——**S. 7 (iv) (d)—Injunction—Suit for.**

In a suit for injunction, the plaintiff must value the relief he seeks although the amount at which he values it is entirely at his discretion. A.I.R. 1934 Rang. 268=12 Rang. 335=153 Ind. Cas. 1037.

— S 7 (iv), (d)—Injunction, suit for—Valuation.

The valuation of a suit for injunction restraining the defendant from cutting timber from plaintiff's jungleis the amount at which the plaintiff values the relief sought. 46. Ind. Cas. 884. (Cal.).

—S. 7 (iv) (d)—Injunction—Suit for—Valuation of claim.

In a suit tor injunction, plaintiff valued the claim as Rs. 10 for Court-fees and at Rs. 500 for jurisdiction, and paid Court fees on the former amount. Held, that plaintiff was entitled under S. 7, Cl. (iv) (d) to value his claim at Rs. 10 for Court-fee purposes and it was wholly unnecessary for him to fix any other value for the purposes of jurisdiction, under S. 8 of the Suits Valuation Act, 1887, and that he was not bound to pay Court-fee on Rs. 500. 22 Bom. L R. 1450=45 Bom. 567=59 Ind. Cas. 777=A.I.R. 1921 Bom. 65.

——S. 7, Cl. (iv) (d)—Injunction—Suit for—Valuation by plaintiff—Increase of valuation by court and return of plaint—Order invalid:—A sued for an injunction and valued the relief at Rs. 50. The court found that the proper valuation was Rs. 2,700 and returned the plaint for presentation to the proper court: Held, that the court could not increase the value of the suit, as the Court-Fees Act, S. 7, Cl. (iv) (d), requires that in a suit for injunction the plaintiff shall state the amount at which he values the relief sought.—24 M. 34.

——S. 7 (iv) (d)—Plaintiff's right of valuation—How far interfered with by the notification of Madras High Court under S. 9 of the Suits Valuation Act.

It is clear from the words of the notification issued by the High court under S. 9 of the Suits Valuation Act itself that a plaintiff cannot value his claim at an amount less than the market value of the property under the notification. Giving the plain meaning to the words of the notification it only means that he cannot value the claim at less than half. But before the notification the plaintiff had absolute discretion which could not be interfered with by the Court and this discretion to value over and above half the market value is not taken away by the notification which only affects the lower limits to which the plaintiff can go. 63 L.W. 247 = A.I.R. 1950 Mad. 643=(1950) 1 M.L.J. 326.

——S. 7 (iv) (d)—Plaintiff's valuation of injunction sought, palpably inadequate—Court's power to revise it.

The Court has no power to revise the valuation which the plaintiff has placed upon injunctions sought for by him even if it is palpably inadequate. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=52 L.W. 610=1940 M.W.N. 1062=I.L.R.(1941) Mad. 157=195 Ind. Cas. 439.

——S. 7 (iv) (d)—Injunction—Suit for permanent injunction by occupancy raiyat against unrecognized transferee of under raiyati interest from korfa tenants or against sub-tenant holding under them restraining him from building permanent structures and also for mandatory injunction directing him to remove permanent structures, is governed by S. 7 (iv) (d). A.I.R. 1940 Cal. 552=44 C.W.N. 1038=191 Ind. Cas. 381.

——S. 7 (iv) (d)—Suit by ex-communicated member of caste for declaration that resolution of ex-communication was illegal and for permanent injunction restraining community from interfering with plaintiff's joint possession of caste properties.

An ex-communicated member of a community filed a suit for a declaration that the resolution ex-communicating him was improper and illegal and that he, as a member of the said community, was entitled to use or enjoy in common the movable as well as immovable properties of the community as a co-owner and for a permanent injunction against the defendants, representing the community, restraining them from obstructing him in his enjoyment of the said properties as a co-owner. There were several members of the caste, and the plaintiff's interest in the caste property was less than Rs. 5,000:

Held, that if the relief of permanent injunction be regarded as a consequential relief and the suit was governed by S. 7 (iv) (c) then the Second Class Subordinate Judge had jurisdiction to try the suit.

Even if the suit was regarded as one for joint possession of the caste properties, then the subject-matter of the suit was the value of the plaintiff's share in them. The value of the subject-matter of the claim made by the plaintiff was less than Rs. 5,000 and the Second Class Subordinate Judge had jurisdiction to try the suit. A.I.R. 1939 Bom. 287=41 Bom. L.R. 425.

S. 7 (iv) (d)—Valuation.

——Suit for injunction restraining municipality from demolishing thara—Valuation for the purposes of court-fees and jurisdiction same—Plaintiff can put any valuation. 116 Ind. Cas. 908=A.I.R. 1929 Lah. 566.

S. 7 (iv) (d)—Valuation.

Whatever the ligislature may have intended, the clear meaning of S. 7 implies that the plaintiff in a suit with consequential relief of injunction is at liberty to assign any value to the relief he claims. A.I.R. 1921 Bom. 65; A.I.R. 1924 Nag. 316 and A.I.R. 1918 P.C. 135; Foll. 99 Ind. Cas. 868=A.I.R. 1927 Nag. 375.

S. 7 (iv) (d)—Valuation.

——In a suit brought for the purpose of obtaining a declaration of title regarding a piece of land, a further relief was sought, in that the Court should issue a perpetual injunction restraining the defendant from interfering, and for purposes of jurisdiction the value of the land was stated.

Held, the plaintiff is bound to pay a court-fee for relief by way of injunction on the valuation of the land according to S. 8, Suits Valuation Act. 94 Ind. Cas. 951=48 All. 412=24 A.L.J. 478=A.I.R. 1926 All. 423.

S. 7 (iv) (d)—Valuation.

——In a suit for injunction, the court-fee is to be computed according to the amount at which the relief is valued in the plaint unless the same appears to be arbitrary or inconsistent with the value of the reliefs claimed. 79 Ind. Cas. 982=40 C.L.J. 150=A.I.R. 1924 Cal. 969.

——S. 7 (iv) (d)—Valuation.

——In suits falling under Court Fees Act, S. 7 (iv) (d) the valuation for court-fees and jurisdiction is the same, i. e., the value at which the relief is valued in plaint which also is the basis for calculating pleader's fees. 69 Ind. Cas. 577= A.I.R. 1924 Lah. 364.

——S. 7 (iv) (d) and (i)—Valuation—Suit for rent declaration and injunction.

A suit for rent, and for declaration of title with injunction falls under S. 7 (i) and (iv) (d). The value for purposes of Court-fees and jurisdiction is the same. 6 S.L.R. 114=17 Ind. Cas. 44

——S. 7 (iv) (e).

—S. 7 (iv) (e) and S. 7 (iv) (c) by Madras Proviso—Expression 'the relief' sought is with reference to any immovable property, meaning of—Declaratory suit claiming customary rights from forest beloging to another, falls under S. 7 (iv) (e) and Madras Proviso does not apply.

The prima facie interpretation of the expression 'the relief sought is with reference to any immovable property' in the Proviso to S. 7 (iv) (c) inserted in the Court-Fees Act by the Madras Act (V) of 1922 is that the dispute should, in some sense, relate to the title to immovable property. A suit for a declaration that the plantiffs have certain customary and mamool rights, viz., to graze cattle, to take leaves of manure, to cut and take wood required for fuel and other building and domestic purposes, etc., all free of charge from a forest area belonging to another, not being a suit relating to any title to immovable property falls under S. 7 (iv) (e) and not under S. 7 (iv) (c) and the Madras proviso does not apply to such a suit. A.I.R. 1946 Mad. 235=59 M.L.W.41 = (1946) 1 M.L.J. 61=1946 M.W.N. 80.

——S. 7 (iv) (e)—Periodical payment.

—A suit for a declaration that plaintiff is liable to pay Achu palisha (a kind of royalty payable to a hill owner, at a rate lower than that claimed by the defendant does not fall within S. 7, cl. (1) or cl. (4) (e) or cl. (11) (f). It is a pure suit for a declaratory decree without any consequential relief and plaintiff cannot be allowed to put for jurisdictional value anything more than the value of the subject-matter in dispute which is the capitalised value of the difference between plaintiff and defendant's claims. 79 Ind. Cas. 343=19 M.L.W.668 =34 M.L.T. 271=A.I.R. 1924 Mad. 621=46 M.L.J. 377.

——S. 7 (iv) (e) and 7 (v)—Suits Valuation Act, S. 8—Declaration and possession—Suit for.

A suit for a declaration that a certain decree is not binding on the plaintiffs or the properties in their hands and for possession of a portion of those properties which had been sold in execution of the decree is a suit for declaration and consequential relief and Court-fee is to be paid only on the relief for possession. 30 Mad. 335 (F. B.) Dist. 38 Mad. 1184=1 L. W. 824= 25 Ind. Cas. 683.

——S. 7 (iv) (f).

Synopsis.

1. Accounts.
2. Administration Suit.
3. Appeal.
4. Mesne profits.
5. Partition suit.
6. Partnership.
7. U. P. Agr. Rel. Act—Suits under.
8. Miscellaneous.

1. Accounts.

——S. 7 (iv) (f)—Accounts—Suit for — Court-fees — Determination of amount by Court— Proper stage.

In suits for accounts it is for the plaintiff to tentatively value his suit for purposes of jurisdiction and Court-fee, and after evidence has been led it will then be for the Court to find out at the proper stage as to what the amount due will be and on the determination of that amount Court-fee has to be paid by the plaintiff. A.I.R. 1949 E.P. 372.

——S. 7 (iv) (f)—Accounts—Suit for—Valuation by plaintiff—Correction—Power of Court.

The principle under lying both S. 7 (iv) (c) and S. 7. (iv) (f), Court-Fees Act, is substantially the same. In both the cases it is for the plaintiff to put his valuation whether it is a case of consequential relief or whether it is a case of accounts. Ordinarily the Court should not endeavour to correct the plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable, and bears no relation to the value of the right litigated. But when the valuation put by the plaintiff appears to be arbitrary and unreasonable, the court may reject the plaint and leave the plaintiff to correct the valuation or have the suit rejected. I.L.R. (1947) Nag. 933=A.I.R. 1948 Nag. 212

—(as amended), S. 7 (iv) (f)—Accounts—Suit for by temple trustees against previous trustees— Prayer for taking of account and recovery of amounts—Allegations of mismanagement and falsification of accounts—Court-fee payable.

The trustees of a temple sued the previous trustees to render a true and proper account with reference to the transactions, collections, expenses, remissions, amounts allowed to become timebarred, etc., and for the appointment of a commissioner to examine the accounts. The first charge against

the trustees was in respect of the "estimated loss" on account of the deliberate and regular underselling of paddy for which the defendants were bound to account, if they failed to give a proper explanation. After giving some of the intances, the plaintiffs estimated the loss on that account at a certain figure. The other charges against the defendants was systematic and unauthorised excess expenditure and the creation of faked up receipts and vouchers for expenses alleged to have been incurred. It appeared that the defendants had not previously submitted an account of their management of the properties of the temple. On a question as to the court-fee payable,

Held, that the suit was one for an account falling within S. 7 (iv) (f) of the Court-Fees Act, and that ad valorem court-fee was not payable on the basis that the suit was for recovery of specific sums. 60 L.W. 143=1947 M.W.N. 175=A.I.R. 1947 Mad. 360 (2)=(1947) 1 M.L.J. 148.

—S. 7 (iv) (f)—Accounts—Suit for—Right of, plaintiff to put arbitrary valuation.

In a suit for accounts, the plaintiff is entitled under S. 7 (iv) (f) of the court-fees Act, to put his own valuation on the plaint and pay court-fees accordingly. He can put an arbitrary valuation on the claim, having regard to the fact that he would be required later to pay full court-fee on the claim decreed. I.L.R. (1948) Nag. 999=A.I.R. 1949 Nag. 4=1948 N.L.J. 437.

—S. 7 (iv) (f)—Accounts—Suit for—Final decree for specific sum—Appeal must bear stamp on amount of decree at least.

In an appeal in a suit originally instituted for an account seeking to set aside a final decree for specific sum found to be due from the appellant, the appellant is bound to value his appeal at the amount of that decree at least. It is not open to him to value his appeal at a notional amount. A.I.R. 1941 Bom. 242=43 Bom. L.R. 475=I.L.R. (1941) Bom. 477=195 Ind. Cas. 894.

—S. 7 (iv) (f)—Accounts—Suit for accounts against guardian by ward on attaining majority.

In the suit by the ward on attaining majority for accounts against the guardain, if the suit is for accounts, the plaintiff need not specify the amount he expects to receive; it is sufficient to pay court-fees on the relief of accounting and to pay court-fees later on the amount found due. But where the suit is to surcharge and falsify the accounts already furnished by the guardian to the Court by whom he was appointed and to recover specific sums, the plaintiff must value and stamp his plaint accordingly on an ad valorem basis. A.I.R. 1946 Mad. 136=(1945) 2 M.L.J. 460=224 Ind. Cas. 353.

—S. 7 (iv) (f)—Accounts—Suit for—Valued at Rs. 100—Decree passed against plaintiff for Rs. 4,000—Plaintiff filing appeal and paying court-fee on Rs. 100—Plaintiff-appellant, held, could value his relief in same manner as in plaint.

The plaintiff filed a suit for accounts of a dissolved partnership and for delivery of posession of the plaintiff's share of the partnership assets after taking accounts. The relief for accounts was valued at Rs. 100 in the plaint and court-fee paid thereon. The plaintiff did not succeed in the suit. On the other hand, the trial Court passed a final decree directing him to pay the defendants Rs. 4,582-5-0 with interest. The plaintiff thereupon filed an appeal valuing the relief at Rs. 100, the value mentioned in the plaint and paid court-fee accordingly:

Held, that in the matter of valuing an appeal under S. 7 (iv) (f) the plaintiff-appellant has greater freedoom than the defendant-appellant and the plaintiff-appellant can value it as in the plaint. The court-fee paid was therefore correct. A.I.R. 1943 Mad. 685=56 L.W. 510=(1943) 2 M.L.J. 347=1943 M.W.N. 817=211 Ind. Cas. 10.

——S. 7. (iv) (f)—Accounts.

——In a suit for accounts, the plaintiff can put his own valuation as he pleased. The fact that he, on previous occasion, had claimed larger amount which was arbitrary and the present one more reasonable will not affect the valuation. 1942 N.L.J. 197.

——S. 7. (iv) (f)—Accounts—Suit for—Valuation determines forum of trial and appeal—Valuation in plaint, if can be changed in appeal—When can be changed.

The scheme of the Court-fees Act, in respect of suit for accounts is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so, his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this, he is bound by the valuation fixed by himself at the commencement of the litigation. An appellant, therefore, in an appeal against a decree dismissing a suit for an account cannot change his valuation, although the subject-matter of the appeal is the same as in the trial Court. A.I.R. 1938 Mad. 887=1938 M.W.N. 946=48 L.W. 454=(1938) 2 M.L.J. 557=I.L.R. (1938) Mad. 1031=178 Ind. Cas. 159 (F.B.)

——S. 7. (iv)(f)—Accounts—Suit for—Valuation for purposes of jurisdiction.

The value of a suit for accounts for purposes of jurisdiction is the same as its value for the purposes of court-fees. By S. 7, sub-s. 4, cl. (f), Court-fees Act, the value of such a suit for purposes of court-fees is the amount at which the relief sought is valued in the plaint. A.I.R. 1937 Cal. 430=41 C.W.N. 851=172 Ind. Cas. 474.

——S. 7. (iv) (f)—Accounts—Suit for accounts of rent and payment of share.

Where a suit is nominally one for accounts of the rent recovered by the defendants and for payment of the plaintiffs' share in those rents, when the amount recovered had been ascertained, and the plaintiffs have issued a notice in which they claim a definite sum, the suit is one for accounts in spite of the plaintiffs' having claimed a fixed sum by their notice and according to S. 7 (iv) (f), Court-fees Act, it is open to the plaintiffs to value their plaint as they please and the plaint as valued by them ought to be accepted. A.I.R. 1936 Bom. 166=38 Bom. L.R. 218=162 Ind. Cas. 227.

——Ss. 7(iv)(f), 7(i)—Accounts—Suit for—Allegations in plaint that certain sum was stated as due in account sent by defendant.

In a suit for account against an agent which was tentatively valued by the plaintiff at rupees four hundred, there was an allegation that in an account sent by the defendant to the plaintiff some time before the plaintiff's agency terminated, a sum of Rs. 1,873 was stated to be in the hands of the defendant. The trial Court held that the plaintiff was bound to value the suit at Rs. 1,873 under S. 7 cl. 1 of the Court-fees Act:

Held, that the suit was in substance a suit for account and the order of the lower Court was not correct. A.I.R. 1936 Mad. 525=163 Ind. Cas. 822.

——Ss. 7. (iv) (f), 11—Accounts Suit for—Plaintiff can value relief at his own figure.

As it is impossible to say at the outset, in a suit for accounts, what exact amount the plaintiff will recover, the Court-fees Act has left it open to him to estimate the amount. He is, therefore, entitled to value the relief sought by him at his own figure. If he recovers more, he pays the extra fee under S. 11, Court-fees Act. A.I.R. 1935 Bom. 212=37 Bom. L.R. 148=156 Ind. Cas. 424.

——S. 7 (iv) (f) — Accounts—Tenants—in-common—Suit for partition—Defendants asking for account of rents—Court-fee, if to be paid on such relief.

The plaintiffs and the defendants were tenants-in-common in certain property. The plaintiffs filed a suit for partition of the property. The dafendants said in their written statements that the plaintiffs had been managing the property and recovering the rents and that they should give account of the rents. But they did not value their relief for account of the rents or pay court-fee thereon:

Held, that if the defendants wanted an account of rents in that suit on the ground that the plaintiffs as agents were liable to account, it was incumbent upon them to value their relief and to pay necessary Court-fee. A.I.R. 1933 Sind 304=147 Ind. Cas. 528.

——S. 7. (iv) (f)—Accounts—Suit for—Counter-claim—Value of suit.

In a suit for an account, the defendant who is an accounting party makes no cross-claim. He admits that he is an accounting party and offers to render the account and at the same time pleads that the result of the account would be in his favour and not in favour of the plaintiff. If it was the intention of the Legislature that if in a suit of this nature the defendant claims a decree in his favour, he should not only plead in his written statement that as a result of an account being taken a sum of money would be found due to him, but that he should claim a decree for a specific sum as due to him and pay court-fee thereon, the Legislature should have said so. A.I.R. 1933 Sind 247=150 Ind. Cas. 464.

——S. 7 (iv) (f)—Accounts—Suit for—Defendant, if can say that on accounts being gone into, money would be due to him.

In a suit for accounts, it is open to the defendant to say that on the accounts being gone into, money would be due to him and that a decree should be passed in his favour for such amount as may be found due to him, in such cases there is no reason why a Court of Equity should refuse to pass a decree in favour of the defendant and refer him to a separate suit if as the result of an inquiry held by it at the instance of the plaintiff, it finds that the plaintiff is indebted to the defendant. There is also nothing in the provisions of the Court-fees Act to suggest that in a suit of this nature, it is incumbent upon the accounting party to pay any court-fee on the written statement filed by him claiming a decree for such sum as may be found due to him on a settlement of the account. A.I.R. 1933 Sind 247=150 Ind. Cas. 464.

——S. 7 (iv) (f)—Accounts—Suit for Plaintiff entitled to put his own valuation—Order to amend plaint by putting higher valuation at evidence stage—Material irregularity.

The plaintiff instituted a suit for winding up the affairs of a partnership, for taking accounts and for recovery of a share of the profits alleged to be due to him from the partnership. As the account books were with the defendant, the plaintiff valued the relief claimed in the plaint under S. 7, cl (iv) (f), Court-fees Act, at Rs. 100 and paid court-fee thereon. During the examination of the plaintiff, he stated that the profits due to him would be about Rs. 7,000 or Rs. 3,750. At that stage, the Court directed the plaintiff to amend the plaint by putting at least Rs. 3,750 as the valuation of the suit. Plaintiff preferred a petition in revision:

Held, (i) that the suit was one for accounts within the meaning of S. 7, cl. (iv) (f), Court-fees Act, and that in such a suit, it was prima facie open to the plaintiff to value the relief at any figure he liked;

(ii) that the lower Court acted illegally and with material irregularity in the exercise of its jurisdiction in directing the plaintiff to amend the plaint at that stage of the trial of the suit. A.I.R. 1932 Mad. 656=35 L. W. 846=1932 M.W.N. 979=139 Ind. Cas. 105.

——S. 7 (iv) (f)—Accounts—Suit for—Essentials.

A suit does not necessarily become a suit for accounts because the plaint asks for an account. The plaint must show that the defendant is an accounting party and that the plaintiff claims on the footing that an account has to be taken to ascertain the sum due to him. Such a suit is governed by S. 7, cl. (iv) (f), Court-fees Act, and the plaintiff is entitled to pay court-fee on the value he has thought fit to give to the relief sought, notwithstanding that he has through mistake or inadvertence stated the value for the purposes of jurisdiction at a different figure. A.I.R. 1932 Mad. 565=35 L.W. 358=137 Ind. Cas. 871.

——S. 7 (iv) (f)—Accounts — Suit for—Subsequent collection of of Court-fee.

The option or discretion of the plaintiffs in fixing his valuation is not confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented, though possibly combined with other circumstances the fact

that such relief can be ascertained might be a reason for holding that the suit for accounts does not lie. The plaintiff is entitled to exercise the privilege of valuing his relief at any figure be chooses, and the stamp will have to be made up subsequently if relief of greater value be granted to him. 8 L.L.J. 78=27 P.L.R. 187=94 Ind. Cas. 650=A.I.R. 1926 Lah. 242.

——S. 7 (iv) (f) — Accounts—Suit for—In a suit for an account it is open to the plaintiff to value his suit for purposes of Court-fee at any figure be chooses. 86 Ind. Cas. 568=2 Rang. 408 =3 Bur. L. J. 207=A.I.R. 1924 Ran. 354.

——Ss. 7 (iv) (f) and 11—Accounts—Suit for—Valuation—Deficiency.

A suit for administration is a suit for accounts purposes of Court-fees, and is to be valued under S. 7 (iv) (f) of the Court Fees Act according to the amount at which the relief is valued in the plaint. If the amount decreed is in excess of the amount at which the relief was valued, the deficiency in Court-fees must be recovered under S. 11 of the act. 12 Bur. L.T. 207=55 Ind. Cas. 258.

——S. 7 (iv) (f)—Accounts—Suit for—Value of —Jurisdiction—Appeal.

The value of a suit for accounts both for original trial and for appeal is the value stated in the plaint by the plaintiff and the Court trying such suit does not lose its jurisdiction because the amount found due on inquiry exceeds the jurisdiction of the Court. 9 N.L.R. 112=20 Ind. Cas. 928.

2. Administration Suit.

——S. 7 (iv) (f) and S. 11 (Sind) — Administration Suit—If one for accounts—Claimant—creditor coming in under preliminary decree —If liable to pay court-fee.

A suit by a creditor for himself and others for administration of an estate is, in essence, a suit for accounts, to which S. 7 (iv) (f) and S. 11 of the Court-fees Act apply. It follows that a plaintiff-creditor is entitled under S. 7 (iv) (f) to put a notional value on his plaint in the first instance and that upon the passing of the decree for a higher amount, additional court fees are leviable. A claimant-creditor, coming in under a preliminary decree, becomes a party to the suit and is therefore, within the explanation to S. 11 (added in Sind) if an amount is found due to him. I.L.R. (1946) Kar. 104=222 Ind. Cas. 139 =A.I.R. 1946 Sind 72.

——S. 7 (iv) (f)—Administration suit—Court-fee. See 48 Bom. L.R. 110=A.I.R. 1946 Bom. 356

——S. 7 (iv) (f)—Administrative suit, if falls under—Aggrieved defendant's remedy.

In a suit for administratoin, the valuation for purposes of court-fees and or of jurisdiction made by the plaintiff, cannot be questioned by the defendant. A suit for administration is a suit for accounts and falls under sub-para. (f) cl. (iv) of S. 7, Court-fees Act, and the plaintiff is entitled to place his own valuation on the relief sought. The party aggrieved has a remedy open to him under S. 24, Civil P. C. The aggrieved defendant who considers that the relief has been undervalued and he is being deprived of his rights of appeal thereby has his remedy under S. 24 Civil P. C. A.I.R. 1941 Rang. 322=1941 Rang. L.R. 512=198 Ind. Cas. 414 (F.B.)

——S. 7 (iv) (f)—Administration suit.

In a suit for accounts, including an administration suit, and in an appeal from a decree in such a suit, a plaintiff or an appellant is entitled to value his relief for the purposes of court-fee at such figure as he may fix. 42 P.L.R. 101.

——Ss. 7 (iv) (f), 17 — Administration suit.—Valuation of claim at Rs. 200—Prayer for declaration of a will as void and for handing over properties to executors—Held, suit was one for accounts and S. 7 (iv) (f) applied. A.I.R. 1936 Bom. 353=38 Bom. L.R. 754=165 Ind. Cas. 954.

——S. 7. (iv) (f)—Administration suit—Appeal—Valuation.

In a suit for accounts including an administration suit, and in an appeal from a decree in such a suit, a plaintiff or an appellant is entitled to value his relief for the purposes of court-fee at such figure as he may fix. A.I.R. 1936 Lah. 879 =168 Ind. Cas. 105.

——S. 7 (iv) (f)—Administration suit, valuation of.

An administration suit is a suit for an account and court-fees thereon are payable under cl. (iv) (f) of S. 7. The plaintiff is entitled to make such estimates as he pleases of the value of the relief that he claims. A.I.R. 1935 Rang. 13=12 R. 512=153 Ind. Cas. 858.

——S. 7 (iv) (f)—Administration suit.

A suit for administration and accounts is in essence a suit for accounts within the meaning of S. 7 (iv) (f) and the plaintiff can value the claim for accounts approximately and pay Court-fees thereon. If ultimately a decree be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid, the plaintiff can under the provisions of S. 11 of the Court-fees Act execute such a decree only on paying the fee on the whole amount of the decree. 39 Bom. 545, Foll. 45 Cal. 634=26 C.L.J. 265=22 C.W.N. 115=41 Ind. Cas. 693.

——S. 7 (iv) (f)—Administration suit.

An administration suit by a creditor is in fact a suit for account within S. 7 (iv) (f) and the plaintiff can place his own valuation on the relief claimed in such suit, which valuation is the same as the valuation for jurisdiction under the suits valuation Act, S. 8. 44 Cal. 890=24 C.L.J. 448=21 C.W.N. 310=38 Ind. Cas. 835.

——Ss. 7 (iv) (f) and 11—Administration suit—Valuation, if lies in the discretion of the plaintiff.

Where the plaintiff in a suit for accounts and administration and for her share in the estate valued the suit at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction, held, that the suit was for an account and was properly valued under S. 7 (iv) (f). 39 Bom. 545=17 Bom. L.R. 574=29 Ind. Cas. 949.

——S. 7 (iv) (f)—Administration suit.

A suit for an account of any property and for its due administration falls within the purview of S. 7 (iv) (f), Court-fees Act. The valuation for Court-fees and jurisdiction is the same. A suit for administration of the estate of an intestate is in some respects unique but it has certain common features with a suit for winding up of an insolvent's estate or for dissolution of a partnership. The taking of accounts is important in all the suits and the fact that Courts act on different lines in different classes of cases does not take any of them out of the purview of suits for accounts. 100 P. R. 1914=239 P.L.R. 1915=26 Ind. Cas. 342.

——S. 7 (iv) (f)—Administration suit—Prayer for accounts.

A suit for administration under O. 25, R. 13, C.P.C. of the estate of the deceased, and giving Plaintiff his share after taking accounts is a suit for accounts and ad valorem fee is payable. 1. O.L.J. 281=24 Ind. Cas. 643.

3. Appeal.

——S. 7. (iv) (f)—Appeal—Defendant preferring appeal from decree claiming, dismissal of suit —Valuation.

A suit by a partner for rendition of accounts of the partnership and recovery of his share of the assets was valued at Rs. 5,250 for purposes of jurisdiction and court-fee, and an appeal was filed against the decree passed in the suit, claiming dismissal of the suit:

Held, that the same valuation continued through out the legitation in a case where the appellant claimed dismissal of the suit in its entirety and full court-fee according to that valuation should be paid. A.I.R. 1943 Nag. 13=1942 N.L.J. 557= I.L.R. (1943) Nag. 17=205 Ind. Cas. 17

——S. 7 (iv) (f)—Appeal—Suit for accounts dismissed—Appeal must be stamped according to full amount of valuation in plaint.

The plaintiff whose suit for accounts is dismissed is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint. A.I.R. 1940 Mad. 878=(1940) 2 M.L.J. 278=52 L.W. 247=1940 M.W.N. 841=193 Ind. Cas. 597.

—S. 7 (iv) (f)—Appeal by defendant from preliminary decree—Memorandum should be stamped according to plaintiff's valuation—Appeal by defendant from final decree—Court-fees should be paid on amount of decree passed against him.

Clause (iv) (f) of S 7 of the Court-fees Act applies even to appeal by defendants. A defendant appealing from a perliminary decree for an account has ordinarily to stamp his memorandum according to the plaintiff's valuation. It cannot be said that in compelling a defendant to follow a plaintiff's valuation, hardship is likely to result. A plaintiff is never anxious to pay more than is necessary in court-fees. Section 7, Court-fees Act, gives great freedom to plaintiff-appellants, but it does not give the same freedom to defendant-appellants. When a defendant-appellant appeals against a final decree, he knows exactly the value of his relief. A defendant appealing against a final decree should pay a court-fee on the amount of the decree passed against him, except in cases where he appeals only against a portion of the decree. A.I.R. 1938 Mad. 435=47 L.W. 488= (1938) 1 M.L.J. 628=1938 M.W.N. 373=I.L.R. (1938) Mad. 598=175 Ind. Cas. 47o (F.B.)

[Overrules A.I.R. 1933 Mad. 33o=37 M.L.W. 106=1933 M.W.N. 36=64 M.L.J. 122=141 Ind. Cas. 602]

—Ss. 7 (iv) (f), 11—Appeal—Suit for accounts—Final decree for definite sum passed—Appeal by defendant—Appeal must be valued according to amount of decree—court-fee payable is ad valorem. A.I.R. 1938 Rang. 23=1937 Rang. L.R. 369=174 Ind. Cas. 663.

—S. 7 (iv) (f)—Appeal—Suit for accounts—Defendant appealing against preliminary decree—Whether must value his appeal as was originally valued in plaint by plaintiff.

Where in a suit for accounts, the plaintiff values his suit at a certain sum or at whatever sum found due and pays court-fee accordingly, the valuation in the plaint is intended by the plaintiff to be a valuation of the final decree and not of the preliminary decree. If the defendant appeals against the final decree, the defendant has to pay court-fee on whatever sum is found due to the plaintiff, but where the defendant only appeals against the preliminary decree, he is entitled to value that preliminary decree at any sum which he considers suitable, A.I.R. 1937 All. 465=1937 A.L.J. 480= 1937 A.W.R. 443=170 Ind. Cas. 119.

——Ss. 7 (iv) (f). 11—Appeals—Applicability to appeals.

The provisions of S. 7 (iv) (f) and S. 11 of the Court-fees Act also apply to appeals. Where the plaintiff to a suit for dissolution was found to have provided all the capital for the business of the firm, it is not necessary for the plaintiff to pay a crurt-fee stamp on the whole amount, which he claims should be taken into account in adjusting the final accounts between the parties. It is open to him to value his relief for the purpose of court-fee stamp tentatively at such figure as he may choose to fix, under S. 7 (iv) (f). A.I.R. 1936 Lah. 458=160 Ind. Cas. 642.

——S. 7 (iv) (f)—Appeal—Suit for accounts—Final decree for definite amount passed—Appeal challenging whole decree—Appellant, if can value appeal arbitrarily for an amount less than that decreed against him.

It is not open to an appellant in a suit for accounts, against whom a final decree for a definite amount has been passed, to value his

appeal, under S. 7, cl. (iv) (f) of the Court-fees Act, arbitrarily for an amount less than the amount decreed against him. When the whole decree is challenged, the appeal should be valued at the amount decreed by the Lower Court and the amount of pending interest and ad valorem court-fee should be paid thereon. A.I.R. 1934 All. 807=1934 A.L.J. 643=4 A.W.R. 263=150 Ind. Cas. 1090.

——S. 7 (iv), (f), Sch. II, Art. 17 (vi)—Suit for accounts—Appeal claiming excess amount.

In a suit for accounts, a preliminary decree was passed and two persons were appointed as referees with the consent of the parties for the purpose of going into the amounts. The trial Court passed a decree in accordance with their report disallowing the objections raised by the plaintiff, on the ground that it was not open to her to raise any objections as the referees were appointed with her consent. An appeal was preferred by the plaintiff to the District Judge on a court-fee stamp of Rs. 10. The plaintiff claimed definite items amounting to about Rs. 1,450 in excess of the sum recommended by the referees:

Held, (i) that the appellant was entitled to value the appeal but she acted wrongly in paying a court-fee of Rs. 10 only under Art. 17 of the Court- fees Act;

(ii) that the value of the relief sought would naturally be the amount claimed in excess, although the plaintiff wanted only a remand;

(iii) that the Lower Appellate Court should have informed the appellant of the decision of the Court on the point and given her a reasonable opportunity to value the relief sought in appeal as required by S. 7 (iv) (f) of the Court-fees Act and pay court-fee thereon. A.I.R. 1933 Lah. 633=14 Lah. 738=34 P.L.R. 1079=144 Ind. Cas. 559.

——S. 7 (iv) (f)—Appeal.

——Where a suit for accounts is decreed and the defendants prefer an appeal, it is open to them to fix their own value of the subject-matter provisionally for the purpose of court-fee. A.I.R. 1933 Nag. 127=16 N.L.J. 10=29 N.L.R. 34=141 Ind. Cas. 277 (2).

——S. 7 (iv) (f)—Appeal.

——In a suit for rendition of accounts, the defendant is bound by the plaintiff's valuation and must pay court-fee on appeal on the basis of that valuation. A.I.R. 1931 Lah. 143=32 P.L.R. 62=131 Ind. Cas. 337.

——S. 7 (iv) (f)—Appeal—Suit for certain sum of cesses—Defendant danying liability in toto—Decree finding defendant liable and directing determination of amount by commissioner—Appeal by defendant—Valuation.

The plaintiff sued for arrears of royalty and cesses under a mining lease, valuing the cesses due at a particular amount. The defendants denied their liability to pay the cesses in toto. The trial Court found that the defendants were liable and directed that a Commission should issue to ascertain the total amount. The defendants appealed contending that they were not liable to pay any cesses:

Held, that the defendants were bound to value the appeal according to the valuation given by the plaintiff in the plaint.

Where the liability which has been found to exist by the trial Court is denied in toto or where liability is denied for a portion of the claim, which portion has been clearly and definitely valued in the plaint, it is not open to a defendant appealing from the decree to value his appeal otherwise than at the value which the plaintiff, as required by the provisions of S. 7 (iv) (f), Court-fees Act, has placed upon his relief. A.I.R. 1931 Pat. 335=10 Pat. 458=133 Ind. Cas. 365.

——S. 7. (iv) (f)—Appeal—Defendant appealing against decree, whether bound by valuation of trial court.

In a suit coming under cl. (iv) (f) of S. 7, Court-fees Act, when the plaintiff has valued the relief prayed for and the trial Court has amended the valuation under the provisions of S. 12 of the said Act and the plaintiff has obtained a priliminary decree, for accounts and the defendant appeals against the whole decree, the defendant is not bound by the valuation of the plaint of the trial Court but is at liberty to make a fresh valuation for the purpose of the appeal. A.I.R. 1931 Rang. 146=9 Rang. 165=133 Ind. Cas. 91 (F.B.)

——S. 7 (iv) (f)—Appeal.

——In a suit for accounts the plaintiffs tentatively valued their claim at Rs. 3,000 but the defendants put in a cross claim for Rs. 29,000. The lower Court granted a decree for the defendants for Rs. 19,991. Plaintiffs appealed both as regards their claim and as to the cross claim decreed and paid court-fee of Rs. 975 on the cross claim decreed.

Held, that the valuation applied to the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour and that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellant.

Held, further, that this was pre-eminently a case for the exercise by the judicial authority of the discretion under S. 149 C. P. Code. 117 Ind. Cas. 493= 31 Bom. L.R. 841=33 C.W.N.781= 56 I.A. 232=50 C.L.J. 39=30 M.L.W. 104=10 Lah. 737=1929 M.W.N. 818=31 P.L.R. 7=A.I.R. 1929 P.C. 147=57 M.L.J. 281. (P.C.)

——S. 7 (iv) (f)—Appeal.

——The amount payable on the memorandum of appeal is prima facie governed by the same words as govern the plaintiff's liability to pay court-fee when he brings his suit. 33 C.W.N. 743=A.I.R. 1929 Cal. 815.

——S. 7 (iv) (f) Appeal—Plaintiff's valuation whether binding on defendant.

Where the liability which has been found to exist by the trial court is denied in toto or where

liability is denied for a portion of the claim, it is not open to a defendant appealing from the decree to value his appeal otherwise than at the value which the plaintiff as required by S. 7 (iv) (f) has placed upon his relief. 11 Pat. L.T 629=128 Ind. Cas. 795=A.I.R. 1930 Pat. 605.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts—Value in the plaint.

Plaintiff brought a suit for accounts, valued his claim at Rs. 3,000 and odd, and paid Court-fee on the same. A preliminary decree was passed for taking accounts and determining the exact amount due to plaintiffs. The defendants preferred an appeal against the preliminary decree and pleaded that the suit was time barred. The claim in appeal was valued at Rs. 130 and court-fee stamp was laid on that.

Held, that as the objections to the preliminary decree for account were not partial but total, the appellants were bound by the plaintiff's valuation and they were liable to pay court-fees on the value put on the claim in the plaint. A. I. R. 1922 All. 228 and A. I. R. 1924 Pat. 161, Expl. and Dist.; 39 Mad. 725, Rel. on. 115 Ind. Cas. 391=52 Bom. 904=30 Bom. L. R. 1284=A. I. R. 1928 Bom. 476.

——**S. 7 (iv) (f)—Appeal**:—Where the plaintiff has obtained a preliminary decree for an account and the defendant or the plaintiff appeals against the decree, the valuation once fixed by the plaintiff must be adhered to unless the subject-matter of the appeal is not identical with that of the suit in which case, of course it is open to the appellant to value the subject-matter of the appeal differently and to pay court-fees thereon. 23 Mad. 490; 39 Mad. 725 and 13 C. W. N. 815, Foll.; A. I. R. 1925 All. 787; Not Foll. 98 Ind. Cas. 909=21 S. L. R. 377=A. I. R. 1927 Sind. 100.

——**S. 7 (iv) (f)—Appeal**—Insufficient Court-fee—Procedure.

A sued B on bahi accounts for Rs. 4,969—0—6 principal and Rs. 1,631—10—0 interest. Trial court decreed the suit for Rs. 3,385—11—6 only. Plaintiff appealed asking for full amount claimed but paid court-fees covering a demand of Rs. 3,215 only.

Held, the whole appeal will not be dismissed but appellant will not get a decree in appeal for more than the amount for which fee was paid. 96 Ind. Cas. 135=A. I. R. 1926 Lah. 558.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts.

A defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and pay the Court-fee on that valuation, and is not bound to accept the valuation given by the plaintiff in his plaint. A. I. R. 1922 All. 228, Foll. 91 Ind. Cas. 32=26 P. L. R. 825=A. I. R. 1926 Lah. 189.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts.

In a appeal from a preliminary decree in a suit for accounts, the appellant is entitled to fix his own value for the relief he claims and is not bound by the valuation put by the plaintiffs, on the suit. 39 Mad. 725 and 23 Mad. 490, Diss. 89 Ind. Cas. 122=47 All. 756=23 A. L. J. 725=6 L. R. A. Civ. 362=A. I. R. 1925 All. 787.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts.

Where in a suit for settlement of accounts the plaintiff has valued the relief prayed for under cl. 4 of S. 7 of the Court-Fees Act and has obtained a preliminary decree and the defendant appeals against the whole of the said decree he is bound by the valuation in the plaint and must stamp the memorandum of appeal accordingly. 23 M. 490; 33 Ind. Cas. 602; 28 Ind. Cas. 262; Foll. 79 Ind. Cas. 923 (Sind).

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts.

S. 7. cl. (iv) (f) leaves the appellant free to value the relief sought in the appeal from a priliminary decree for accounts and he is bound to pay Court-fee according to the amount at which he values the relief sought. The principle that a party will not be allowed to value his relief arbitrarily does not arise in a case, where by its nature the relief sought in the appeal is not capable of a correct valuation. 75 Ind. Cas. 871=3 Pat. 146=4 P. L. T. 638=A. I. R. 1924 Pat. 161.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree for accounts.

Where in a suit for accounts valued by the plaintiff at Rs. 8,000 a preliminary decree for accounts was passed and the defendant thereupon appealed against the preliminary decree valuing his appeal at Rs. 200,

Held, that the appellant was entitled to value it as he did. 66 Ind. Cas. 841=44 All. 542=20 A. L. J. 416=A. I. R. 1922 All. 228.

——**S. 7 (iv) (f)—Appeal**—Single appeal against preliminary and final decrees—Separate Court-fee.

In a suit for accounts it is competent for the appellant to prefer a single combined appeal against the preliminary and the final decrees if the dates permit him to do so. The Court-fee calculated upon the amount ascertained and embodied in the final decree is not sufficient to enable the appellants to appeal against the preliminary decree also. If the appeal in a suit for accounts is from the whole decree, the appellant is bound by the plaintiff's valuation in the plaint. 39 Mad. 725, Foll. 32 All. 517, Dissented from. 70 Ind. Cas. 392=14 M. L. W. 389=1921 M. W. N. 558=A. I. R. 1921 Mad. 406.

——**S. 7 (iv) (f)—Appeal**—Preliminary decree—Suit for dissolution of partnership.

On an appeal against the preliminary decree for winding up a partnership a Court-fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. 1 Lah. 6=19 P. L. R. 1920=6 P. W. R. 1920=57 Ind. Cas. 185.

——**S. 7(iv) (f)—Appeal—Valuation.**

If a suit falling under S. 7 (iv) is valued by plff. at a certain figure and if plff. has obtained a preliminary decree for an amount, the deft.'s appeal against the whole decree must be valued at the same figure. 39 Mad. 725=30 M. L. J. 402=33 Ind. Cas. 602.

——**S. 7 (iv) (f)—C. P. C. (1908)—Appeal from preliminary decree.**

An appeal against a decree in a suit for dissolution of partnership and accounts, Court-fee must be paid ac-

cording to the value in the memo. of appeal, whether the appeal be from preliminary or final decree; the provision of C.P.C. (1908), compelling an appeal from preliminary decree, does not make any difference in the matter of Court fees. 32 All. 517=7 A. L. J. 546=6 Ind. Cas. 832.

4. Mesne profits.

——**S. 7 Cl. (iv) (f)—Mesne profits.**

A claim for mesne profits is not a claim, the value of which cannot be ascertained and ad valorem Court-fee is to be paid thereon and plaintiff cannot recover anything in excess for the valuation put by him. Per Roe. J. S. 7. Cl. (iv) is peremptory and such suits shall be approximately valued. 1 P.L.W. 781=3 P.L.J. 67=40 Ind. Cas. 579.

5. Partition suit.

—S. 7 (iv)(f)—Partition Suit.

——Even though there may be a relief asking for account on the ground of fraud and improper conduct of the "karta" of a joint Hindu family, a suit for partition by a junior member against the "karta" of the family cannot become a suit for account. The allegation of fraud and improper conduct do not change the character of the suit. 9 M.I.A. 123; 22 Mad. 470 (P.C.), 43 Cal. 459; A.I.R. 1921 Pat. 487; A.I.R. 1927 Mad. 801; 21 C.W.N. 784 and A.I.R. 1928 Bom. 476, Ref. 120 Ind Cas. 770=8 Pat. 818=10 P.L.T. 491=A.I.R. 1930 Pat. 1.

——**S. 7 (iv) (f)—Partition suit.**

——Where a part of the family property to be divided consists of Mundi trade, the plaintiff is not bound to value that item of property in accordance with its value as afterwards ascertained in the course of the trial by the Commissioner appointed by the Court, but he is at liberty to put on it an approximate valuation. 70 Ind. Cas. 17=14 M.L.W. 446=1921 M.W.N. 611=A.I.R. 1921 Mad. 508=41 M.L.J. 433.

——**S. 7 (iv) (f) 11 Sch. II. Art. 17 (6)—Partition suit.**

Under Sch. II, Art. 17 Cl. (6) the Court-fee on a plaint for partition is Rs. 10, and if the suit includes also a claim for accounts the plaintiff can value it approximately under S. 7 and if the Court finds it insufficient it should persue the course laid down in S. 11. 22 C.W.N. 669=46. Ind. Cas. 165.

6. Partnership.

——**S. 7 (iv) (f)—Partnership—Suit for dissolution and accounts—Preliminary decree passed—Appeal by defendant—Valuation of appeal—If may be different from plaintiff's valuation in plaint.**

Per Full Bench (Teja Singh, J. contra):— Where in a suit for dissolution of partnership, rendition of accounts and recovery of such amount as may be found due, the plaintiff under S. 7 (iv) (f) of the Court-Fees Act values the relief sought in the plaint at a certain figure, and a preliminary decree is passed dissolving the partnership, fixing the shares of the parties and directing accounts to be taken and the defendant appeals from the decree it is not open to the defendant to fix value of the appeal at a different figure for purposes of court-fee under S. 7 (iv) (f) or some other provision of the Court-Fees Act. I.L.R. (1947) Lah. 47=226 Ind. Cas. 5=48 P.L.R. 250=A.I.R. 1946 Lah. 280 (F.B.)

[Overrules (1) A.I.R. 1926 Lah. 189=91 Ind. Cas. 32 and (2) A.I.R. 1936 Lah. 458=160 Ind. Cas. 642.]

——**S. 7 (iv) (f)—Partnership at will—Suit for** dissolution and accounts.

A partnership at will is dissolved by a notice from one member of the partnership to another, and a plaint in a suit for dissolution, constitutes a notice of dissolution and the dissolution dates from the date of the plaint.

Consequently, in a suit for dissolution of a partnership at will and accounts, the partnership between the parties is dissolved on the date of the plaint and there is nothing for the Court to do in that respect except to declare that all the relief which the Court is called upon to give is solely to order the taking of an account. For the purposes of court-fee, such a suit is governed by S. 7 (iv) (f), Court-fees Act. A.I.R. 1943 Mad. 639=56 L.W. 391=I.L.R. (1944) Mad. 271=(1943) 2 M.L.J. 130=1943 M.W.N. 470=210 Ind. Cas. 65.

——**S. 7 (iv) (f)—Partnership—Suit for dissolution**—Neither money decree claimed nor granted against defendant—Only declaration that certain sum was due to partnership from debtors, granted—Suit, held, could not be treated as one for accounts within S. 7 (iv) (f).

In order that a suit which does not expressly ask for accounts may be treated as one for accounts in essence, the substance of the allegations in the plaint may legitimately be looked into and these allegations must show that the plaintiff is asking for accounts against the defendant as an accounting party.

In a suit for dissolution of partnership, the plaintiff claimed no money decree against the defendant. In the final decree passed after taking accounts, the Court granted no money decree against the defendant but merely gave a declaration that a certain sum of money was due to the partnership firm from certain debtors:

Held, that the suit could not be treated as one for accounts within the meaning of S. 7. (iv) (f) Court-fees Act. A.I.R. 1944 Oudh 101=1943 O.W.N. 480=1943 A.W.R. 184 (2)=211 Ind. Cas. 125.

——**S. 7 (iv) (f)—Partnership—Appeal by defendant** against final decree in suit for dissolution of partnership and accounts—Court-fee to be paid is on amount mentioned in final decree.

In an appeal by a defendant against a final decree in a suit for dissolution of partnership and accounts, court-fee has to be paid on the amount mentioned in the final decree and not on the provisional valuation put in the suit by the plaintiff when he instituted it. The ground for allowing a provisional estimate, i. e., the uncertainty about the amount due, no longer exists after a final decrce has been passed. A.I.R. 1938 Nag. 527=1938 N.L.J. 341=I. L. R. (1941) Nag. 344=179 Ind. Cas. 224.

——Ss. 7. (iv) (f), 11—**Partnership—Suit for** dissolution and accounts—Preliminary decree for taking accounts—Defendant disputing—Valuation of appeal—S. 11, if applies.

'Suit' in part 2 of S. 7. (iv) (f), Court-fees Act, is wide enough to include both plaint and memorandum of appeal. On a preliminary decree for taking acccounts in a suit for dissolution of partnership and rendition of accounts, if the defendant appeals disputing his liability to account for the amount fixed by the plaintiff, who alone can reasonably be expected to know approximately the amount which will turn out to be due to him, the defendant must value his appeal at the plaintiffs' valuation in the plaint, for the purposes of court-fees. He cannot value his appeal at any figure he likes and S. 11, Court-fees Act, does not apply to such a case. A.I.R. 1937 Lah. 694, I.L.R. (1937) Lah. 196=39 P.L.R. 884=171 Ind. Cas. 837.

——**S. 7 (iv) (f)—Partnership—Suit for dissolution** and accounts—Preliminary decree—Appeal by defendant—valuation, if restricted by plaintiff's valuation—Court's power to decide, if appeal is undervalued.

When a perliminary decree is passed in a suit for dissolution of partnership and accounts, the defendant is not bound, in his memorandum of appeal, by the valuation given by the plaintiff. He is entitled to place his own valuation upon the relief which he seeks and the Court should accept the memorandum of appeal at this valuation.

Per **Mohammed Noor J.**—Ordinarily the value of the claim as given by the plaintiff in his plaint is to be the basis of the appeal. There may, however, be cases where the defendant's valuation should be accepted. The Court can always call upon the appellant to correct the valuation and pay additional court-fee.

Per **James J.**—The plaintiff in a suit for accounts places a tentative valuation on his suit, roughly estimating the amount which he is likely to get as a result of his litigation, but it is obvious that if the defendant considers that apart from the merits of the case, the suit has been heavily overvalued, he should take the objection at once. He it vitally interested in the matter, since the court-fee paid on the plaint will form part of the costs which he himself will have to bear if the preliminary decree is given against him. If the defendant appeals from the preliminary decree, the value of the appeal is not what would be the value of the decree to the plaintiff if the appeal should succeed; it is what would have been the value of that decree if no appeal had been preferred at all. The value placed on the memorundum of appeal must not be an arbitrary valuation; and in all ordinary cases, coming under S. 7 (iv) (f), Court-fees Act, a defendant preferring an appeal from the preliminary decree should not be permitted to value his appeal at anything less than the valuation of the plaint (provided of course that he is appealing from the whole decree) unless he can demonstrate that there is valid ground for holding that the plaint was deliberately overvalued. A.I.R. 1935 Pat. 396=2 B. R. 57=16 P.L.T. 433=14 Pat. 658=159 Ind. Cas. 4.

——S. 7. (iv) (c) Partnership—Suit for settlement of accounts—Valuation at choice of plaintiff—Decree for payment of money by plaintiff—Appeal—Court-fee payable on two reliefs — Arbitrary valuation—Power of Court to compel revision of valuation.

The provisions of the Court-fees Act, are controlled by the provisions of O. 7, R. 1 (2) and R. 11, Cl. (b) Civil P. C., and where the Court finds that the relief has been valued arbitrarily or improperly, the Court can compel the plaintiff to revise his valuation and pay proper court-fee thereon.

In a suit for settlement of partnership accounts, the plaintiff valued his suit at Rs. 200 and paid the necessary court-fee. The Court ordered him to pay a sum of Rs. 1,400 to the other side. In appeal, disputing his liability to pay the amount, he valued his relief at Rs. 200 as in the lower Court and paid court-fee accordingly.

Held, that the plaintiff was seeking two reliefs, one to get rid of the decree passed against him and secondly to get a decree for an additional amount and that so far as the amount decreed against him went, he must pay a court-fee thereon and so far as the additional amount which he claimed, it was open to him to say that he is not able to ascertain that amount, and might put his valuation at a nominal figure.

The test which is generally laid down in determining what is the proper court-fee payable on a memorandum of appeal is: "What is the value of the relief granted which is sought to be got rid of".

Where a definite sum has has been decreed against a plaintiff, it is rather difficult for him to contend that it is open to him to value his relief at any figure which is less than the amount decreed against him. A.I.R. 1933 Sind 322=27 S.L.R. 335=147 Ind. Cas. 251.

——**S. 7 (iv) (f)—Partnership.**

—Suit for dissolution and accounts—Valuation for court-fees and jurisdiction is that which has been fixed by the plaintiff in the plaint and not the amount which may be decreed by the Court. A.I.R. 1932 Bom. 111=34 Bom. L.R. 44=56 Bom. 23=137 Ind. Cas. 702.

——**S. 7 (iv) (f)—Partnership—Suit for winding up of and accounts—valuation.**

In a suit for the winding up of a partnership and for accounts, the amount of fees payable in the suit is to be computed according to the amount at which the relief sought is valued in the plaint. 15 Bom. L.R. 1123=22 Ind. Cas. 71.

——**S. 7 (iv) (f)—Partnership suit—Right of defendant.**

In a partnership case a defendant may get a decree or whatever if found due to him, without being called upon to pay Court-free on what he alleges himself entitled to. 163 P.L.R. 1911=214 P.W.R. 1911=10 Ind. Cas. 250.

——**S. 7 (iv) (f)—Partnership suit—Appeal from preliminary decree.**

Under S. 7 (iv) (f) an appeal from the preliminary decree in a suit for dissolution of partnership and rendition of accounts must bear Court-fees ad valorem on the amount at which the relief is valued in the plaint. 50 P.R. 1908; 18 Bom. 202; 13 P.R. 1901; 6 Bom. 143 and 13 C.W.N. 815, (819), Ref. 7 P.R. 1915=15 P.L.R. 1916=28 Ind. Cas. 262.

7. U.P. Agri. Relief Act—Suits under.

——S. 7 (iv) (f) U.P. Agri. Relief Act, S. 33 Suit under.

Suit under S. 33, U. P. Agri. Relief Act falls under S. 7 (iv) (f) and ad valorem court-fee under Art. 1, Sch. I is payable on appeal arising out of such suit even when the defendant has not obtained a decree under S. 33 (2) of that Act—Agri. Relief Amending Act IX of 1937 has not effected any change. A.I.R. 1942 Oudh 209=1941 O.W.N. 1355=1942 A.W.R. (cc) 99 and (Rev.) 51=17 Luck. 502=198 Ind. Cas. 40.

——S. 7 (iv) (f) U. P. Agri. Relief Act S. 33—

—Appeal out of suit under — Ad valorem Court-fee is payable on amount involved therein.

An ad valorem fee should be charged on an appeal in a suit under S. 33, U. P. Agri. Relief Act on the amount involved therein.

Where, therefore, in an appeal arising out of a suit brought under S. 33, Agri. Relief Act, the appellant challenges the amount awarded against him by the trial Court and further claims that he should himself have been awarded a certain amount, he is liable to pay a court-fee on an ad valorem basis under Sch. I, Art. 1, on the total amount, that is, the amount decreed against him and the amount claimed by him. A.I.R. 1941 Oudh 304=1941 O.W.N. 479=1941 R.D. 236=193 Ind. Cas. 300.

——S. 7 (iv) (f) — U. P. Agri. Relief Act, S. 33—Suit under.

Suit under S. 33, U. P. Agri. Relief Act is a suit for accounts and is not a declaratory suit. Article 17 (iii) Sch. II, has no application. The suit is governed by S. 7 (iv) (f). Court-fee has to be paid on the amount at which the relief sought is valued. The appeal in such a suit is also governed by S. 7 (iv) (f) (S. 7 (iv) (b) of the Court-fees Act as amended in U.P.) and the court-fee chargeable is one the value put on the memo. of appeal. A.I.R.1940 All. 504=1940 A.L.J. 689=1940 O.W.N. 1130=1940 A.W.R. 549=1940 R.D. 538=I.L.R. (1940) All. 762=191 Ind. Cas. 337 (F.B.)

——S. 7 (iv) (f).—U. P. Agri. Relief. Act. S. 33.—Suit under.

The Court-fees Act does not draw a distinction between suit for account in which the plaintiff claims that a snm of money is due to him, and a case where the claim is that a sum of money is due from the plaintiff to the defendant.

A suit asking for relief under S. 33, U. P. Agri. Relief Act and suit for account and the amount at which the relief is valued in the plaint or memorandum of appeal must be taken for the Court-fees Act and an ad volorem court-fee must be paid on it and not a declaratory court-fee. A.I.R. 1940 All. 189=1940 A.W.R. 43=1940 A.L.J. 36=I.L.R. (1940) All. 93=188 Ind. Cas. 149.

8. Miscellaneous.

——S. 7 (iv) (f)—Miscellaneous—Defendant valuing his relief and offering additional court-fees on settlement of accounts — Remaining claim, if deemed relinquished.

The Court-fees Act has to be strictly construed and in the absence of any express provision in that behalf, there is no obligation on a defendant to claim any specific sum as due to him in his written statement or to pay court-fee thereon, on pain of being debarred from obtaining a decree in his favour in the same suit. There is equally no warrant for holding that where a defendant nominally values his relief in his written statement on which he pays court-fee and offers to pay additional court-fee on such sum as may be found due to him on a settlement of accounts, he must be deemed to have relinquished his clajm for the balance. A.I.R. 1933 Sind 247=150 Ind. Cas. 464.

——S. 7 (iv) (f) and 11—Miscellaneous—Suits Valuation Act (VII of 1887), S. 8.

Where a plaintiff values his suit at an approximate amount and institutes a suit in a Court having limited jurisdiction, he must be presumed to seek a decree for a sum not exceeding the highest amount of its jurisdiction. So a plaintiff valuing a claim at Rs. 1,000 cannot get a decree for more than Rs. 1,000, which will be beyond the jurisdiction of a Munsiff. 9 C.L.J. 367=13 C.W.N. 493=1 Ind. Cas. 86.

——S. 7 (iv) (f)—Miscellaneous.

——Approximate value of all items.

According to S. 8, Suits Valuation Act the valuation for the purpose of jurisdiction and of assessment of Court-fees must be the same. The plaintiff must state an approximately correct valuation and S. 11 makes provisions for additional court-fee if original valuation is found to be incorrect. But this does not mean that the plaintiff having valued his claim is entitled to select one or two items and leave the rest for assessment under S. 11 after the final decree has been obtained. 5 P.L.J. 394, Ref. A.I.R. 1929 Pat. 626.

——S. 7 (iv) (f)—Miscellaneous.

——Suit for a definite sum recorded in the form of account.

Per Fawcett and Baker, JJ.—The character of a suit is determined by the cause of action and the relief actually sought, and not by any side issues that the defendant may raise. Where a commission agent does not ask for any accounts to be taken, and sues for a definite sum of money to be paid by the defendant the suit is a suit for money; and the fact that the record of the suit transactions in the form of a written account, which is not a settled or stated account, may have to be gone into, does not turn it into a suit for an account. 33 Cal. 1047 (P.C.), Expl. A.I.R. 1927 Bom. 278 (F.B.), Cons.; A.I.R. 1922 Bom. 376, (F.B.), Rel. on. 115 Ind. Cas. 391=52 Bom. 904=30 Bom. L.R. 1284=A.I.R. 1928 Bom. 476.

——S. 7 (iv), Proviso (1) (U.P.)—Suit in respect of immovable property—Reliefs of declaration, injunction and damages, claimed.

Held, the relief with regard to declaration did not require to be valued separately. 1948 O.W.N. 23=A.I.R. 1948 Oudh 306=1948 O.A. (C.C.) 4=1948 A.W.R. (C.C.) 4.

——S. 7 (iv) (6)—Not applicable to suits for partition but to suits for joint possession:—

S. 7, (iv) Cl. 6, of the Court Fees Act refers to a suit for joint possession and not to a suit for partition. 29 M. 289 diss. from.—6 C.L.J. 651=12 C.W.N. 37.

——S. 7 (iv-A) (Madras)

Synopsis.

1. Applicability
2. Cancellation of deed
3. Construction
4. Declaration
5. Declaration that alienation is void
6. Declaration that compromise decree is not binding.
7. Declaration that decree is void
8. Declaration that order is void
9. Declaration that will is invalid
10. Partition suit
11. Reversioner
12. Setting aside decree.

1. Applicability

——S. 7 (iv-A) (Madras) and 7 (v)—Applicability—Suit by quondam minor for recovery of possession of his property alienated by his mother and natural guardian under undue influence—Prayer for cancellation of the sale deeds and payment of court-fee thereon—If necessary.

The Plaintiff filed a suit for recovering possession of properties alienated by the first defendant his mother and natural guardian. The suit was based on the allegations that the first defendant who was an illiterate woman inexperienced in life, was influenced by her brother to alienate the properties for very low consideration in his favour and in favour of some of his nominees and that the alienations were not therefore binding on him. On the question of proper valuation of the suit for purposes of Court-fee and jurisdiction,

Held, it is sufficient for the plaintiff to value the suit under S. 7 (v) of the Court-fees Act and the plaintiff need not ask for cancellation of the sale-deeds executed by his mother as guardian and pay court-fee under S. 7 (iv-A) of the Court-Fees Act. (1940) 1 M.L.J. 32, I.L.R. 1940 Mad. 259 (F.B.), (1946) 2 M.L.J. 459 and (1948) 2 M.L.J. 130, followed. M.A.L. 1950 M.W.N, 404=A.I.R. 1950 Mad. 832=(1950) 1 M.L.J. 408.

—S. 7 (iv-A) (Madras)—Applicability—Order for payment of enhanced court-fee—Order contested until final adverse order—Time for payment should be granted.

Where the appellant has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him. A.I.R. 1938 Mad. 921=1938 M.W.N. 835=48 L.W. 277=182 Ind. Cas. 878.

—S. 7 (iv-A) (ii) Sch. II Art. 17-B (Applicability (Madras)—Suit for reduction of maintenance awarded by decree—Court-fee payable.

There is a fundamental difference between a suit for maintenance and a suit for a reduction thereof; in one case it is the person that is entitled to the allowance that brings it, in the other, the person liable to pay it. A suit for reduction of maintenance on the ground that circumstances have changed since the award of maintenance under decree is governed by Art. 17-B. Sch. II, Court-fees Act and not by S. 7 (iv-A) (Madras) or S. 7 (ii). Such a suit is neither a suit for maintenance nor one for the cancellation of a decree. A.I.R. 1935 Mad. 655=59 M. 159=1935 M.W.N. 707=42 L.W. 42=69 M.L.J. 202=157 Ind. Cas. 1033.

—S. 7 (iv-A) (Mad.)—Applicability—Suit for share of family property after setting aside previous partition and alienation—Valuation.

A suit for possession of a certain share in the family property and for a declaration that a previous partition and alienation made by the other members of the family are not binding on the plaintiffs need not be valued on the value of the whole of the family properties involved in the partition or alienation but only on the plaintiffs' share of it.

In a suit of this nature, the declarations sought are only ancillary to the prayer for possession and such a case is governed by S. 7 (iv) (c) Court-fees Act, as to which the Madras Amendment applies, i.e., the valuation for purposes of court-fees is one-half of the value of the immovable property affected by the declaration valued, as provided by S. 7 (v) and not by S. 7 (iv)-A. A.I.R. 1933 Mad. 93=36 M.L.W. 793=1932 M.W.N. 1322=140 Ind. Cas. 585.

—S. 7 (iv-A) (Madras)—Applicability.

—Where in a plaint it was alleged that defendant obtained a decree inter alia against the plaintiff on the basis of mortgage executed by plaintiff's father and the plaintiff prayed for a declaration that the decree was not binding on his share of property:

Held, that though his relief had been so worded as to bring the case within S. 7 (iv) (c), the Court must look to the substance of relief claimed and not the mere form of plaint and S. 7 (iv-A) applied to the case. A.I.R. 1933 Mad. 430=64 M.L.J. 24=1933 M.W.N. 144=37 L.W. 806=141 Ind. Cas. 80.

—S. 7 (iv-A) (Madras)—Applicability.

—Suit for share of family property after setting aside previous partition and alienation—Such a case is governed by S. 7 (iv) (c) as to which Madras

Amendment applies, i. e., valuation for purposes of court-fees is one-half of value of immovable property affected by declaration valued as provided by S. 7 (v) and not by S. 7 (iv-A). A.I.R. 1933 Mad. 93=36 L.W. 793=1932 M.W.N. 1322=140 Ind. Cas. 585.

2. Cancellation of deed.

——S. 7 (iv-A) (Madras)—Cancellation of deed— Plaintiff alleging that sale deed executed by him in favour of defendant was sham and nominal and praying for declaration to that effect and for injunction restraining defendant from interfering with plaintiff's possession—Prayer for cancellation of deed and court-fee for it—If necessary—Valuation for court-fee and jurisdiction.

Where a plaintiff alleged that a sale deed executed by him in favour of the defendant was sham and nominal and prays for a declaration to that effect and an injunction restraining the defendant from interfering with the plaintiff's possession it is not necessary for the plaintiff to pray for cancellation of the deed and to value his suit for purposes of court-fee and jurisdiction under S. 7 (iv-A) of the Court-Fees Act. There can be no objection to the plaintiff's drawing the attention of the Court to the fact that in deciding whether the plaintiff was entitled to an injunction or possession, it would first have to decide whether the document in question was sham and nominal. It cannot be said that the plaintiff should pay additional court-fee for cancellation merely because he mentions the sham document in his plaint. I.L.R. (1948) Mad. 883=61 L.W. 270=A.I.R. 1948 Mad. 451=1948 M.W.N 259=(1948) 1 M.L.J. 270.

——S 7 (iv-A) (Madras)—Cancellation of deed—Setting aside sale deed—Prayer for declaration that deed was nominal and sham and for delivery of possession—Declaration whether a surplusage—Void and voidable documents—Applicability of S. 7 (iv-A) and of Specific Relief Act (I of 1877) S. 39.

A suit to set aside a sale of certain immovable properties effected by a registered sale deed executed by the plaintiff in favour of the defendant praying for a declaration that the sale deed was a sham and nominal transaction and therefore never intended to be acted upon, and not valid in law, and for delivery of possession of the properties from defendant as consequential relief is governed by S. 7, (iv-A) of the Court-Fees Act as the prayer for declaration is not a mere surplusage.

S. 39 of the Specific Relief Act covers both void and voidable documents and S. 7 (iv-A) of the Court-Fees Act is not confined to cancellation of voidable documents only. Even a plaint asking for cancellation of a document which is void ab initio for the reason that it is benami or sham or nominal would fall within the ambit of S. 7 (iv-A). 60 L.W. 207=1947 M.W.N. 180=A.I.R. 1947 Mad. 415=(1947) 1 M.L.J. 212.

——S. 7 (iv-A) (Madras), and Sch. II. Art. 17-A—Cancellation of deed—Deed of sale— Allegation that material sheet abstracted after execution and before registration—Suit to declare deed void and of no effect—Court-fee.

A suit to declare void a sale-deed of immovable property on the ground that certain material pages in the deed were fraudulently abstracted from the deed after execution and before registration, falls for purposes of court-fee under Art. 17-A of Sch. II and not under S. 7 (iv-A) of the Court-Fees Act, as amended in Madras. 59 L.W. 165=1946 M.W.N. 205=A.I.R. 1946 Mad. 342=(1946) 1 M.L.J. 239.

——S. 7(iv-A)—(Madras)—Cancellation of deed—Suit to avoid alienation—Malabar Nambudiri Illom—Sale by karnavan for himself and as guardian of daughter—Suit to avoid by mother, wife and daughter—Relief of cancellation if necessary—Court-fee payable.

The karnavan of a Numbudiri Illom executed a sale deed of properties already covered by a mortgage purporting thereunder to act for himself as karnavan of the Illom and also as guardian of his minor daughter. The sale deed also purported to be executed by the the mother and wife of the karnavan. The mother and wife, as well as the daughter sued for redemption of the mortgage ignoring the sale deed. The former contended that they did not execute the sale deed and that the signatures on the document were forged, while the latter contended that the document was not binding on her.

Held, that (1) so far as the mother and wife were concerned it was not necessary to ask for cancellation of the deed as they not parties to the document.

(2) As regards the daughter, inasmuch as she was represented by her legal guardian it was not necessary to apply for the relief of cancellation to the extent of her share and that court-fee was payable on that basis. 59 L.W. 464=1946 M.W.N. 574=231 Ind. Cas. 300=A.I.R. 1947 Mad. 130=(1946) 2 M.L.J. 166.

——S. 7. (iv-A) (Madras) and (iv-C)-Cancellation of deed—Suit for declaration of a sale deed as sham and nominal—Court-Fees whether payable on the sale deed value without its cancellation being asked for—Court-fee payable under S. 7 (iv-A) (Madras), Court-Fees Act.

Where the plaint prayed for a declaration that a sale deed executed by the plaintiff in the name of the first defendant was sham and nominal transaction and that the first defendant had no title to the property covered by the said sale and therefore asked for an injunction restraining defendants 5 and 6 from bringing the property to sale in execution of a decree on the question whether the Court-fee payable by him, should be on the basis of the cancellation of the deed,

Held, that as the plaintiff was a party to the document, the relief prayed for should be its cancellation and not a mere declaration in respect of it, which was the view expressd in (1939) 2 M.L.J. 400. Therefore court-fee should be paid under S. 7 (iv-A) and not under S. 7, Cl. (iv-C). 59 L.W. 411=1946 M.W.N. 506=229 Ind. Cas. 201=A.I.R. 1947 Mad. 57=(1946) 2 M.L.J. 114.

——S. 7 (iv-A) (Madras)—Cancellation of deed—Suit on mortgage—Prayer for sale of mortgaged property free from claims of other alienees—

Plaintiff not party to document of alienation—Relief of cancellation held unnecessary—No additional court-fee payable under S. 7 (iv-A) (Madras). A.I.R. 1946 Mad. 181=(1945) 2 M.L.J. 582=1946 M.W.N. 45=59 Mad. L.W. 64.

——S. 7—(iv-A) (Madras)—Cancellation of deed ——Suit for declaration that plaintiff was owner and for possession—Gift deed by plaintiff averred to be inoperative and intended merely for screening property from creditors:

Held, that the court-fee for cancellation of gift deed was not necessary. A.I.R. 1944 Mad. 408 (2)=1944 M.W.N. 424=57 M.L.W. 392=(1944) 1 M.L.J. 497.

——S. 7(iv-A) (Madras)—Cancellation of alienation document, if essential—in Suit for possession.

Where the alienation document is an insuperable obstacle to a prayer for possession so long as it has not been declared void or cancelled, the cancellation or avoidance of that document is an essential part of the relief sought and the case must come under S. 7 (iv-A), Court-fees Act. It is not of any avail to say that the prayer for possession is the main prayer. Possession is, of course, the ultimate object of the suit, but the main difficulty in the way of attaining that object is the document of alienation which has to be removed. When once this document has been got rid of, possession follows as a matter of course and the essential object of the suit though not perhaps its ultimate object is to get rid of the barrier which lies in the way of obtaining possession.

The value upon which the court-fee is to be based under S. 7 (iv-A) is the actual market value and not the artificial value prescribed under S. 7 (v) of the court-fees Act. A.I.R. 1938 Mad. 921=1938 M.W.N. 835=48 L.W. 277=182 Ind. Cas. 878.

——Ss. 7 (iv-A), (Madras), 17—Cancellation of deed—Suit on accounts—Allegation that defendants had not duly executed sale deed for plaint claim as they had agreed—Court-fees for cancellation of deed, whether necessary.

In a suit for recovery of money on a settlement of accounts it was alleged that there was an agreement between the parties according to which the defendants had agreed to sell certain lands to the plaintiffs in satisfaction of the claim but as the defendants had not fulfilled their obligations, the plaint claim may be decreed after establishing if necessary that the sale deeds executed by the defendants were cancelled. The trial Court held that the plaint was governed by 17. S of the court-fees Act and that the plaintiff should pay an additional fee under S. 7 (iv-A) of the Court-fees Act in view of the prayer of cancellation:

Held, that the suit was not one for cancellation of a document in the sense in which that expression is known to law but a suit for recovery of money on the ground that the agreement had not been carried out and that the order of the lower Court was therefore wrong. A.I.R. 1936 Mad. 266=1936 M.W.N. 150=161 Ind. Cas. 184.

——S. 7 (iv-A) (Madras)—Cancellation of deed of conveyance and for possession.

In a suit for the cancellation of a deed of conveyance and for possession of the property covered by the deed, the plaintiff should value his relief in accordance with the provisions of S. 7 (iv) (A) and not in accordance with those of S. 7 (v), Court fees Act. To give the wording of para. (iv-A) its plain meaning, the valuation must be the valuation based on the market value of the property at the date of the plaint. A.I.R. 1939 Mad. 462=1939 M.W.N. 407=49 L.W. 566=1939 1 M.L.J. 702=I.L.R. (1939) Mad. 764=183 Ind. Cas. 95 (F.B.)

[Overrules (1) A.I.R. 1927 Mad. 825=105 Ind. Cas. 171; (2) A.I.R. 1932 Mad. 605=56 Mad. 212=36 M.L.W. 225=63 M.L.J. 764=1932 M.W.M. 992=139 Ind. Cas. 317.]

——S. 7 (iv-A) and (V)—Cancellation of deed—Suit for cancellation of mortgage and sale deeds and for possession.

A suit for the setting aside of certain mortgage deeds and sale deeds executed by the plaintiff's father is governed for the purposes of computation of court-fees, by cl. (iv-A) of S. 7 of the Court-fees Act as amended in Madras and not cl. (v) of the said section.

In the case of a mortgage deed, the court-fee has to be computed under S. 7 (iv-A) on the amount fo which the instrument is executed, in other words, the principal amount secured by it.

With regard to sale deeds, the amount of court-fee must be computed on the market value of the properties with which they deal and not according to the artificial method of valuation prescribed in cl. (v).

The fact that the prayer for cancellation is coupled with a prayer for possession does not take away such a suit from the purview of cl. (iv-A). A.I.R. 1935 Mad. 863=(1935) M.W.N. 981=69 M.L.J. 458=42 L. W. 860=59 M. 240=159 Ind. Cas. 263.

——S. 7 (iv-A), Sch. II, Art, 17-A (1) (Madras)—Cancellation of deed—Suit for declaration that a registered document is a forgery—Prayer for cancelling deed whether necessary—Proper court-fee.

Where the plaintiff brought a suit alleging that a sale deed which purported to have been executed by him and which was directed by the Registrar to be registered was in fact a forgery by the defendant and praying that the instrument may be declared a forgery:

Held, that it was not incumbent on the plaintiff to have it cancelled or set aside and the suit was governed for purposes of court-fee, by Sch. II, Art. 17-A (1) of the court-fees Act and not by S. 7 (iv-A). A.I.R. 1935 Mad. 203=1935 M.W.N. 42=41 L.W. 90=68 M.L.J. 95=58 M. 448=155 Ind. Cas. 948.

——S. 7 (iv-A) (Madras)—Cancellation of deed ——Partition deed—Suit to set aside—Prayer in regard to share of plaintiffs—Court-fee payable.

Where some members of a Malabar tarwad, being dissatisfied with a partition, sued to set aside the deed so far as they were concerned:

Held, that it was sufficient for the plaintiff to pay court-fee only on the value of their share of the property. A.I.R. 1932 Mad. 491=35 L.W. 798=62 M.L.J. 712=1932 M.W.N. 579=138 Ind. Cas. 303.

3. Construction.

——S. 7 (iv-A) (Madras)—Construction.

—"Securing," construction of—Deed by widow in favour of adopted son, reciting fact of adoption and confirming his existing rights but not securing any property to him—Deed does not come under Sec. 7 (iv-A) and does not require cancellation. A.I.R. 1938 Mad. 824=48 L.W. 623=1938 M.W.N. 520=181 Ind. Cas. 431.

4. Declaration.

——S. 7 (iv-A) (Madras)—Declaration—Suit for bare declaration — Widow having life interest, plaintiffs having vested remainder—Decree against widow personally and husband's property in her hands—Suit for declaration that decree is collusive—Court-fee payable.

There is a distinction between an obligation imposed on a party by a decree and an obligation imposed on a party by the personal law by which he is governed in pursuance of the decree. In the one case, he seeks to get rid of the obligation existing under the decree; in the other he seeks to have it declared that he or his interest in the estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case, he is not bound to sue for cancellation of the decree; in the former case, he is bound to sue for cancellation. Even if he sues for a bare declaration, it necessarily involves cancellation and the form of the relief he prays for is immaterial.

The plaintiffs alleged that a widow had only a life interest in the property under the will of her husband; they had a vested remainder therein.

A decree was passed against her personally and against the property of her husband in her hands. They sued for a declaration that the decree was collusive and did not affect their interests:

Held, that the plaintiffs' reversiones were not bound to sue for cancellation of the decree which could not affect their interests and hence were not bound to value the suit under S. 7 (iv-A), Court-fees Act. A.I.R. 1937 Mad. 449=1937 M.W.N. 230=45 L.W. 380=171 Ind. Cas. 889.

5. Declaration that alienation is void.

——S. 7 (iv-A) (Madras)—Declaration that alienation is void—Creditor's suit under S. 53, T. P. Act, for declaration that alienation by debtor is void against creditors is not a suit for cancellation of a document securing money or property falling under S. 7 (iv. A) of the Court-fees Act. A. I. R. 1939 Mad. 894=1939 M.W.N. 778=50 L. W. 248=(1939) 2 M.L.J. 400=I.L.R. (1940) Mad. 73=189 Ind. Cas. 301.

6. Declaration that Compromise decree is not binding.

——S. 7 (iv-A) (Madras)—Declaration that compromise decree is not binding—Valuation—Basis.

In a suit brought for a declaration that a compromise decree passed in a prior suit was not binding on the plaintiff the plaint should be valued on the value of the properties that formed the subject-matter of the decree sought to be set aside. For purposes of court-fee and valuation the plaintiff has to adopt the market value of the property at the date of the plaint in the suit in which the decree sought to be set aside was passed. A.I.R. 1950 Mad. 458=(1950) 1 M. L. J. 436.

——S. 7(iv-A) Sch. II, Art. 17-A—(Madras)—Declaration that Compromise decree was void—Compromise decree against Malabar tarward—Suit by minor member to declare decree null and void—Proper court-fee.

Where a **razinama** decree was passed against the members of a Malabar **tarwad** and the plaintiffs who were at the time of the decree minor members represented by the defendants sued for a declaration that the decree may be declared null and void:

Held, that the suit was not governed by S. 7 (iv-A) of the Court-fees Act but by Art. 17-A.

If a party to a decree sues to set aside or cancel the decree, S. 7 (iv-A) governs the court-fee but if the party suing was not a party to the decree which he seeks to have declared not binding on him, the appropriate provision of the Court-fees Act is Art. 17-A. A.I.R. 1936 Mad. 470=43 L.W. 715=1936 M.W.N. 566=71 M.L.J. 383=163 Ind. Cas. 203.

7. Declaration that Decree is void.

——S. 7 (iv-A) (Madras)—Declaration that decree is void on allegation of non-representation—Allegation not proved—Plaintiff seeking to avoid decree as not binding—Further court-fees—Necessity of.

Where in a suit by junior members of a tarwad to avoid a decree on the allegation that the karnavan did not represent them in the suit or even if he represented them, they were not bound by the decree, the plaintiffs fail to establish their allegation that the decree is void for want of proper representation, they would not be able to have the decree set aside so far as the plaintiffs were concerned without paying the further court-fee for avoiding the decree. A.I.R. 1945 Mad. 430=(1945) 1 M. L. J. 259 = I. L. R. (1945) Mad. 886 = 1945 M. W. N. 291.

——S. 7 (iv-A) (Madras)—Declaration that decree is not executable against plaintiff by reason of agreement to that effect prior to suit between decree-holder and plaintiff — Plaintiff, held, must pay court-fee under S. 7(iv-A). A.I.R. 1943 Mad. 106=55 M.L.W. 747 (2) =(1942) 2 M. L. J. 658=1942 M.W.N. 792= 205 Ind. Cas. 215.

——S. 7 (iv-A), Art. 17A (1) (Madras)Declaration that certain decree against temple obtained in collusion with trustee is not binding on temple.

Held, that the suit in substance was a suit for cancellation of the decree and was consequently governed by S. 7 (iv-A) and not by Art. 17A (1), Court-fees Act. A.I.R. 1941 Mad. 493=I.L.R. (1941) Mad. 708=53 M.L.W. 311=1941 M.W.N. 243=(1941) 1 M.L.J. 414 =199 Ind. Cas. 528.

8. Declaration that order is void.

——**S. 7 (iv-A)and iv)(c)Madras—Declaration that** order is avoid — Order of Deputy Commercial-Tax Officer levying tax—Not a "decree"—Suit for declaration that such order was illegal—Court-fee.

An order of the Deputy Commercial-Tax Officer levying-tax is not a "decree" within the meaning of S. 7 (iv-A) of the Court-fees Act and for a suit for declaration that such order was illegal S. 7 (iv-A) does not apply and **ad valorem** court-fee on the amount of tax need not be paid.

S. 7 (iv) (c) of the Court-Fees Act applies and the plaintiff is entitled to value the relief under that section, put his own valuation, and pay court-fee on the value so fixed by him. That value will also be the value for purposes of jurisdiction under S. 8 of the Suits Valuation Act.

It is not necessary to value separately the consequential reliefs for injunction to restrain the defendants from assessing sales-tax in future on plaintiff's business. I.L.R. (1950) Mad. 34=62 L.W. 200=1949 M.W.N. 262= A.I.R. 1949 Mad. 778=(1949) 1 M.L.J. 379.

——**S. 7 (iv-A) (Madras) Declaration that order of** Liquidator under Co-operative Societies Act was null and void—Court-fee payable.

The plaintiff in his plaint prayed for a declaration that an order of a Liquidator of a Co-operative Society determining the amount of contribution payable by the plaintiff under S. 42 (b) of the Co-operative Societies Act was null and void. The case of the plaintiff was that he ceased to be a member in or about June 1930, that more than two years after he ceased to be a member, an order for contribution was made against him on November 25, 1933, directing him to pay a large sum namely, Rs. 800 and that the Liquidator had no jurisdiction to pass such an order and he therefore prayed for a decree that such an order is 'illegal, void and of no effect and unenforceable against the plaintiff' and a court-fee of Rs. 100 was paid under Sch. II, Art. 17A (iii):

Held, that the term 'decree' in S. 7 (iv-A), Madras Court-fees Amending Act connoted a final order of a Court, whether civil or revenue, in a suit and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money, will not come within its purview. The order of the Liquidator under S. 42 (b), Co-operative Societies Act, was not a decree for money within the meaning of S. 7 (iv-A), Court-fees Act, not having been passed by any Court in a suit and hence the Court-fee paid was correct. A.I.R. 1937 Mad. 604=1937 M.W.N. 341=45 L.W. 563=(1937) 1 M.L.J. 640=I.L.R. (1938) Mad. 63=169 Ind. Cas. 698.

9. Declaration that Will is invalid.

——**S. 7 (iv-A) (Madras)—Declaration that will of** deceased to be invalid—Court-fee payable—Will whether secures money or other property.

A will is merely a declaration of the intentions of the testator with respect to his property to take effect after his death and is not a document "securing money or other property" within the meaning of S. 7 (iv-A) of the Court-Fees Act as amended in Madras. Consequently, a person suing for a declaration that the will of the deceased was not true in fact and was at any rate invalid in law is not bound to pay court-fee under S. 7 (iv-A) on the market-value of the properties forming the subject-mater of the will. 1948 M.W.N. 427=A.I.R. 1948 Mad. 501=(1948) 1 M.L.J. 455.

10. Partition suit.

——**S. 7 (iv-A) (Madras) — Partition suit—** Suit for partition—Plaintiff's case that certain releases are void or in the alternative voidable—Plaintiff must seek to set them aside and pay adequate court-fee.

In a suit for partition, the plaintiff put forward his case in the plaint that two documents purporting to be deeds releasing her rights in the suit properties were forged and therefore void and in the alternative that they were vitiated by fraud, mis-representation and undue influence.

Held: In view of the alternative plea, the plaintiff must seek to set aside the alleged release deeds and the plaintiff, before she can get rid of the documents, must pay the appropriate court-fee for their cancellation. The ricital in the deeds that money had been received does not 'secure' any money to the plaintiff and the analogy of lien for purchase money dors not apply as such lien is conferred by statute and does not flow from the document. The phrase in S. 7 (iv-A) 'documents securing money or other property having such value' includes sales and also release deeds. A.I.R. 1938 Mad. 824, foll. 63 L. W. 1000=(1950) 2 M.L.J. 268.

——**S. 7 (iv-A) and (v) (Madras)—Partition suit—** Suit for partition and possession—Fixed court-fee and court-fee under S. 7 (v) paid—Plaint setting out that **ex parte** decree against plaintiff was null and void—. Whether separate court-fee under S. 7 (iv-A) payable.

In considering the question of court-fee the principle to be followed is to look at the substance of the claim and not the form and language employed in the plaint.

Where the petitoner (plaintiff) sued for partition and possession of her share of her father's estate and in the plaint she stated that an **ex parte** decree obtained against her by the fifth defendant in an earlier suit was null and void as she was fraudulently impleaded therein as a major while in fact she was a minor at that time and that no guardian **ad litem** was appointed and had paid a fixed court-fee and separate court-fee for possession under S. 7 (v).

Held, that since the plaint allegations was clear and the plea of nullity of decree was taken, it was not open to the court to call upon the plaintiff to pay court-fee under S. 7 (iv-A) of the Court-Fees Act. (1940) 1 M.L.J. 32; I.L.R. (1940) Mad. 259, dist.; 71 M.L.J. 383 and 1931 Mad. 674, ref. to. 1949 M.W.N. 681=62 L.W. 751=A.I.R. 1950 Mad. 190=(1949) 2 M.L.J. 553.

——**S. 7 (iv-A) (Madras), and (v)—Partition suit—** Alienation by father—Suit for partition and possession —Election to treat alienation as void—Setting aside sale deed—Court-fee whether payble under S. 7 (iv-A)

An alienation by a limited owner or a manager is not absolutely void but is **prima facie** voidable at the election of the reversionary heir or other members of the family. They can elect to treat it as a nullity without the intervention of the Court and the commencement of an action to recover possession of the property may amount to such an election. In such cases the plaintiff is not bound to ask for cancellation of the sale deed but can claim the relief of possession of the property covered by the sale deed, ignoring the sale.

The plaintiffs instituted the suit for partition of the family properties by metes and bounds. It was alleged that the properties were the ancestral properties of the plaintiffs and their father the first defendant and that the first defendant executed a mortgage and that he had later on sold the said properties though there was no necessity for the sale. The plaintiffs while seeking to recover possession ignoring the alienation offered to pay their share of the mortgage debt if it was found that they were bound to do so,

Held, that as the plaintiffs had by filing the suit elected to treat the alienation as not binding on them the suit was in substance one for mere possession falling under S. 7 (**v**) of the Court-Fees Act and that the plaint was not leviable to court-fee under S. 7 (**iv**-A) o the Act as amended in Madras. 1948 M.W.N. 578=61 L.W. 637=A.I.R. 1949 Mad. 105=(1948) 2 M.L.J. 130.

——**S. 7 (iv-A) (Madras) and (v)—Partition suit—Suit by minor sons for declaration that sale by father was not binding on them, for partition and possession**—Value for purposes of court-fees and jurisdiction.

The suit was filed by three minnor sons of a Hindu represented by their mother as next friend and they sought a declaration that a sale deed executed by their father for himself and as the guardian of two of them was not binding on them inasmuch as it was not executed for family necessity, for partition and for recovery of the properties.

Held, that in the circumstances, the plaintiffs were in effect seeking for partition of the joint family properties and for possession ignoring the alienation, and that the value of the suit for purposes of court-fees and jurisdiction should be determined under S. 7 (v) and not 7 (iv-A) of the Court Fees Act. I.L.R. (1947) Mad. 628=1947 M.W.N. 93=A.I.R. 1947 Mad. 237=(1946) 2 M.L.J. 459.

——**S. 7 (iv-A), (v) and Sch. II, Art. 17-B (Madras)—Partition suit—Suit for partition and possession**—Alienations and decrees impugned—Father holding on behalf of alienees—Cour-fee payable.

The plaintiffs sued for partition and possession of joint family properties. The alienees of some of the items of family properties were also impleaded as defendants. The plaintiffs averred that their father and his mother, defendants 1 and 2 in the suit had fraudulently executed deeds purporting to alienate family properties and further stated that notwithstanding those alienations they along with their father were in joint possession of the said properties. A consolidated court-fee of Rupees one hundred was paid on the plaint under Art. 17-B of the Court-Fees Act, as amended in Madras.

Held, that in the absence of particulars given by the plaintiffs as to the alienations, the first defendant should be taken to be in possession of the alienated properties on behalf of the alienees and that being so, the plaintiffs cannot be regarded as being in joint possession and court-fee was payable under S. 7 (v) in respect of the relief claimed.

Held further, that in respect of decrees passed against the father, which the plaintiffs were impugning, court-fee was payable under S. 7 (iv-A) of the Act on the footing that they were **eo nomine** parties to the decree. 59 L.W. 330=1946 M.W.N. 397=229 Ind. Cas. 79=A.I.R. 1947 Mad. 16=(1946) 1 M.L.J. 411.

——**S. 7(iv-A)(Madras)—Partition suit by minor**—Prayer for declaration that simple money decrees passed against him in suits to which he was **eo nomine** made party did not affect him—Court-fees under S. 7 (iv-A) in respect of such decrees must be paid.

Where in a suit for partition by a minor son against his father, the son prays for a mere declaration that the simple money-decrees passed against him in suits in which he had ben **eo nomine** impleaded as a party, do not bind him and the family, he must pay the fee prescribed by S. 7 (iv-A). Such decrees bind him until set aside, and, therefore, he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or merely a junior member of the family, as the considerations which apply to the decree of a competent Court, once it is passed, are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint **ad valorem** on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. A.I.R. 1940 Mad. 113=(1940) 1 M.L.J. 32=51 L.W. 11=1940 M.W.N. 126=I.L.R. (1940) Mad. 259=186 Ind. Cas. 494 (F.B.).

11. Reversioner.

——**S. 7 (iv) (a), Sch. II, Art. 17-A—Reversioner**—Claim for property by survivorship—Will by coparcener alleged to be a forgery—Held, claim for declaration not affected by will and Art. 17-A, Sch. II applied and not S. 7 (iv) (a).

The plaintiff claimed certain properties as belonging to joint family alleging that he was entitled to them by right of survivorship and that the alleged will by his coparcener bequeathing the said properties to the coparcener's widow and daughter was a forgery. It was held by the lower Court that it was imperative on the plaintiff to pray for a cancellation of the will and that under S. 7 (iv) (a) Court-fees Act he must pay court-fees therefer :

Held, that the claim for possession could not be held to be consequential upon the declaration that the will was a forgery and invalid. The plaintiff's claim to possession of the properties, based as it was on the claim that the properties are joint family properties, was unaffected by the will. If the properties were joint family properties, then the will could not deprive the plaintiff of his share in them and the claim with regard to the properties must be held to be for a declaration only and must be valued under Art. 17-A, Sch. II of the Court-fees Act. A.I.R. 1936 Mad. 344 =1936 M.W.N. 475=43 L.W. 696=70 M.L.J. 542= 163 Ind. Cas. 837.

12. Setting aside decree.

——S. 7 (iv-A) (Madras)—Setting aside decree—Minor—Party to a decree through guardian.

A **quondam** minor who impeaches a decree to which he was a party through a guardian and chooses the institution of a suit as the only mode of avoidance, he is bound to include in the plaint a prayer for setting aside the decree and he can be directed to pay court-fee under S. 7 (iv-A) of the Court-Fees Act. (1941) 1 M.L.J. 800 I.L.R. (1941) Mad. 775 (F.B.), applied. (1950) 2 M.L.J. 378=A.I.R. 1951 Mad. 278.

——S. 7 (iv-A)—(Madras)—Setting aside decree—Decree obtained for excess amount in collusion between mortgagor and mortgagee—Suit by purchaser of equity of redemption to get rid of decree—Court-fee payable.

Where after a redemption decree had been passed the purchaser of the equity of redemption files a suit to get rid of a consent decree passed behind his back by the collusion between the mortgagor and mortgagee, in respect of the excess over the amount agreed between all the three with a prayer for possession consequential upon the declaration, the suit falls within the meaning of S. 7 (iv-A), Court-fees Act. The proper court-fee payable is on the amount in excess over the amount agreed to be paid. The suit cannot be treated as a second redemption suit and the fact that the suit has been brought not by the original mortgagor but by his transferee can make no difference. A.I.R. 1935 Mad. 671=69M.L.J. 45=1935 M.W.N. 709=42 L.W. 217=158 Ind. Cas. 982.

——S. 7. (iv-A) (U. P.)—Applicability—Waqf giving property to idol and subsequent sale of same property by donor to third parties—Suit by idol to recover property—Sale-deed, if has to be adjudged as void.

Where a person after executing a waqf giving property to an idol sells the same property to third parties and the idol sues to recover the property, the idol claims upon a prior title and would be entitled to possession of the property on proof of the title set up and it would not be necessary for the plaintiff to have the sale-deed adjudged void in order to obtain the relief claimed by him. Hence he cannot be asked to pay a court-fee such as is leviable under S. 7 (iv-A) of the Court-Fees Act over and above the court-fee payable for the relief of possession. 1950 A.L.J. 20=A.I.R. 1950 A. 231=1950 A.W.R. 46.

——S. 7 (iv-A)—(U. P.)— Applicability—Document securing right of Mutwalliship—If falls within the mischief of S. 7 (iv-A).

The question for purposes of S. 7 (iv-A) of the Court-Fees Act is not whether express mention or specific claim about cancellation of documents has been made in the relief but whether the plaint considered as a whole involves cancellation of or adjudging void or voidable a document.

The section does not hit all documents but hits only those instruments which either "secure money" or "secure property" having a "market value." Where the document in question secures the right of mutwalliship to the plaintiff, it is not such as to fall within the mischief of S. 7 (iv-A) of the Court-Fees Act. I.L.R. (1950) All. 81.

—(as amended in U. P.) S. 7 (iv-A)—Applicability—Suit under S. 5 (2), U. P. Muslim Wakfs Act—Prayer for declaration that property in suit not wakf—Allegation that wakfnama executed by vendor's ancestor was not properly executed and was invalid and of no effect—Court-fee payable.

Per Harish Chandra. J — A wakfnama is obviously a document which purports to operate as an extinguishment of the rights of the executant in the property dealt with in the wakfnama and to convey it to the donee and a suit under S. 5 (2) of the U.P. Muslim Wakfs Act (1936), to have it declared that the property dealt with by that deed is not wakf property, on the allegation that the deed was not properly executed by the allegad wakif and that it was invalid and without effect, falls under S. 7 (iv-a) of the Court-fees Act, though there is no prayer in the plaint specifically for cancellation of the deed or for having it adjudged void. The declaration sought in the plaint does in fact involve the cancellation of or adjudging void the wakfnama. Even if the document be regarded as a document merely declaring a wakf which may have been created by an oral declaration, the suit is governed by S. 7 (iv-A)

Per Sapru, J—A wakf can be created by a wakfnama. When there is no reference to any oral declaration in the plaint, and the plaintiff does not allege that the wakf was created by an oral declaration and later evidenced by a wakfnama, it must be held that the wakf was created by the wakfnama, and therefore the wakfnama is a document which "secures" property and it would therefore be necessary for the plaintiff to set aside the wakfnama. Hence Court-fee has to be paid on the plaint in accordance with S. 7 (iv-A) (1) of the Court-Fees Act, as amended in U.P. I.L.R. (1949) A. 99=A.I.R. 1949 A. 63.

—S. 7 (iv-A) (U.P.)—Applicability—Attempt to get over a sale certificate without paying expressly the relief of cancellation.

Where a suit for a declaration is merely an attempt to get over a sale certificate and the mere fact that there is no mention of the cancellation of the sale certificates would not take the case away from S. 7 (iv-A) of the Court-Fees Act. It cannot be said that merely because the relief for cancellation of a document is not expressly claimed it cannot "involve" cancellation. 1948 A.W.R. (C.C.) 13=1948 O. A. (C.C.) 13=A.I.R. 1948 Oudh 218=1948 O.W.N. 125.

——S. 7 (iv-A)—Applicability—Suit by sons for partition aganist father and also transferees from him, claiming share in properties transferred.

Where in a partition suit by the sons against their father, they implead also transferees from their father and claim a share in the properties transferred on the ground of the sale being not binding on them, the case involves cancellation of the sale deeds in question and as such S. 7 (iv-A) of the Court-Fees Act would apply to the case. I.L.R. (1949) A. 498=1949 A.L.J. 381=A.I.R. 1949 A. 535=1949 A.W.R. (H.C.) 67.

——S. 7 (iv-A) (U. P.)—Applicability—Deed of transfer.

Securing money or property having such value does not seem to have been used in S. 7 (iv-A) of

the Court-Fees Act in any technical sense. The word 'secure' has many meanings. Hence a deed of transfer can properly be called an instrument securing money or property having such value within the meaning of S. 7 (iv-A). 22 Luck. 203=1947 O.A. (C.C.) 65=1947 A.W.R. (C.C.) 65=231 Ind. Cas. 13=1947 O.W.N. 285 A.I.R. 1947 Oudh 149.

——**S. 7 (iv-A) (U.P.)—Applicability—Suit for cancellation of tamliknama, and possession—Separate court-fee on the two reliefs—If payable.**

A tamliknama would fall within the class of instruments mentioned in S. 7 (iv-A) of the Court-Fees Act and in a suit for its cancellation and for possession the two reliefs have to be separately valued and separate court-fee has to be paid on them. 22 Luck. 509=A.I.R. 1948 Oudh 24 (2)=1947 O.A. (C.C.) 137=1947 A.W.R. (C.C.) 137=1947 O.W.N. 366.

——**S. 7 (iv-A) (U.P.)—Applicability—Suit for dissolution of partnership or in the alternative for amount found due—Court-fee on relief of cancellation of agreement—Necessity.**

Where a suit is prima facie a simple suit for dissolution of a partnership or in the alternative if the Court holds that the partnership had already dissolved, for the recovery of the amount due to the plaintiff there is neither an express prayer for relief of cancellation of any document nor any implied claim for any such relief and as such no court-fee is necessary under S. 7 (iv-A) of the Court-Fees Act. A.I.R. 1950 All. 410.

——**S. 7 (iv-A) (U. P.)—Applicability.**

——Suit under O. 21, R. 103 of Civil P.C. falls under Art. 17 (1) and not under S. 7 (iv-A) of Court-fees Act. A.I.R. 1945 All. 111=1945 O.W.N. (H.C.) 30=1945 A.W.R. (H.C.) 32=1945 A.L.J. 109 I.L.R. (1945) All. 68=219 Ind. Cas. 335.

——**S. 7 (iv-B) Proviso—Construction "Involved in or affected by the relief sought"—Meaning.**

The words "involved in or affected by the relief sought" in proviso to S. 7 (iv-B) must be construed strictly; the words clearly exclude all properties which are not involved in or affected by the relief sought. When the plaintiff seeks relief only in respect of the properties specified in the plaint in his capacity as the adopted son of a certain person, he is not bound to include, for purposes of court-fee the value of all the properties which had devolved on him in that capacity. A.I.R. 1944 All. 84=1944 A.L.J. 70=1944 O.W.N. 25=1944 A.W.R. 38=I.L.R. (1944) All. 133=213 Ind. Cas. 412.

——**(as amended in U.P.), S. 7 (IV-A)—Construction "Market-value"—Meaning of.**

The "market-value" of a property for purposes of S. 7 (iv-A) of the Court-Fees Act, as amended in U. P., is the value which the property would fetch in the open market irrespective of any limitations to which it may be subject, and regardless of any consideration, such as litigation relating to it. I.L.R. (1949) A. 3=A.I.R. 1949 A. 63.

——**S. 7 (iv-A) (U. P.) Construction— "Money decree," if includes mortgage decree**—Suit for cancellation of mortgage decree.

The words "a decree for money" as used in S. 7 (iv-A), Court-fees Act as amended in U. P., do not necessarily mean "a simple money decree." In a suit for cancellation of a mortgage decree, it is the amount of the decree that should be the basis of valuation of the property, in respect of which the decree was passed for the purpose of court-fee. A.I.R. 1944 Oudh 118=1943 A.W.R. 33 (2)=19 Luck. 54=211 Ind. Cas. 282.

——**S. 7 (iv-A) (1) and (2) (U.P.)—Construction "Party" insub-S. (1)**—If includes person on whose behalf a deed is executed.

The word "party" in S. 7 (iv-A) (1) of the Court-Fees Act (U.P.) refers to the person who is directly a party to the instrument. Hence where a sale-deed is executed by a father on his own behalf and on behalf of his minor son as his guardian, the minor is not a party to the deed in question and as such a suit by him challenging its binding nature is covered by S. 7 (iv-A) (2) of the Court-Fees Act and not by S. 7 (iv-A) (1). 1950 A.W.R. 341=A.I.R. 1950 A 460=1950 A.L.J. 299,

——**S. 7 (iv-A), Cl. (1) (U.P.)—Construction—**—"Predecessor-in-title"—If includes in the cases of trustees predecessor-in-office.

The term predecessor-in-title used in Cl. (1) of S. 7 (iv-A) of the Court-Fees Act, as amended in the U.P. would include the predecessor-in-office in the case of trustees. I.L.R. (1949) A. 765=1948 O.W.N. 425=A.I.R. 1949 A. 347=1948 A.L.W. 423.

——**(as amended in U.P.), S. 7 (iv-A) construction "Predecessor in title"—Meaning of.**

The word "predecessor-in-title" in S. 7 (iv-A) (1) of the Court-Fees Act, as amended in U. P., as referring to the immediate predecessor-in-title of the plaintiff, includes also a remote predecessor. I.L.R. (1949) A. 3=A.I.R. 1949 All. 63.

——**(as amended in U.P.), S. 7 (IV-A)—Construction**—"Securing money or other property" etc.—Interpretation of.

Per Haris Chandra, J. (Sapru, J. contra).—The words "securing money or other property", etc., in S. 7 (iv-A) of the Court-Fees Act, as amended in U. P., are not, of course, very clear; but they have to be construed in a wide sense and not in a narrow sense. There is no warrant for holding that the document which is sought to be set aside must of itself have secured the property or that there must have been a conveyance of the said property or a release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing. I.L.R. (1949) A. 3=A.I.R. 1949 A. 63.

——**S. 7 (iv-A) Determination of value under—Mode.**

The "amount" mentioned in S. 7 (iv-A) of the Court-Fees Act refers to those decrees which are for money, or to those instruments which secure money, while the "value of the property in respect of which the decree was passed or the instrument was executed" refers to those cases where the decree was for other property having a market value or the instrument was for securing

other property having such value. This is the proper and natural interpretation and it would not be proper to construe it as giving an alternative to the plaintiff either to value his suit on the amount of the sale consideration or on the value of the property. I.L.R. (1949) A. 498=1949 A.L.J. 381= A.I.R. 1949 A. 535=1949 A.W.R. (H.C.) 67.

——**S. 7 (iv-A) (U. P.)—Relief involving cancellation of deed—Test.**

The test to determine whether a suit does or does not involve cancellation of a document within the meaning of S. 7 (iv-A) of the Court-fees Act is to see whether the granting of the relief which the plaintiff seeks necessarily requires a cancellation of a deed. Where the relief claimed is possession based on plaintiff's reversionary title, and mention is made of a deed of relinquishment by the last limited owner with an allegation that it was ineffective and void for various reasons, the relief claimed does not include any relief expressly or by necessary implication as to adjudging void the deed of relinquishment referred to in the plaint. The mere mention of that deed cannot be regarded as essential for the relief sought. 22 Luck. 481=A.I.R. 1948 Oudh 86=1947 O.W. N. 281=1947 A.W.R. (C.C.) 94=1947 O. A. (C.C.) 94.

——**Ss. 7 (iv-A) and (v) and 17—Suit by Hindu widow for possession—Plaint stating that compromise entered into during her minority by guardian with defendant in previous suit not binding—No relief claimed for adjudging Compromise void—Court-fee payable.**

In a suit by a Hindu widow who had inherited the property of her husband, the only relief claimed in the plaint was for possession of that property. But in the body of the plaint it was stated that a compromise entered into during her minority by her guardian in a previous suit for possession against the defendant under which the latter was given a certain share in the property, was not binding on her. No relief was however, claimed for adjudging void the compromise or for declaration that the compromise was not binding on her. The plaintiff had paid court-fee under S. 7 (v), Court-Fees Act.

Held, that the plaintiff was bound to pay court-fee under S. 7 (iv-A) also as the suit involved cancellation or adjudging void the compromise. The plaintiff was however not bound to pay separate Court-fees under Ss. 7 (iv-A) and 7 (v), but should pay court-fee on the aggregate amount of the two reliefs.

Held, also that S. 17 of the Court-Fees Act was not applicable to the case as the adjudging of the compromise as void and giving the plaintiff a decree for possession was not based on two causes of action nor amounted to alternative reliefs. I.L.R. (1949) A. 896=A.I.R. 1949 All. 641.

—S. 7 (iv) (a) (U.P.)
—Ss. 7 (iv) (a), (iv-A), (v-A) and 17 (1) (U.P.)
—Suit for declaration of sale deed as invalid and for possession.

Where, in a suit, the plaintiff claims that certain sale deeds should be declared invalid and ineffectual and that the possession of the property should be delivered to him, he must pay a court-fee both on the relief for possession and on the relief for adjudging the deeds of sale to be void or voidable. The causes of action for a suit under S. 39, Specific Relief Act, and a suit for possession or a suit for declaration and possession under S. 42, Specific Relief Act, are essentially different in which case sub-s (1) of S. 17 would apply. A.I.R. 1945 All. 290=I.L.R. (1945) All. 516=1945 A.W.R. (H.C.) 128=1945 A.L.J. 244=1945 O.W.N. (H.C.) 162.

——**S. 7 (iv-A) (U.P.) (v)—Suit claiming declaratory relief along with consequential relief in respect of immovable property such relief being incapale of valuation**—Court-fee payable.

Where the suit which falls under cl- (a) of S. 7 (iv), Court-fees Act, is to obtain a declaratory decree where consequential relief is prayed and the relief claimed is with reference to immovable property and it is obvious that this relief is incapable of valuation, the amount at which this relief should be valued is the value of the immovable property computed in accordance with sub s. (v) of S. 7, Court-fees Act, which deals with suits for possession of land, buildings or gardens. This means that the court-fee payable on the latter relief should be **ad valorem** such as would be paid if the suit was one for possession of property.

S. 7 (iv-B) (b) applies to a suit in which the only relief claimed is one to obtain an injunction and not to the above suit which clearly falls under S. 7 (iv) (a). The clauses of the Court-fees Act are exclusive of one another. The intention of the Legislature appears to be that when along with a declaratory relief, there is sought some consequential relief in respect of immovable property, but such relief is not capable of valuation in money, then court-fee should be paid as if the relief was one for possession of immovable property. A.I.R. 1940 Oudh 249=1940 O.W.N. 223=1940 A.W.R. 122 =15 Luck. 415=186 Ind. Cas. 671.

——**S. 7 (iv-A) (2) (U. P.)—Suit for possession involving also cancellation of a deed of transfer—Separate fee for cancellation also, if payable.**

Where though full court-fee for possession has been paid in respect of a suit for possession which also involves the cancellation of a deed of transfer, separate court-fee is payable in respect of the relief of cancellation of that deed under S. 7 (iv-A) (2), 22 Luck. 203 =231 Ind. Cas. 13=1947 O.W.N. 285=1947 O.A.(C.C) 65=1947 A.W.R. (C.C.) 65=A.I.R. 1947 Oudh. 149.

——**S. 7 (iv-A) (U. P.)—Substance of relief.**

A Court should not be entirely guided by the language used by the plaintiff but should look at the substance of the relief claimed. A.I.R. 1944 All. 271=1944 A.L.J. 256=1944 A.W.R. 128=I.L.R. (1944) All. 336=220 Ind.Cas. 65.

——**S. 7 (iv-A) (U. P.)—Declaration, that decree is inoperative if amounts to consequential relief.**

In a suit for declaration that decree was inoperative as regards plaintiff's rights because property covered by it was joint family property of which he was the member.

Held, that the suit was governed by S. 7 (iv-A). A.I.R. 1944 All. 208=1944 A.L.J. 304=1944 O.W.N 126=1944 A.W.R. 161 (2)=I.L.R. (1944) All. 388.

——S. 7 (iv A) (U. P.)—Applicability—Will.

A will is no more than the declaration of an intention. It cannot possibly be described as an instrument securing any property. A will therefore does not fall within S. 7 (iv-A). A. I. R. 1944 All. 84=1944 A.L.J. 70=1944 O.W.N. 25=1944 A.W.R. 38=I.L.R. (1944) All. 133=213 Ind. Cas. 412.

——S. 7(iv-A) (U. P.) — Suit for cancellation of decree and sale in execution and for possession—Court-fee payable.

On the claim for cancellation of the decree and sale in execution thereof and for possession, the court-fee is chargeable on the claim for cancellation of the decree and on the claim for possession. As the cancellation of the decree necessarily involves the cancellation of all subsequent proceedings, including the sale deed, no separate court-fee is chargeable on the cancellation of the sale. A.I.R. 1944 Oudh 118=1943 A.W.R. 33 (2)=19 Luck. 54=211 Ind. Cas. 282.

——S. 7 (iv-A) (U. P.)—Suit for declaration and possession based on deed of gift and will—Decree declaring title — Appeal by defendants challenging validity of will—S. 7 (iv-A), held, applied.

A suit was brought by the plaintiffs for a declaration with possession of certain property on the basis of a deed of gift executed in their favour by one M whose title to the property was founded upon a will. The defendants pleaded that the will was invalid both because it was not genuine aad because even if it was, it conferred only a life interest on M who had, therefore, no power to gift the property. These pleas were rejected by the Court of first instance which awarded the plaintiffs a declaration of their title in the property. The defendants appealed and raised the question of the validity of the will and of M's title.

Held, that S. 7 (iv-A) of the Court-fees Act as amended in 1938 applied and the defendants-appellants were liable to pay court-fee under that section A.I.R. 1944 Oudh 29=1943 O.W.N. 250=1943 R.D. 345=211 Ind. Cas. 432.

——S. 7 (iv-B) (b) (U. P.)—Suit to restrain interference with tahbazari right — Valuation for court-fees.

The tahbazari right is a substantial right in land and hence a suit to restrain by an injunction the interference with such rights involves or affects the property upon which the bazar is held. The amount of fee payable has to be computed according to the amount at which the relief is valued in the plaint. 21 Luck. 245=223 Ind. Cas. 484 = 1945 O. A. (C.C.) 261=1945 A.W.R. (C.C.) 261=1945 A.L.W. (C.C.) 369=1945 O.W.N. (C.C.) 404=A.I.R. 1946 Oudh 61.

——(as amended in U. P. in 1938), S. 7 (iv-B) (d)—Scope and effect of—Suit by widow for possession—Allegation that adoption by husband is invalid—Court-fee— Separate court-fee for declaration of invalidity of adoption—If payable.

S. 7 (iv-B) (d) of the Court-fees Act, as amended in U. P. in 1938, cannot be read as involving the consequence that in a suit for possession by a Hindu female, alleging that an adoption by her husband is invalid, the plaintiff must pay two separate court-fees in respect of possession and also in respect of the adoption which she seeks to get over as invalid. It is not necessary for the plaintiff to seek a declaration as to the invalidity of the adoption and pay court-fee thereon separately. The only effect of the amendment made in 1938, is that a suit of that character is to be charged with court-fee in accordance with S. 7 (iv-B) (d). 33 I.A. 156; 39 I.A. 19; 51 I.A. 220, ref. I.L.R. (1949).

——S. 7—(iv) (b) (U.P.)

——Accounting—Relief for.

There is nothing in law to prevent the plaintiff from valuing a relief for accounting at any figure he has chosen. The plaintiff cannot get a decree for any amount in excess of that figure, until he pays the court-fee thereon. A.I.R. 1944 All. 84=1944 A.L.J. 70=1944 O.W.N. 25=1944 A.W.R. 38=I.L.R. (1944) All. 133=213 Ind. Cas. 412.

——S. 7 (iv-B) (U.P.)—Suit under U.P. Debt Redemption Act, Ss. 7 and 9—Plaintiff agriculturist.

Held, that the suit being one for accounts within the meaning of S. 7 (iv) (b), Court-fees Act, **ad valorem** court-fee is payable on the plaint and the plaintiff is not entitled to the benefit of the reduced scale under U. P. Debt Redemption Act. A.I.R. 1944 Oudh 59=1943 O.W.N. 473=1943 R. D. 495=1943 A.W.R. 178=211 Ind. Cas. 76.

——S. 7 (iv-B) (U.P.)—Suit under S. 33. U. P. Agriculturists' Relief Act.

Suit under S. 33, U. P. Agri. Relief Act—Decree declaring amount due from plaintiff to defendant—Plaintiff appealing and seeking reduction of amount—Ad valorem court-fee on appeal must be paid, amount to be calculated according to Art. 1 of Sch. I upon the amount by which plaintiff seeks reduction in his appeal—He cannot put fictitious valuation for purpose of S. 7 (iv) (f) corresponding to S. 7 (iv) (b) of the U. P. amendment. 204 Ind. Cas. 506=1942 O.W.N. 789=1943 R.D. 110.

——S. 7 (iv) (b) (U. P.), Sch. II, Art. 17— Plaintiffs' suit for recovery of share in profits—Necessity of accounts being gone into—Suit, if one for accounts.

Where in a suit the plaintiffs' claim is for the recovery of profits, the mere fact that accounts may have to be gone into, in determining the plaintiffs' share of profits, will not convert it into a suit for accounts. The mere fact that the plaintiffs have added in the prayer that whatever sum be found due to them be decreed does not convert the money suit into a suit for accounts. If it is not a suit for accounts, S. 7, cl. (iv) (b), Court-fees Act, will not apply. The case will be governed by Sch. II, Art. 17 of the Court-fees Act. A.I.R. 1941 Oudh 622=1941 O.W.N. 1095=1941 R.D. 845=1941 A.W.R. 865=17 Luck. 246=196 Ind. Cas. 441.

——S. (iv-B) (U.P.)—Oudh Civil Rules, R. 268, cl. III—Appeal in suit under S. 33, U. P. Agriculturists' Relief Act—Valuation—Court-fee payable.

An appeal in a suit under S. 83, U. P. Agri. Relief Act, is to be valued according to the provisions of S. 7 (iv) (b) of the Court-fees Act, and the court-fee is to be paid accordingly. Suits are deemed, under cl. III of R. 268, Oudh Civil Rules, to be suits for accounts for the purposes both of the Court-fees Act and the Suits Valuation Act. The appellant can value the appeal at a reasonable amount and pay **ad valorem** court-fees on that amount, where he does not seek modification of the decree of the Court below to the

extent of a specific amount. A.I.R. 1941 Oudh 100=1940 O.W.N. 1185=1940 R.D. 588=1941 A.W.R. 1=16 Luck. 398=191 Ind. Cas. 732.

——**S. 7 (iv-B), (U.P.)**—Suit by zamindar for injunction restraining defendant from interfering with plaintiff's right to realize tahbazari dues from shopkeepers of bazaar—Relief to be valued at not less than one-tenth of market-value of land—Market-value should be computed according to sub-s. (v).

By virtue of the proviso to S. 7 (iv-B) the relief to obtain an injunction has to be so valued that the amount shall not be less than one-tenth of the market value of the property involved in or affected by the relief sought. The Act nowhere says that the relief for injunction must have direct concern with the land liable to pay the land revenue.

Where a person owning the village where a bazaar is held brings a suit for an injunction restraining the defendant from interfering with the plaintiff's right to relize **tahbazari** dues from the shopkeepers of the bazaar, the relief for injunction involves or affects the property upon which the bazaar is held.

According to Expln. I to S. 7 (iv-B) the market-value of such property should be computed in accordance with the provisions of sub-s. (v) of S. 7, according to which twenty times the annual average of the net profits for three years immediately preceding the date of presenting the plaint will constitute the market-value of the property. A.I.R. 1946 Oudh. 61=1945 O.W.N. 404.

—S. 7 (iv—B) (U.P.)—Declaration and injunction—Reliefs not independant.

The plaintiffs prayed for two reliefs first for the declaration that the office-bearers declared duly elected at the meeting presided over by K and not defendants Nos. 1 to 6 were the duly elected office-bearers of the Cawnpore Kapra Committee, second, for an injunction restraining the defendants to act as elected office-bearers of the committee. The plaintiffs valued the first relief at Rs. 100 and second relief at Rs. 5,100 and paid a Court-fee of Rs. 30 on first relief under Art. 17 (iii) of the Act and Rs. 200 on the second relief under S. 7 (iv-B) (b):

Held, that the words "relief sought" mean the whole relief which is prayed for in the suit. Since the relief for injunction could not be treated as an independant relief, it could not be valued under sub-s. (iv-B) (b) and the litigant was not entitled to the maximum limit of Rs. 200 provided by that sub-section. A.I.R. 1944 All. 113=1944 A.L.J. 95=1944 O.W.N. 40=1944 A.W.R. 78=I.L.R. (1944) All. 214=213 Ind. Cas 227.

—**S. 7 (iv-B) Proviso (U. P.)**—Under proviso. court-fee to be calculated upon market value at date of presentation of plaint—Suit for injunction filed before proviso came into force—Valuation of suit at Rs. 5 was proper—Court-fee on Rs. 5 is proper for purposes of appeal.

Under the proviso to S. 7 (iv-B) it is the amount mentioned in the plaint which is the basis of the valuation and, therefore, the Court must look back to the date of the institution of the suit and calculate the court-fee upon the market value at the date of presenting the plaint. Hence, a suit for injunction must be deemed to have been correctly valued at Rs. 5 when at the date of the presentation of the plaint, S. 7 (iv-B) proviso was not in force and court-fee paid on memorandum of appeal on such valuation is correct. A.I.R. 1941 All. 134=1940 A.L.J. 904=1941 O.W.N. 238=1941 A.W.R. 17=I.L.R. (1940) All. 793=193 Ind. Cas. 747.

——**S. 7 (V)**

Synopsis.

1. **Adoption.**
2. **Amendment suggested.**
3. **Ancillary relief.**
4. **Appeal.**
5. **Applicability.**
6. **Cancellation of deed.**
7. **Claim petition.**
8. **Cross-objection.**
9. **Declaration—Suit for in respect of land.**
10. **Declaration and possession.**
11. **Declaration principal relief.**
12. **"Land"**
13. **Licencee—Ejectment of.**
14. **Market value.**
15. **Mortgagee—Suit for possession.**
16. **Paddy lands.**
17. **Partition.**
18. **Possession.**
19. **Pre-emption.**
20. **Setting aside order relating to immovable property.**
21. **Specific performance.**
22. **Tank bed.**
23. **Tenant suing land-lord.**
24. **Trust suit.**
25. **S. 7 (v) (a)**
26. **S. 7 (v) (b)**
27. **S. 7 (v) (c)**
28. **S. 7 (v) (d)**
29. **S. 7 (v) (e)**
30. **S. 7 (v) (l)**
31. **S. 7 (v) Provisos.**

1. Adoption.

——**S. 7 (v)—Adoption.**

——In a suit for possession of field declaration that the plaintiff was the owner, the plaint contained the allegation that the defendant was falsely setting up his adoption which even if proved was illegal:

Held, that since the suit was for possession the court-fee was payable only under S. 7 (v) (b). No court-fee needed to be paid on declaration to avoid adoption, since its mention amounted to anticipation of the defence of the defendant. 1942 N.L.J. 372.

——**S. 7 (v)—Adoption—Suit to declare invalid.**

A suit to declare an adoption invalid cannot be valued according to the method provided for in S. 7 (v). Court-fees Act. A.I.R. 1935 Mad 279 (1)=1935 M.W.N. 320=68 M.L.J. 329=41 L.W. 469=159 Ind. Cas. 424 (1).

2. Amendment suggested.

——S. 7 (v)—**Amendment suggested.**

Per **Kupchand, A. J. C.**—The Court-fees Act is an antiquated Act and is deficient in several particulars. It is desirable that the provisions of S. 7 (v) should be made more expliicit by expressly providing that in the case of land whether built upon or not, which have a market-value, court-fee should be paid on such value. A.I.R. 1931 Sind 6=130 Ind. Cas. 550.

3. Ancillary relief.

——S. 7 (v)—**Ancillary relief—Suit for possession of village share and Sir fields**—One of Sir fields containing orange garden—Court-fee payable.

Per Sen, J. (on difference of opinion between Mudholkar, J. and Hidayatullah, J.)—If the claim for possession of Sir lands is merely ancillary to the claim for possession of the village share no separate court-fee need be paid. Similarly if the substance of the claim is not house or gardens Cl. (e) of S. 7 (v) of the Court-Fees Act would not apply but Cls. (a) to (d) if the land is assessed to land revenue and satisfies the conditions in those clauses. Where the substance of the claim is for possession of Sir lands in addition to the village share they have to be separately valued under Cl. (d). Where the substance of the claim involves a garden or house the valuation is under Cl. (e) on the market-value of the house or garden, and it does not matter if the land on which they are situate is or is not assessed to land revenue. I.L.R. (1950) Nag. 748=1950 N.L.J. 580=A.I.R. 1950 Nag. 249.

——S. 7 (v)—**Ancillary relief.**

In a suit by a vendee for possession of the land contracted to be sold and for execution of a deed of sale and have it registered on receipt of the balance of the price.

Held, that the suit was one for possession of land the prayer as to the execution of the sale deed being merely ancillary Court-fees were payable in accordance with S. 7 (v) of the Court Fees Act. 60 Ind. Cas. 512 Lah.)

4. Appeal.

——S. 7 (v)—**Appeal by some defendants only.**

When there was no appeal in the lower Appellate Court in so far as the lands claimed by some of the defendants were concerned, court-fee cannot be demanded from the other defendants who are respondents in second appeal on the ground that they should have paid full court-fee in the lower Appellate Court. A.I.R. 1945 Pat. 453=24 Pat. 379.

——S. 7 (v)—**Appeal—Mortgage-decree against father**—Appeal by sons claiming exemption of their shares—Court-fee—Mode of calculation.

Where a suit brought on a mortgage bond executed by a Hindu father in which the father as well as his two sons were impleaded as defendants was decreed, and the sons appealed alleging that their two-thirds share was not liable for the debt :

Held, that the court-fee must be paid on the two-thirds share of the property or on the decree amount whichever was less. The method of valuation mentioned in S. 7 (v), cannot be adopted in such a case. A.I.R. 1931 Mad. 710=135 Ind. Cas. 11.

——S. 7 (v)—**Appeal—Defendant in possession.**

Where in a suit for recovery of possession of certain property on payment of the necessary court-fees on the value of the property the claim is decreed and the defendant appeals against the decree, he is bound to pay the same court-fee upon the value of such property on the memorandum of appeal although he was in possession of property. 116 Ind. Cas. 110= A.I.R. 1929 Sind 161.

——S. 7 (v) Appeal — Court-fee — Value of the relief granted.

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of, that value being determined according to S. 7 (v). 85 Ind. Cas. 405=48 Mad. 652=21 M.L.W. 15=A.I.R. 1925 Mad. 323=47 M.L.J 919.—**See also.**—68 Ind. Cas. 444=45 Mad. 246=30 M.L.T. 88=14 M.L.W. 624=1921 M.W.N. 854=A.I.R 1922 Mad. 211=41 M.L.J. 587.

——S. 7 (v)—Appeal.

——Suit for possession—Appeal—Landlord.

The suit was filed against three persons of whom defendants 1 and 2 were alleged to be the persons in possession and defendant No. 3 was the admitted landlord. The plaintiff asked for a declaration of title and recovery of possession on the allegation that he had got settlement from defendant No. 3 but that subsequently the other defendants dispossessed him. The plaintiff set up a jote right to the land. The trial Court passed a decree against defendants 2 and 3 and dismissed the suit against defendant 1. The decree declared the plaintiffs jote right and provided that he do get khas possession. An appeal having been preferred by defendant 3 the same was dismissed. The said defendant thereupon preferred a second appeal. A question of court-fee having been raised, **Held**, that the appeal was governed by Sch. I, Art. 1 read with S. 7. para. (v) of the Court-Fees Act 34 C.W.N. 217.=126 Ind. Cas. 777=A.I.R. 1931 Cal. 333.

5. Applicability.

——S. 7 (v) — **Applicability — Consequential** relief regarding immoveable property incapable of being valued—Valuation.

Where the consequential relief regarding immovable property in declaratory suit is incapable of being valued, then the amount at which that relief should be valued is the value of the immovable property computed in accordance with sub-S. (v) of S. 7 of the Court-Fees Act. 23 Luck. 189=1948 O. A. (C. C.) 35=1948 A.W.R. (C. C.) 35=A.I.R. 1948 Oudh 297=1948 O.W.N. 120.

——S. 7 (v) and Sch. II, Art, 17 (iv)—Applicability— Rival mutawallis — Suit by one against other for declaration of right and for being put in charge of trust estate — Court-fee payable.

A relief for taking charge of an office or trust estate is different from that for recovery of possession of properties, though the latter relief is sought by a trustee.

A suit for declaration that the plaintiff is the mutawalli of certain endowed properties, that he is and the defendant is not entitled to remain in

charge of the trust estate and that the defendant may be directed to make over charge of the said estate to the plaintiff cannot be regarded as a suit for possession, when the plaintiff claims no beneficial ownership in the properties in suit. The relief sought is not capable of any money valuation and is governed for purposes of Court-fee by Art. 17 (vi) of schedule II of the Court-Fees Act. Such a suit is not for possession falling under S. 7 (v). Court Fees Act. A.I.R. 1932 All. 593; A.I.R. 1925 All. 804; A.I.R. 1925 Mad. 421; A.I.R. 1934 Pat. 647 dist. and expl. A.I.R. 1934 Pat. 647, followed and applied. 21 All. 200, ref. 27 Pat. 494.

——**S. 7** (v)—Applicability—Hindu widow—Death of—Suit for possession of estate by reversioners—No prayer to declare invalid or set aside alienation by widow—Court-fee payable. **See** Court-Fees Act, S. 7 (iv) (c) and (v). 27 Pat. 14.=A.I.R. 1949 Pat. 328.

——**S. 7** (v)—Applicability—Suit for possession and redemption—Prayer for declaration of invalidity of sale-deed and of ownership of plaintiff in respect of properties—Court-fee — Market-value — Determination of. **See** Court-Fees Act, S. 7 (iv) (c) and (v). 48 Bom. L.R. 193=A.I.R. 1946 Bom. 363.

——**S. 7** (v) — Applicability—Suit for possession involving declaration of invalidity of decree or execution sale—Court-fee. **See** Court Fees Act, S. 7 (iv) (c) and (v). 29 P.L.T. 316=A.I.R. 1949 Pat. 363.

——**S. 7** (v)—**Applicability—Obiter**:—S. 7 (iv) (c) should not be applied to cases falling under S. 7 (v). A.I.R. 1940 Mad. 273=1939 M.W.N. 841.

——**S. 7** (v)—**Applicability**—Person out of possession claiming property—S. 7 (v) and not Art. 17 (vi), Sch. II applies. A.I.R. 1938 Lah. 275=40 P.L.R. 27 =I.L.R. (1938) Lah. 240=176 Ind. Cas. 762.

——**S. 7** (v)—**Applicability**—Suit by assignee of landlord against tenant holding over is not governed by S. 7 (v). A.I.R. 1937 Mad. 91=44 L.W. 800 =71 M.L.J. 842=1936 M.W.N. 1374=168 Ind. Cas. 462.

S. 7 (v)—**Applicability**—Where the relief asked for is by way of possession, the suit will **prima facie** fall under cl. (v) and not under cl. (iv) (c) and it can make no difference for this purpose that a prayer for a declaration is also included in the suit. A.I.R. 1936 Mad. 411=1936 M.W.N. 148=70 M.L.J. 398=43 L.W. 58=161 Ind. Cas. 679.

——**S. 7** (v)—**Applicability—Investigation of title.**

Where the suit is one for possession of land after determination of the question of title and the title is gone into, the case falls within S. **7** (v) and the Court fee is payable on the market-value of the land. 27 M.L.J. 475 and 24 C.W.N. 151, Foll.; 17 C.W.N. 120 Dist., 16 C.L.J. 375, Expl. 5 Pat. 208=7 P.L.T. 642=94 Ind. Cas. 19=**A.I.R. 1926 Pat. 251.**

6. Cancellation of deed.

——S. 7 (v)—**Cancellation of deed**—In a suit for cancellation of a deed of conveyance and for possession of property covered by deed, plaintiff should value his relief in accordance with provisions of S. 7 (iv-A) (Madras) and not in accordance with those of S. 7 (v) Court-fees Act. A.I.R. 1939 Mad. 462=49 L.W. 566 =1939 M.W.N 407=(1939) 1 M.L.J. 702=I.L.R. (1939) Mad. 764=183 Ind. Cas. 95 (F.B.).

Overrules (1) A.I.R. 1927 Mad. 825=105 Ind. Cas. 171, (2) A.I.R. 1932 Mad. 605=36 M.L.W. 225= 1932 M W.N. 992 = 63 M.L.J. 764 = 139 Ind. Cas. 317.

——**S. 7** (v)—**Cancellation of deed.**—Declaration with consequential reliefs of cancellation of deed and possession—Suit does not fall under S. 7 (v). 1938 N.L.J. 130.

——**Ss. 7** (v) (iv-A)—(**Madras**)—Cancellation of deed—Suit for cancellation of sale deed and for possession and mesne profits—Relief for possession, only ancillary—Court-fee payable.

In a suit for cancellation of a sale-deed and for recovery of possession of the land comprised in the deed and for mesne profits, the claim with respect to possession is only ancillary to the main claim, viz., the setting aside of the sale-deed, and consequently, court-fee need not be paid on the relief with regard to possession. A.I.R. 1933 Mad. 231 (2)=37 L.W. 146= 64 M.L.J. 127=1933 M.W.N. 225=56 Mad. 401= 142 Ind. Cas. 29.

7. Claim Petition.

——S. 7 (v), **Sch. II, Art. 17**—Claim petition—Suit to set aside order—Court-fee payable—Value of Suit for purposes of jurisdiction—Value of land, if market-value.

A purchased a certain land from **B** and his mother, for a certain sum of money. **C** was the holder of a decree against **B**. In execution of his decree, **C** attached the property sold to **A**. **A** then preferred a claim in execution. This claim having been dismissed **A** brought a suit under O. 21, R. 63, Civil P. C., for declaration of his title to the property, for raising of the attachment and for an injunction against the continuing of the execution.

Held, (i), that the suit being one in substance for avoiding the attachment, court-fee was payable under Sch. II, Art. 17, Court-fees Act.

(ii) that even if it is assumed that the subject-matter was the land, the value of suit for the purposes of jurisdiction was the value of the land as determined under S. 7 (v), Court-fees Act, and not its market-value and must be computed as such under S. 14, Mad. Civil Courts Act. A.I.R. 1933 Mad. 439= 37 L.W. 552=1933 M.W.N. 402=64 M.L.J. 568= 56 Mad. 716=144 Ind. Cas. 243.

8. Cross objections.

—S. 7 (v)—Cross objections.

——In the case of a cross-objection claiming possession of an immoveable property the court-fee is payable **ad valorem** on the value of the property and should not be calculated on five times the land revenue in accordance with S. 7 (v). 40 All. 93, Foll.

An **ad valorem** fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Art. 17 of Schedule II, for Art. 17 does not provide for cross objections but only for plaints and appeals. 1924 All, 175, Foll. 85 Ind. Cas. 270=47 All. 89=5 L.R.A. Civ. 712=22 A. L. J. 911=A.I.R. 1925 All. 119.

—S. 7 (v)—Cross-objections—Court fee on.

——The first Court dismissed the suit. The appellate Court decreed the suit subject to a payment of Rs. 100 by the plaintiff. Plaintiff appealed. Defendant filed cross-objections claiming restoration of first Court's decree.

Held, cross-objections should be stamped **ad valorem**. 83 Ind. Cas. 780=45 All. 537=A.I.R. 1924 All. 175.

—S. 7 (v)— Cross-objections.

——S. 7 (v) (b) refers only to suits for possession of land and not to cross-objections arising out of suit for declaration. 39 P.L.R. 586.

9. Declaration—Suit for in respect of land.

——**S. 7 (v) and Sch. II, Art. 17—Declaration—Suit for in respect of land.—Jurisdiction—Appeal.**

For the purpose of determining the course of appeal and jurisdiction the value of a suit for a declaration that an alienation of land is null and void so far as plff.'s rights are concerned, is thirty times the land revenue of the land in respect of which the declaration is sought. 60 P. R. 1907, Foll.; 24 P.R. 1903, Dist. 226 P.L.R. 1912=182 P.W.R. 1912=15 Ind. Cas. 272.

10. Declaration and possession.

——**Ss. 7 (v), 7 (iv)(c) Declaration and possession—Suit for—**

Where a suit was brought for a declaration that a certain property gifted to the plaintiff by her husband, who subsequently became an insolvent, was her property and for possession of the property which had been taken possession of by the Official Receiver as part of the estate of her insolvent husband, the consequential relief of possession must be valued under S. 7 (v), Court-fees Act, and court-fee must be paid under S. 7 (v) upon the total value of the property and not under S. 7 (iv) (c). A.I.R. 1937 Mad. 529=1937 M.W.N. 234=45 L.W. 491=(1937) 1 M. L. J. 739=I.L.R. (1937) Mad. 672=170 Ind. Cas. 573.

——S. 7 (v)—**Declaration and possession**—Suit for declaration and separate possession of plaintiff's share after partition—Proper court-fee.

A suit for declaration that certain properties belong to the joint family and for separate possession of the plaintiff's share after partition by metes and bounds falls within S. 7, cl. (v) especially where the defendants claim the property adversely to the plaintiffs. A.I.R. 1936 Mad. 411=1936 M.W.N. 148=70 M. L. J. 398=43 L.W. 582=161 Ind. Cas. 679.

——**S. 7 (v)—Declaration and possession.**—If the consequential relief prayed for in a suit for declaration is possession, the mode of valuation is that prescribed by S. 7 (v). There being a special provision in S. 7 (v), the general provision in S. 7 (iv) (c) is excluded. A.I.R. 1935 Mad. 346=68 M.L.J. 369=1935 M.W.N. 406=41 L.W. 488=156 Ind. Cas. 840.

11. Declaration principal relief.

——**S. 7 (v)—Declaration principal relief.**

——If the principal relief claimed is one for possession and the plaintiff's right to possession is merely ancillary to it, in that case it is enough to pay the court-fee on the relief for possession. On the other hand if the principal relief is for declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the court-fee would be payable according to the amount at which the relief is valued in the plaint. A.I.R. 1930 Oudh 104, Foll.; A.I.R. 1929 Oudh 419, Dist. 7. O.W.N. 571—A.I.R. 1930 Oudh 368=126 Ind. Cas. 688.

—S. 7 (v)—Declaration principal relief.

——If the principal relief claimed in a suit is one for possession and the relief for declaration is merely ancillary to it, it is enough to pay court-fee on the relief for possession. But if the principal relief is for declaration and the right to possession depends upon plaintiff being entitled to declaration, then the relief for possession is to be regarded as consequential relief and the court-fee is to be payable according to the amount at which the relief sought is valued in plaint or memorandum of appeal. The order in which the relief is sought for cannot be decisive of the question.

Where a Hindu son **D** sued for possession of his share questioning the validity of some mortgages by his father,

Held, that it was necessary for **D** to get a declaration about the decrees not being binding on him before he could be entitled to a decree for possession. The relief for possession therefore was undoubtedly a consequential relief. A.I.R. 1929 Oudh 419 and A.I.R. 1926, Oudh 380, Ref. 6 O.W.N. 1105=A.I.R. 1930 Oudh 104=5 Luck 474=124 Ind. Cas. 420.

12. "Land".

——**S. 7 (v)—'Land'—If limited to agricultural land.**

The term "land" in S. 7 (v) of the Court-Fees Act is not limited to agricultural land. As that term is not defined anywhere in the Act, it should be interpreted in the ordinary sense, and should cover all kinds of land, regardless of the use to which it is put or may be likely to be put. A.I.R. 1948 E.P. 9=50 P.L.R. 14.

13. Licensee—Ejectment of.

——**S. 7 (v)—Licensee—Ejectment of—Suit for possession after revocation of licence—Valuation.**

A suit for possession of a house from a licensee whose licence has been revoked is governed for purposes of Court-fee by S. 7 (v) of the Court Fees Act, and must be valued accordingly. 1947 Bom. 482 foll.; 5 Pat. 631; 24 C.W.N. 167, not foll. A.I.R. 1949 Cal. 621.

——**S. 7 (v)—Licensee—Ejectment of—Suit for possession of house from licensee — Court-fees.**

Where a plaintiff sues for possession of a house, claiming that the defendant is in possession as his licensee, court-fee is payable according to the market-value of the house. The subject-matter of the suit is the house itself and not anything else. 49 Bom. L. R. 552=A.I.R. 1947 Bom. 482.

—S. 7 (v) — Licensee Ejectment of.

——A suit to eject a licensee at will from a house with an incidental prayer for determining plaintiff's title is in essence a suit for ejectment and is covered by Cl. (v). The subject-matter of the suit in an ejectment suit is the right to eject the defendants and the value of that right is the value at which the defendant's right to remain in the house under the licence of the plaintiff may be valued. 15 All. 63 Foll. 5 Pat. 631=98 Ind. Cas. 817=A.I.R. 1927 Pat. 140.

14. Market value.

—S. 7 (v) (vi)— Market value—Parties in agreement regarding price paid—Duty of Court.

Where in a suit for pre-emption, the parties are in agreement as to the price actually paid the Court is relieved of the necessity of fixing the fair market value of the property and that,

amount should be taken to be the fair market value for purposes of court-fee. A.I.R. 1945 Oudh 135=1944 O.W.N. 501=1944 A.W.R. (C.C.) 302.

S. 7 (v)—Market value — Computation of.

——Suit claiming declaratory relief along with consequential relief in respect of immovable property, such relief being incapable of valuation:

Held, that amount at which the latter relief should be valued is the value of immovable property computed in accordance with S. 7 (v), Court-fees Act. A.I.R. 1940 Oudh 249=1940 O.W.N. 223=15 Luck. 415=1940 A.W.R. 122=186 Ind. Cas. 671.

——**S. 7 (v), (iv) (c) — Market value, determination of—Dispute as to kudivaram right alone.**

In suits to obtain recovery of possession of immovable property, the relief ought to be valued under S. 7 (v) and not under S. 7 (iv) (c) of the Court-fees Act although the possession is asked for as being consequential on the declaration.

Suits for possession of land are in terms governed by S. 7 (v) of the Court-fees Act and the fact that the melwaram right is not in dispute, does not make any difference. But in assessing the market value of the land under sub. cl. (b) of S. 7 (v) deduction should be made in respect of the melwaram right regarding which there is no dispute and the kudiwaram right alone which is in dispute should be taken into consideration. A.I.R. 1935 Mad. 569=1935 M.W.N. 418=41 L.W. 562=68 M.L.J. 755=58 Mad. 1051=157 Ind. Cas. 94.

——**S. 7 (v)—Market value—Purchase in execution of mortgage decree;**—In execution of a mortgage decree, a property was purchased for Rs. 2,500 by the mortgagee—**Held,** that for the purpose of court-fee, Rs. 2,500 must be taken as the value of the property affected by the decree.— 10 C.W.N. 1010=33C. 1133=4 C.L.J. 121.

15. Mortgagee—Suit for possession.

—S. 7 (v)—**Mortgagee—Suit by—Possession as per deed.**

A suit by a mortgagee to recover possession of the mortgaged property under the terms of the deed, connot be governed by S. 7 (v) for it is not a suit for possession of land within the meaning of that section. But in such a suit Court-fee ought to be calculated accrording to the provisions of S. 7 (ix) i. e, on the principal money expressed to be secured according to the mortgage-deed. 117 Ind. Cas. 766=6 O.W.N. 491=A.I.R. 1929 Oudh. 321.

16. Paddy Lands.

——S. 7 (v)—**Paddy lands— Suit for possession of paddy lands—Court-fee payable.**

Court-fee for a suit for possession of paddy lands is to be paid on five times the land revenue due on the fields. A.I.R. 1934 Rang. 313=154 Ind. Cas. 249.

17. Partition.

——**Ss. 7 (v) and 12 (ii)—Partition—Suit for—Assignment of rights of plaintiff after suit to stranger—Addition of such stranger as plaintiff—Original plaintiff subsequently transposing himself as defendant—Continuation of suit by transferee as plaintiff—Nature of suit thereafter—Court-fee payable—Procedure.**

The mere fact that during the pendency of a suit for partition by a coparcener the plaintiff transfers his rights to a stranger who is then added as additional plaintiff would not entail additional Court-fee on the ground that the alienee was not a person in joint possession of the suit properties along with the defendants. But when the original plaintiff decides not to prosecute the suit as originally laid by him and finally allows himself to be transposed as a defendant, the nature of the suit becomes altered in a material degree. It ceases to be a suit for partition by one coparcener against the other coparceners. It becomes a suit by a person claiming to be an alienee from a coparcener for partition against the other members of the family. The alienee could in no sense be described as a person in joint possession actually or even constructively along with the other members of the family. The proper course on transmission of the original plaintiff as a defendant is to call upon the transferee plaintiff to pay ad valorem court-fee on the share of the properties, which he was claiming.

Where what the trial Court did intend was to dismiss the suit on the merits and to direct at the end of the judgment the transferee plaintiff to pay additional Court-fee within one month from the date of judgment and in default that the plaint would stand rejected on that ground, held in an appeal by the transferee plaintiff: S. 12, (ii) of the Court-Fees Act confers on the appellate Court ample power to set right any mistake in procedure. The appellant can be ordered to pay the proper Court-fee which he ought to have paid as calculated under S. 7, cl. (v) of the Court-Fees Act both on the plaint and memorandum of appeal and it can be directed that in default the appeal as well as the plaint should be rejected as not bearing the proper court-fee as far as the appellant was concerned. I.L.R. (1947) Mad. 763=60 L.W. 8=1947 M.W.N. 56=A.I.R. 1947 Mad. 285=(1947) 1 M.L.J. 15.

——**S. 7 (v) and (iv) (b) and (c) — Partition—Suit by widow for partition and possession against co-widow and her alienee—Court-fee payable.**

In a suit by a widow for partition and possession against her co-widow and an alienee from her where the plaintiff's right to partition is challenged, if the claim embraces a revenue paying estate or comprises property mentioned in S. 7 (v) of the Court-Fees Act, the value for purposes of court-fee would have to be determined by the rules contained under S. 7 (v) and not according to the market value of the property under S. 7 (iv) (b) of the Act. The plaintiff is not bound to pay court-fee on the relief of declaration regarding the property alienated by her co-widow under S. 7 (iv) (c) of the Act. The plaintiff not being a party to the sale-deed, is not bound, to set it aside, and the relief of declaration sought for is only ancillary one and is not the primary one. I.L.R. (1947) Nag. 220=229 Ind. Cas. 193=1947 N.L.J. 83=A.I.R. 1947 Nag. 243.

——**S. 7 (v)—Partition between brothers—Minor brother represented by father as guardian—Subsequent suit by minor for partition ignoring pre-**

vious partition as void—Court-fees paid under S. 7 (v)—Previous partition, held, need not be set aside—Suit, held competent.

In 1938, there was a partition between three brothers one of whom was a minor represented by the father, who had already previously separated, as his guardian. Subsequently, the minor brought a suit for partition ignoring the partition of 1938 as void as the elder brother had taken as his share much more than he was entitled to; court-fee was paid under S. 7 (v) on Rs. 1,010 odd:

Held, that it was not necessary for the plaintiff to sue for setting aside the partition deed of 1938 and hence the suit was competent. A.I.R. 1943 Mad. 427=56 M.L.W. 158=(1943) 1 M.L.J. 249=1943 M.W.N. 175=210 Ind. Cas. 278.

——S. 7 (v)—Partition suit—Minor son challenging transaction by father—No relief for cancellation—Prayer for possession of his share in alienated properties—Nature of relief—Court-fees payable.

Where in a suit for partition by a minor son against his father, the plaint challenges the validity of transactions entered into by the father as manager of the family, the plaintiff must pay court-fees in accordance with the relief which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The court must look at the real nature of the suit and decide what the plaintiff is asking for. Where, therefore, the plaintiff is in effect asking in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the properties alienated, the plaintiff has to stamp his relief in respect of these transactions in accordance with the provisions of S. 7 (v), A.I.R. 1940 Mad. 113=1940 1 M.L.J. 32=51 L.W. 11=1940 M.W.N. 126=I L.R. (1940) Mad. 259=186 Ind. Cas. 494 (F.B.).

—S. 7 (v)—Partition Suit where plaintiff is in joint Possession.

S. 7, (v) Court-fees Act, cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. A joint owner who is in possession does not need to sue for possession. He has possession and the fact that his possession is shared by others does not affect the position. Section 7 (v) can only apply where the plaintiff is seeking relief in respect of possession of immovable property when he is out of possession, A.I.R. 1940 Mad. 113=(1940) 1 M.L.J. 32=51 M.L.W. 11=1940 M.W.N. 126=I.L.R. (1940) Mad. 259=186 Ind. Cas. 494 (F.B).

—S. 7 (v)—Partition—Mortgagee of portion of house obtaining decree, purchasing that portion and obtaining symbolical possession thereof—Another mortgagee of whole house obtaining decree purchasing whole house and disallowing first mortgagee to enter into possession of his portion—Suit by first mortgagee for partition and possession, held, fell under S. 7 (v) and not under Sch. II, Art. 17-B (Madras). A.I.R. 1939 Mad. 506=49 L.W. 481=1939 M.W.N. 303=(1939) 1 M.L.J. 531=185 Ind. Cas. 459.

—S. 7 (v)—Partition—Suit for partition of tavazhi properties with allegation that certain mortgages were not binding on tavazhi—one item in possession of defendant karnavan which he had mortgaged as his separate property—Court-fee under S. 7 (v), held, should be paid in respect of plaintiff's share in that item.

Plaintiff instituted a suit for partition of certain tavazhi properties on the footing that he was a junior member thereof and that the suit properties were tavazhi properties. The plaint made reference to certain mortgages and debts and alleged that these mortgages and debts were not binding on the tavazhi. In respect of one of the items, the plaintiff stated that the defendant, the karnavan, was still in possession of the item which he had mortgeged as his separate property and the plaintiff should not, therefore, be called upon to pay additional court-fee in respect of such item:

Held that as according to the allegations in plaint, the possession of the defendant on the date of the suit was not on behalf of the tavazhi, court-fee under S. 7 (v) Court-fees Act, ought to be paid in respect of the plaintiff's share in that item. A.I.R. 1938 Mad. 474=1938 M.W.N. 131=181 Ind. Cas. 905.

—S. 7 (v)—Partition—Suit against co-sharer for partition and separate possession—Plaintiff excluded from possession.

Where the plaintiff is in possession, actual or constructive, and merely seeks to change the form of his enjoyment by obtaining a divided in the place of an undivided share, in such a case, there is a conflict of judicial opinion as to the appropriate provision applicable. But where, the plaintiff has been excluded, upon his allegation, from possession the court-fee payable is ad valorem under S. 7 (v). A.I.R. 1938 Mad. 278=1938 M.W.N. 169=47 M.L.W. 70=1938-1 M.L.J. 29=I.L.R. (1938) Mad. 309=177 Ind. Cas. 904.

—S. 7 (v) and Sch. II, Art. 17 (vi)—Partition—Suit for partition of his share by co-proprietor in joint possession.

A suit for partition by a co-proprietor of his share in joint possession should be stamped under Art. 17 (vi) Sch. II and not under S. 7 (v). A.I.R. 1935 Pesh. 30.

—S. 7 (v)—Partition—Plaintiff out of possession and seeking partition and possession of partitioned share.

Where a plaintiff is out of possession and he seeks not only partition but also possession of the partitioned share, court-fee must be paid ad valorem on the value of his share. A.I.R. 1935 Pesh. 30.

—S. 7 (v) and (iv-A) (Mad.)—Partition—Suit for share of family property after setting aside previous partition and alteration—In a suit of this nature the declarations sought are only ancillary to prayer for possession and such a case is governed by S. 7 (iv) (c) as to which Madras Amendment applies i. e., valuation for purposes of court-fee is one-half of value of immovable property affected by declaration valued as provided by S. 7 (v) and not by S. 7 (iv-A). A.I.R. 1933 Mad. 93=1932 M.W.N. 1322=36 L.W. 793=140 Ind. Cas. 585.

—S. 7 (v)—Partition and possession.

—A suit by Mahomedan co-sharer, who sues other co-sharers for partition and possession of her share of her deceased father's properties, and alleges that she is in possession of some of the items as

indicative of her joint possession in law with the other co-sharers of the deceased's estate, falls under Art. 17, clause (6). 43 Mad. 396; 44 Ind. Cas. 216, Foll. 75 Ind. Cas. 93=1923 M.W.N. 564=A.I.R. 1924 Mad. 207.

18. Possession.

——S. 7 (v) (iv) and Sch. II, Art. 17 (vi) —Possession—Suit to establish title and for possession of property not joint—Court-fee payable.

Where the plaintiff sues for getting possession of a certain share in separate part belonging to a deceased and the defendant contests the claim saying that the plaintiff was not the reversionary heir of the deceased and the plaintiff has never been in possession of the property, he has to pay ad valorem court-fee on the market-value of the interest claimed by him. Partition and possession is only incidental after the title is established. A.I.R 1950 Kut. 60.

——S. 7 (v) Possession—Suit by mutwalli for possession of wakf property—Valuation of suit.

In a suit by the plaintiff for possession of wakf properties in his capacity as mutwalli, ad valorem court-fees should not be paid on the maket-value of the wakf properties. The mutwalli is not the owner and he can be called upon to value his suit in accordance with his estimate of what the value of his rights as mutwalli of the properties would amount to. The Court can certainly check this estimate and decide for itself on proper materials as to what the valuation should be. I.L.R. (1949) 1 Cal. 333=A.I.R. 1948 Cal. 312=83 C.L.J. 211.

——S. 7 (v)—Possession—Suit for management of trust property—Is not one for possession.

A suit beween rival managers for their right to manage trust property is not a suit for possession within the meaning of S. 7 (v), but falls under Sch. II, Art. 17 (iii). A.I.R. 1944 All. 279=1944 A.W.R. 194=1944 O.W.N 166=1944 A.L.J. 408=I.L.R. (1944) All. 564=218 Ind. Cas. 50.

——S. 7 (v)—Possession.

——It cannot be said that in all suits where possession is one of the reliefs claimed, the suit must fall within S. 7 (v), Court-fees Act. A.I.R. 1942 Lah. 209=44 P.L.R. 162=202 Ind. Cas. 174.

——S. 7 (v)—Possession.

——Suit for possession without asking for declaration —Plaintiff cannot be asked to seek declaration on his title and to pay ad valorem court-fee thereon. 21 P.L.T. 609.

——S. 7 (v)—Possession.

Where the plaintiff claims possession of certain property with any other relief to which he may be entitled as the heir of the mother of the deceased, there cannot be any pretence that the claim is one for a declaration with consequential relief. The suit is merely for possession and should be valued under S. 7 (v), Court-Fees Act.

Similarly, if the plaintiff claims certain property as a reversionary heir of the deceased male after the death of his widow on the ground that the alleged gift by the widow under which the defendants claim possession is void, it is a suit for possession as the deed of gift can be ignored and there need not be any suit or claim to have it set aside. A.I.R. 1938 Pat. 22=18. P.L.T. 977=4 B.R. 178=16 Pat. 766=172 Ind. Cas. 840. (F.B.).

——S. 7 (v), Sch II, Art. 17-B (Madras) Possession—Suit for mere possession of managership of institution.

In a case where the plaintiff does not ask for recovery of possession of the building and endowments of certain institution but asks merely for possession of the office of the managership, it is a case where a relief is really incapable of valuation. It is not correct to treat the suit as though it is a suit to recover the buiilding and properties movable and immovable. Such a suit does not therfore fall under S. 7. (v) Court-fees Act, but should be treated as one coming under Art. 17-B of Sch. II. It cannot be said that the relief of possession of the office of the managership is not related to things which have a definite money value and that the reliefs do not affect those things. The right to the managership certainly affects the right to be in possession of and to manage the institution and its properties. Hence the value for purposes of jurisdiction is the value of the properties affected. A.I.R. 1939 Mad. 776=1939 M. W. N. 720=50 L. W. 154=(1939) 2 M.L.J. 226=189 Ind. Cas. 289.

——S. 7 (v), Sch II. Art, 17 (v)—Possession. —In a suit for possession of properties belonging to idol of temple, by plaintiff claiming as rightful mahant and for injunction, ad valorem court-fee has to be paid, subject to the proviso that if the properties are incapable of being valued, e. g. materials and the site of the temple and of other buildings adjunct to the temple, court-fee under Sch. II. Art. 17 (vi) is payable. 40 P.L.R. 113.

——S. 7 (v), (x), (c)—Possession—Suit by lessee against lessor and others alleged to be in possession in collusion with lessor, for specific performance and possession—Suit held in substance one for possession and court-fee payable was under S. 7 (v).

Where under a registered deed, a lease is granted in 1929, for a period of 20 years to commence in 1935, and the lessee institutes a suit against the lessor and others alleged to be in possession of the property by the collusion of the lessor, for specific performance of the contract of lease and for possession of the property, the court-fee payable is under S. 7 (v) of the court-fees Act and not under S. 7 (x) (c). The suit is in substance for possession and not for specific performance, the allegations in the plaint being that strangers to the contract were unlawfully withholding possession from the plaintiff. A.I.R. 1939 Mad. 360=49 M.L.W. 196=1939 M.W.N. 152=(1939) 1 M.L.J. 268=I.L.R. (1939) Mad. 367=180 Ind. Cas. 640 (F.B.).

——S. 7 (v), (x)—Possession—Dispute to title of property compromised—In consideration of certain sum defendant No. 2 conveyed two-thirds of certain properties and defendant No. 1, one third of some other property to plaintiff—Subsequently by mutual arrangement much of the properties intended to be conveyed by defendant No. 2, sold—Plaintiff's suit to enforce original arrangement with possession—Prayer that defendant No. 1 should relinquish interest in share to be conveyed and defendant No. 2 to execute conveyance—Claim against defendant

No. 2, nature of and court-fee payable—Claim against defendant No, 1, nature of and court-fee payable on.

Held, that the suit, so far as a conveyance respecting defendant No. 2's interest was sought, was essentially one for specific performance of a contract and the court-fee payable was on the sum agreed to be paid to defendant No. 2, under S 7. cl. (x), Court-fees Act, though many of the properties agreed to be conveyed had been disposed of. The claim against defendant No. 1 was really one for possession and so the plaintiff was entitled to value the same under S. 7, cl. (v). A.I.R. 1937 Mad. 831=1937 M.W.N. 236=176 Ind. Cas. 777.

——S. 7 (v)—Possession—Representative suit—Prayer for possession after ejectment of those in possession—Crurt-fee payable.

A suit under O. 1, R. 8., Civil P. C. by certain members of the caste for administrtion of property in which all members of the caste are interested, and in which there is a prayer for recovery of possession of the properties after ejectment of persons in exclusive possession refusing to have the property administered for the common benefit, is governed for purposes of court-fee by S. 7. cl. (v), Court-fees Act. A.I.R. 1937 Mad. 591=1937 M.W.N. 217=45 M.L.W. 510=169 Ind. Cas. 819.

——S.7. (v)—Possession—Suit titled as administration suit but in fact to recover estate—Court fee payable.

Merely asserting that a suit is a suit for administration does not make it one, and if a party sues to recover an estate, the valuation of the suit must be the value of the estate he seeks to recover. A.I.R. 1937 Rang. 455=1937 Rang. L. R. 426=173 Ind. Cas. 238.

—S. 7 (v)—Possession — Suit for account—Specific claim as regards item misappropriated—Special court-fee, whether necessary—Alternative claim for possession of property purchased with misappropriated amount—court-fee.

In a suit calling upon the defendant to render an account of his management of the plaintiff's property, the plaintiff alleged that the defendant had taken a renewal in his own name of a promisssory note which had been executed in favour of the plaintiff and had taken a sale deed of certain lands from the debtor in satisfaction of the pro-note claim and prayed that while rendering accounts, the defendant was boun l to pay the amount of the promissory note to the plaintiff or in the alternative, the property purchased may be delivered to the plaintiff with mesne profits:

Held, that as the claim relating to the promissory note was not a claim independant of the accounting but was only an item to be accounted for, the plaintiff was not bound to pay court-fee on the amount claimed in respect of the promissory note but the plaintiff was liable to pay court-fees in respect of the prayer of possession under S. 7 (v) of the Court-fees Act even though the claim was only an alternative one.

Even if a plaintiff sues for possession of property which is held by the defendant in trust for him, he is bound to pay court-fee thereon. A.I.R. 1937 Mad. 235=1936 M.W.N. 118=43 L.W. 300=70 M.L.J. 292=160 Ind. Cas. 935.

——S. 7 (v)—Possession—Suit by trustee to recover property—Matam dedicated to charity and inalienable—Mode of valuation—Matam, whether a house.

The plaintiff in a suit sought to recover possession of a site and building alleging that the building was built by his ancestors for the purpose of affording shelter to pious Nattukkottai Chetties and for keeping certain things which were usually taken on the occasion of the procession of a local god and that he was the hereditary trustee of the said property:

Held, that on the allegations made in the plaint, the suit matam was clearly a house within the meaning of S. 7 (v), Court-fees Act and the fact that the property was dedicated to charity and inalienable did not make any difference as regards the court-fee payable. 159 Ind. Cas. 636=1935 M.W.N. 1241=41 L. W. 765.

——S. 7 (v)—Possession—Claim for confirmation of.

A claim for confirmation of possession is nothing more than a claim for possession. That being so, the proper value to be placed on a relief is the value of the property. As a general proposition relating to matters of this kind, the best method of obtaining the valuation of a particular property is to take the price at which it is sold. It is the market value which is to be taken, and not a fictitious value. A.I.R. 1935 Pat. 191=1 B.R. 644=156 Ind. Cas. 777.

——S. 7 (v), (xi) (e)—Possession—Suit by dispossessed tenant against landlord and third party—Proper Court-fee.

Where a suit was instituted by a person alleging that he was a tenant who was dispossessed by his landlord, against the landlord and a third person who was in possession of the property:

Held, that the suit was not one between landlord and tenant governed by S. 7, cl. (xi) (e) of the court-fees Act, but a suit for recovery of possession being under S. 7 (v) of that Act. A.I.R. 1933 Nag. 312=29 N.L.R. 367=147 Ind. Cas. 749.

——S. 7 (v)—Possession—Suit for Possession of math properties—Value of temple to be excluded.

Section 7, cl. (v). Court-fees Act, is applicable to suits for possession of immovable property and no distinction is made between a suit for possession as a beneficial owner, and a suit for possession as a trustee or as the manager of a religious endowment.

The plaintiff alleged that the defendant who was a mahant of a math, had lost his title to mahantship owing to his marriage, illegal transfers of properties and other wrongful acts and that the plaintiff had been duly elected mahant in his place and he sued for possession of the properties attached to the math and those which had been transferred by the defendant:

Held, that court-fee was payable ad valorem under S. 7, cl. (v) on the value of the properties of the math and that in calculating the value, the value of the temple itself should be excluded, as it had no market value. A.I.R. 1932 All. 593=1932 A.L.J. 777=54 All. 869=142 Ind. Cas. 251.

——S. 7, cls. (v), (ix)—Possession—Suit for possession as mortgagee.

Suits for possession of land, houses and gardens, whatever may be the nature of possession, proprietory, under-proprietory, lessee's possession, tenant's posses-

sion or mortgagee's possession, should be treated as suits for possession within the meaning of cl. (v) of S. 7 of the Court-fees Act.

Certain persons were mortgagees under three deeds of mortgage covering an aggregate sum of Rs. 10,000. The mortgages were possessory. The bulk of the mortgaged property excepting certain houses and groves was in the possession of the prior mortgagees. The mortgagees sued to recover possession of the houses and groves which were not in the prior mortgagee's occupation. The plaintiffs valued the suit at Rs. 600 which was the value of the subject-matter of the suit :

Held, that cl. (v) of S. 7, Court-fees Act applied to the case, cl. (ix) of S. 7 was wholly inapplicable and the plaint was correctly valued. A.I.R. 1931 Oudh 366 =8 O.W.N. 536=6 Luck. 684=134 Ind. Cas. 597.

——S. 7 (v)—Possession—Valuation.

—Defendant holding under a decree.

If the plaintiff does not claim a declaration in his plaint that a decree under which the defendant holds possession is not binding upon him but sues for possession simpliciter, he need pay court-fee only on the actual relief claimed. 50 All. 610, Rel. on; 38 Mad. 1184, Ref. A.I.R. 1929 Nag. 276.

——S. 7 (v)—Possession —Declaration incidental.

Where the real relief which the plaintiff seeks is delivery of possession of the property by dispossession of the defendant and he is not bound first to ask for a declaration before such relief can be granted there is no reason to think that merely because, he asks the Court to adjudicate upon the matters in issue, the suit should be treated as a suit to obtain a declaratory decree with consequential relief. There is no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession, should be interpreted as asking for a declaratory decree. Where a declaration is neither necessary nor in terms asked for, the suit should not be treated as one coming under clause (iv) (c) but under clause (v) of S. 7. A.I.R. 1921 Pat 57; F.A. 242 of 1917, Ref. 68 Ind. Cas. 700=2 Pat. 125=1 Pat. L.R. 1=3 Pat. L.T. 704=1922 P.H.C.C. 291=A.I.R. 1922 Pat. 615 (S.B.)

——S. 7 (v)—Possession—Suit for.

—Suit for possession and past mesne profits—Court-fee payable on the aggregate value of both the reliefs. 32 L.W. 433=54 Mad. 1=1930 M.W.N. 880=A.I.R. 1930 Mad. 833=59 M.L.J. 469 (F.B.)

——S. 7 (v) Possession—Suit on the death of an occupancy tenant for possession of holding on the ground that the defendant—has no right to hold the same—Further Appeal:—Where on the death of an occupancy tenant any persons take possession of the holding on the ground that they succeed to it under S. 59 of the Punjab Tenancy Act, and the plaintiff, denying their right, sues them in the civil court for possession of the land, the value of the suit for purposes of jurisdiction of the Original and the Appellate Courts is thirty times and not fifteen times the revenue, for the claim is on the ground that the defendants are in possession as the trespassers. 156 P.W.R. 1909=117 P.L.R. 1909=3 Ind. Cas 980.

19. Pre-emption.

——S. 7 (v) and (vi) (U. P.) Pre-emption—Computation of market-value —Crucial date—Value to be attached to recital in sale deeds.

In a suit for pre-emption the court-Fee pavable would be according to S. 7 (v) and (vi) (U.P.) of the Court-Fees Act on the market-value of the property concerned. That has necessarily to be decided upon some evidence and obviously the recitals in the sale deeds as to the purchase price cannot be evidence against the plaintiff. The wording of the section suggests that the value has fo be determined with reference to the time when the right is claimed, that is, the date of the suit and not the date of the sale. 1946 O.W.N. (H.C.) 166=1946 A.L.W. 174.

——S. 7 (v)—**Pre-emption—Suit for pre-emption in respect of separate plots—**

Plots not constituting any definite fraction of a distinct revenue paying area and not separately assessed—Court-fee for suit.

In a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue-paying area and were not themselves separately assessed to revenue, the court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Govt. revenue. A.I.R. 1933 Oudh 533=10 O.W.N. 1100=147 Ind. Cas. 852.

——S. 7 (v)—**Pre-emption—Sale of revenue paying land—Court-fee.**

The Court-fee on the plaint in a pre-emption suit in respect of a sale of land paying revenue should be calculated according to S. 7 (v) of the Court-fees Act. 15 P.R. 1919=43 P.L.R. 1919=49 Ind. Cas. 358.

——S. 7 (v)—**Pre-emption—Garden with house, out houses and trees—Land assessed to revenue.**

What was sold was described as a garden together with a house and out-houses as well as trees of all kinds. In a suit for pre-emption **held,** that the property sold was a garden and that under S. 7 (v) (c) the fee payable should be **ad valorem** on the market value. 146 P.R. 1918; 71 P.R. 1914, Foll. 40 Mad. 824 Dist. 2 Lah. L.J. 362.

——S. 7 Cl. (5)—**Pre-emption—Suit for pre-emption on sale of equity of redemption—**Property in possession of usufructuary mortgagee—Possession not claimed :—The plaintiff sued to pre-empt a sale of the equity of redemption in certain property in the possession of mortgagees with whom the property was usufructuarily mortgaged for Rs. 79,000. The plaintiff alleged that the consideration for the sale he sought to pre-empt was Rs. 5,000 and he paid **ad-valorem** fees on such amount. The first court asked the plaintiff to make good the deficiency of Rs. 975 in the court-fees, which was paid by the plaintiff, but the first court dismissed the suit on the authority of 15 A. 65, as there was not a properly stamped plaint presented within the period of limitation. The plaintiff appealed to the District Judge and again paid **ad-valorem** court-fee on Rs. 5,000. He was again asked to make good the deficiency, but as he did not his appeal was dismissed. The plaintiff preferred a second appeal on the ground that as the subject-matter of sale was only the equity of redemption, the plaintiff was right in paying an **ad**

valorem fee with reference to the value he put upon it. **Held** by the Full Bench, the court-fees should be paid upon the value of the land computed in accordance with S. 7, (V) of Act VII of 1870. 6 A.L.J. 905=32 A. 19 (F.B.)=3 Ind. Cas. 562.

20. Setting aside order relating to immoveable property.

——**S. 7 (v) and Sch. II, Art 17-B and Madras Civil Courts Act (III of 1873) S. 14**—Setting aside order relating to immovable property—Suit for Court-fee.

A suit was filed by plaintiff on behalf of himself and other creditors of defendant 1 to set aside the order passed on a claim petition filed by 2nd defendant, who claimed the properties attached by the plaintiff as belonging to his judgment-debtor. The 2nd defendant claimed the property on the strength of a trust deed which was impeached as sham and nominal by the decree-holder. The plaint was subsequently amended to include a prayer for declaration that the trust deed executed by the first defendant, the judgment-debtor, was a sham transaction executed with the intention to defraud creditors. A court-fee of Rs. 15 was paid under Sch. II, Art. 17-B. On the contention that as the market-value of the property was more than Rs. 9,000 the District Munsiff had no jurisdiction to entertain the suit.

Held, that since the present suit related to a summary order concerning immoveble property, S. 14 of the Madras Civil Courts Act applied and therefore the suit had to be valued as in manner provided by S. 7 (v) of the Court Fees Act. 64 M. L. J. 568; I.L.R. 56 Mad. 716, followed. 1949 M.W.N. 88=A.I.R. 1949 Mad. 621=62 L.W. 165=(1949) 1 M. L. J. 195.

21. Specific performance.

——**S. 7 (v) Specific performance**—Suit for possession on basis of specific performance—Court-fee.

A suit for possession of land on the basis of a specific performance of a contract, is for purposes of Court-fees Act governed by S. 7 (**x**) (**a**), and not by S. 7 (**v**) of the Court-fees Act. A.I.R. 1945 Bom. 81=46 Bom. L.R. 731=I.L.R. (1945) Bom. 32=220 Ind. Cas. 439.

——**S. 7 (v)—Specific performance—Valuation.**

In a suit for the specific performance of a contract to sell a property and for delivery of possession of the property the value of the suit for the purposes of jurisdiction and court-fee should be the market value of the suit property and not the amount of the consideration money. 14 C.L.J. 159, Foll.; 5 Pat. L.J. 314, Dist. 118 Ind. Cas. 134=A.I.R. 1929 Pat. 642.

22. Tank bed.

——**S. 7 (v)—Tank bed**—Suit for recovery of possession of tank-bed with prayer for injunction—Tank-bed, whether incapable of valuation.

A tank-bed has no market-value because it is unsaleable except as accessory to other property, and accordingly, a suit for ejectment of a trespasser from a tank-bed and for an injunction restraining him from interfering with the plaintiff's possession is governed by Art. 17 (B) and not by S. 7 (v) of the Court-fees Act.

In a suit for ejectment of a trespasser, the prayer for recovery of possession is an essential prayer of the suit and the plaint cannot be deemed to fall outside the scope of S. 7, Court-fees Act, merely because other reliefs such as injunction are also claimed. A.I.R. 1934 Mad. 714=1934 M.W.N. 1248=40 L.W. 718=67 M. L. J. 688=58 Mad. 471=152 Ind. Cas. 679.

23. Tenant suing Landlord.

——**S. 7** (v) — Tenant suing landlord and another tenant—Valuation.

A suit by a tenant against the landlord and other tenants is governed by S. 7 (v). 19 C. L. J. 418=25 Ind. Cas. 507.

24. Trust suit.

——**S. 7** (v)—**Trust suit—Person claiming as trustee.**

The plaintiff sued for a declaration that he was Sajjadanashin of two durgas and for the possession of the durgas and their properties. He alleged that he was appointed by the last Sajjada as his successor and that he took possession of the durgas and the properties on the last Sajjada's death, but that he was subsequently dispossessed by the first defendant.

Held, that in a case like this, the plaintiff is bound to ask for possession and the suit falls under S. 7, cl. (v) and that Art. 17 cl. (b) is inapplicable. 19 All. 60, 21 All. 200, 12 C.L.J. 211, Dist. 88 Ind. Cas. 209=22 M.L.W. 163=1925 M.W.N. 252=A.I.R. 1925 Mad. 804=48 M.L.J. 571.

25. S. 7 (v) (a).

——**S.** 7 (v) (a)—Appeal—Two rival per-emptors filed suits and decree was made in favour of one on payment of Rs. 8,000. The other appealed, firstly, to set aside the decree in favour of the rival and secondly to reduce the payment to Rs. 5,000.

Held, as the appeal struck at the root of the case by asking for dismissal of the rival's suit the court-fee on ten times the Jama of the property was proper. 25 P.R. 1916; A.I.R. 1924 Lah. 530 and A.I.R. 1929 Lah. 190, Rel. on. 120 Ind. Cas. 532=A.I.R. 1929 Lah. 879.

—**S.** 7 (v) (a)—**Appeal—Suit to cancel sale-deed and possession of plaintiff's share.**

The father and brother of the plaintiff alienated joint family property in which the plaintiff was interested as a co-parcener. The plaintiff brought this suit for possession of his share and added a relief for cancellation of sale-deed. **Held**, as the plaintiff asked for cancellation of sale-deed, he was liable to pay **ad valorem** fee on the value of the whole estate sold unless his plaint which came under S. 7 (iv) (c) was amended. Where the Court has decreed the claim for possession on the plaintiff paying certain amount to the purchasers the defendants are liable to pay on their memorandum of appeal court-fee only on ten times the Government revenue of the property in dispute. 68 Ind. Cas. 265=44 All. 629=20 A.L.J. 587=A.I.R. 1922 All. 358.

——**S.** 7 (v), (a)—**Applicability**—And Government of India Notification No. 4650 dated 10th September 1889, cl. 18—Khatas separately assessed by Government to land revenue—Suit for fractional share situate in khata—Court-fee payable.

According to cl. 18 of the Government of India Notification No. 4650, dated 10th September 1889, where the suit is for a fractional share of a part of an estate recorded as separately assessed to revenue the court-fee is payable on five times such portion of the revenue separately assessed on that part as may be rateably payable in respect of that share. Hence where the share claimed is situated in khatas separately assessed by Government to land revenue, and the claim

in appeal relates to only one-third of the land originally claimed in the khatas in dispute, the court-fee on appeal is payable on only one-third of five times of land revenue payable on the land orginally claimed. A.I.R. 1943 Pesh. 96=212 Ind. Cas. 41.

——S. 7. (v) (a)—Applicability.

——Plots forming a separate Khata in themselves, though under properietary, must be taken to be separately assessed with Government revenue for purposes of the Court Fees Act when they are so assessed with the rent which the Khata as a whole is liable to pay to the superior proprietor. 24 O. C. 29. Foll. 7 O.W.N. 956=128 Ind. Cas. 286=A.I.R. 1930 Oudh. 520.

——S. 7 (v) (a)—Applicability—Fee for possession of a share and the under—proprietary tenure.

A share in an under-proprietary tenure in a village is a definite share and therefore Court Fee for possession is ten times its revenue. 7 O.L.J. 403=2 U.P.L.R. (J.C.) 127=58 Ind. Cas. 132.

——S. 7 (v) (a) — Applicability — Fractional share.

——Government of India Notification No. 358, dated 10th September 1921—"Fractioual share" in the notification covers also a case where plaintiff claims a definite share within a survey number. 16 All. 493 and 33 All. 630. Diss. from. 105 Ind. Cas. 881=A.I.R. 1927 Mad. 1002=54 M.L.J. 67.

—S. 7 (v) (a)—Applicability—Parts of holding

A suit for the recovery of specific plot of land situated within a permanently settled estate but not constituting a definite share thereof or separately assessed to revenue falls within Cl. (v) (d) and not under Cl. (v) (a) or (b) of S. 7. Court-fee should therefore be paid on the market value of the property in suit. 33 A. 630, Foll. 77 Ind. Cas. 781=34 M.L.T. 92=1924 M.W.N. 338=A.I.R. 1924 Mad. 646=46 M.L.J. 345.

——S. 7 (v) (a) and (xi) (cc)—Suit for possession against transferee from tenant—Court-fees.

A suit by the landlord for recovery of possession against a transferee from the tenant on the ground of forfeiture of tenancy by reason of the transfer by the tenant in breach of the covenant against alienation. is governed not by S. 7 (xi) (cc) but by S. 7 (v) (a) of the Court Fees Act. Under S, 7 (v) (a) the net profit arising out of the land leased out means the net profit which the landlord gets from the tenant by way of rent after excluding collection charges, taxes, etc., which the landlord may have to pay, and not the net profit which the land is capable of yielding if let out or used to its best advantage. I.L.R. (1948) 2 Cal. 554=83 C.L.J. 169=A.I.R. 1949 Cal. 426.

—S. 7 (v) (a)—Suit for possession—Mokarasi deed—Court-fee.

A mokarasi lease of a definite share in a revenue paying estate is land within S. 7 Cl. (v) (a) of the Court-fees Act. A suit for possession of immoveable property on the basis of a mokarasi lease is purely one for possession of immoveable property within S. 7 cl. (v) (a) of the Act. 45 Ind. Cas. 928 (Pat.)

—S. 7 (v) (a)—Tarwad.

—Relief as to possession.

Where a manager of a tarwad in a suit against a member claims certain property as having passed to the tarwad by inheritance and the plaint clearly alleges that the defendant's possession is adverse to the tarwad and not permissible from the tarwad nor in any other way constructively and there is no ground for supposing that the tarwad at any time had possession in any form, a prayer for possession is necessary and court-fee for the suit as well as for the memorandum of appeal must be paid according to S. 7 (v) (a) as to land assessed to land revenue and as to sarvamanyam or revenue-free land on 15 times the mesne profits of the land claimed under S. 7 (v) (c) 21, M.L.J. 21; 43 Mad. 396; 17 Mad. 232. Dist,; 37 M.L.J. 544 and A.I.R. 1925 Mad. 468, Appr. 1930 M.W.N. 291=31 M.L.W. 826=A.I.R. 1930 Mad. 597=58 M.L.J. 497.

—S. 7 (v) (a)—Under-proprietary tenure.

—Where the suit was for possession of one-third share of the under-proprietary tenure of a village which was permanently settled with the superior proprietor.

Held, that who paid the revenue to Government was wholly immaterial for the purpose of determining the court-fee payable on such a claim. The share which was the subject matter of the suit was a definite share of the estate as a whole which paid annual revenue to Government and as such revenue was permanently settled, the amount of court-fee payable by the plaintiff in the suit must be calculated with reference to ten times the revenue so payable. 8 Cal. 192, Foll. 24 O. C. 29=A.I.R. 1921 Oudh 110.

—S. 7 (iv) (a)—Proprietary estate.

—Mesne profits.

Where the relief asked for was "that on proof of the plaintiff's right of ownership and of possession and the invalidity of the sale-deed the plaintiff may be granted actual and proprietary possession of the six annas share by the ejectment of defendant, held, that the suit was one for possession and mesne profits and that court-fee was payable under S. 7. (v) (b) 1930 A.L.J. 1100.

——S. 7 (v) (a) (Beng.)—Conclusion of Court as to amount of net profit in year preceding institution of suit is conclusive and cannot be challenged in appeal.

If the Court sees reason to think that the amount of net profit stated by the plaintiff in his valuation statement had been wrongly estimated, then it is to proceed to make inquiries on the two heads mentioned in the concluding portion of sub-cl. (a) of sub-s. (v) of S. 7 Court-fees Act. It must proceed to ascertain (1) the net profits of the land, building or garden, as the case may be, in the year immediately preceding the presentation of the plaint; and (2) its market value. If the net profits are not readily ascertainable or assessable it is to ascertain the market value, but if the net profits are readily ascertainable or assessable, it is under the obligation to direct its inquiry on both the heads—on the market value also. It can then only require additional court-fee to be paid, (if payable) on the

lower of the two figures arrived at such inquiry. It may be that the amount of net profits may be a criterion for the market value. A capitalized value of the net profits may give the market value. But that is not the only method of determining the market value. If the Court adopts this method for ascertaining the market value, it will have to determine on the evidence the number of years' purchase by which the amount of profits is to be multiplied. The statutory number, fifteen, mentioned in S. 7 (v) Court-fees Act, cannot be adopted without such evidence.

If the Court comes to the conclusion that a certain amount is the net profits in the year immediately preceding the institution of the suit for the purposes of determining the amount of court-fees, that finding would be conclusive and not liable to be challenged in appeal. A.I.R. 1940 Cal. 438=44 C.W.N. 822=I.L.R. (1940) 2 Cal. 450=190 Ind. Cas. 263.

26. S. 7 (v) (b).

——S. 7 (v) (b)—Applicability—Land forming part of estate.

S. 7 (v) (b) of the Court-Fees Act is not confined to the case of an entire estate. The last words of the sub-clause deal with lands forming part of an estate, and when the part is recorded as assessed to revenue, sub-clause (b) would apply. 50 P.L.R. 14=A.I.R. 1948 E. P.

——S. 7, Cl. (v) (b) and (e)—Applicability— Suit by a Hindu reversioner to recover land—Plaint returned for presentation to proper Court—Non-compliance—But fresh plaint for same relief filed in the same Court—Admission—Propriety.

The petitioner, 1st defendant, was sued by the plaintiff who claimed as reversioner to the estate of one M on the death of his daughter. M had sold a half share in the suit property. Subsequent to his death, the defendant, a trust institution, purchased the other half share from the daughter. It is this half share that plaintiff claimed. A prior plaint by this same plaintiff for precisely the same relief as reversioner was returned by the District Munsiff as beyond his own jurisdiction to entertain. The valuation of land was much higher therein and plaint was returned for being presented to the proper Court. But the plaintiff filed a fresh plaint under S. 7 (v) (b) of the Court-Fees Act and the plaint was admitted. On the question as to the Court-fee payable,

Held: That the correct court-fee payable on the plaint in this suit is on half the market value of the entire site under S. 7, (v) (e). The Court should not have entertained the fresh plaint, after having returned the former one for the same relief by the same party. Plaintiff should not twist the language of his plaint for the purpose of evading court-fee. 62 L.W. 402=A.I.R. 1949 Mad. 717=1949 M.W.N. 435=(1949) 1 M.L.J. 608.

——S. 7 (v) (b) and (d)—Applicability—Suit for possession of land separately assessed to land revenue.

Cl. (b) and not cl. (d) of S. 7 (v) of the court Fees Act applies to a suit for possession of land which has been separately assessed to land revenue whether or not it constitutes an "entire estate" 50 P.L.R. 14=A.I.R. 1948 E.P.

——S. 7 (v) (b) and (d) — Applicability — Suit for recovery of fraction of a distinct unit separately assessed to revenue — Whether governed by cl. (b).

A case would be governed by S. 7 (c) sub-s. (b), Court-fees Act, if the land forms an entire estate or a definite share of an estate paying annual revenue to Government or forms part of such estate and is recorded as aforesaid, but would be governed by sub-s. (a) if it forms part of an estate paying revenue to Government but is not a definite share of such estate and is not separately assessed as afore-mentioned. The distinction is perfectly obvious. Where there is an estate paying annual revenue to Government and a fractional share of that estate is transferred, that it is easy to ascertain the proportionate amount of the Government revenue on the property transferred. On the other hand, if the property transeferred, is not a fractional share of an estate paying revenue to Government but is only a specified part of such an estate and such specified part is not separately assessed to revenue it is not possible to ascertain the proportionate liability of that specified plot so far as the payment of Government revenue is concerned. In the former case, where the revenue can be ascertained, the case would be governed by sub-s. (b) while in the latter case by sub-s. (d).

In a suit for the recovery of a three-fourths of two-thirds share in khewat No. 1-2 by pre-emption, where the khewat produced shows that khewat No. 1-2 is a distinct unit, a seperate estate and assessed separately to revenue, a fraction of this distinct unit being in dispute, it is easy to ascertain the proportionate amount of reveuue assessable on this property and hence the case is governed by S. 7 (v) (b) Court-fees Act. A.I.R. 1937 All. 206=1937, A.L.J. 88=1937 A.W.R. 15=I.L.R. (1937) All, 128=167 Ind. Cas. 909.

——S. 7 (v) (b) and (d) — "Definite share of an estate," Meaning of.

By the words "definite share" of an estate used in Cl. (v) (b) of S. 7 of the Act, is meant an undivided tangible fraction of an estate as distinct from a defined demarcated plot which has been taken out of an estate. 19 M.L.T. 266=(1916) 1 M.W.N. 325=33 Ind. Cas. 683.

——S. 7, cl. (5) (b) (d)—"Definite shares of an estate paying revenue to Government"—Plaint presented in wrong court—Market value.

The Plainttffs claimed a half share of a khata in a Bhayachara village numbered 22, measuring 46 bighas 5 biswas and paying an annual revenue to Government.

Held, that the land constituted a definite share of an estate paying revenue to Government and the claim fell under clause (v) (b) not clause (v) (d) of S. 7 of the Court-fees Act, 1870.

Held also, that if the court finds that the plaint has been filed intentionally in the wrong court with a view to give jurisdiction to a court which had no jurisdiction to entertain the suit, the proper course is not to dismiss the suit but to return the plaint for presentation to the proper court. 16-A. 286 referred to. 1906 A.W.N. 195=3 A.L.J. 511.

——Ss. 7, (v) (b) (d), 28 — Document received through mistake or in-advertence—Effect.—The plaintiff in a suit for pre—emption stated in his plaint:—

"The suit is valued at Rs. 197—8, five times Rs. 39—8, the amount of revenue of the property." The property claimed was described as 41 bighas, 10 biswansis paying a revenue of Rs. 39—8 entered as holding No. 2 in the khewat out of a 3 biswas 10 biswansis, 18 kachwansis, 9 nanwansis, 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs. 95, situate in thok Deputy Ali Raza Khan, in village Ukarna. The Mansarim of the court in which the plaint was presented on the last day of limitation accepted this valuation and reported that the plaint was properly stamped.

Held, that in as much as the plaintiff had not stated whether the revenue payable in respect of the share claimed had been separately assessed and recorded in the Collector's register as such, it became the duty of the Munsarim to inquire whether it was separately assessed. The plaint had been admitted through the mistake or inadvertence of the officer of the court and the plaintiff was entitled to the benefit of S. 28 of the Court-Fees Act, 1870. 29 A. 382=1907 A.W.N. 110=4 A.L.J. 363.

——**S. 7 Cl.** (v) (**b**)—Relief for declaratory decree in appeal—Suit for possession.

The plff. sued for possession as the transferee of one G. The first Court gave him a decree on condition that his possession should continue only during the life-time of his transferor. The plff. appealed against this condition and paid a Court-fee of Rs. 10. **Held**, that the Court-fee was proper. The plff. appellant was in possession of the property and simply wanted to clear his title and obtain a declaration that he had the full right of ownership. 33 All. 705=8 A.L.J. 821=11 Ind. Cas. 977.

——**S. 7** (v) (**b**) Suit declaratory and possessory—Hindu reversioners — Nature of suit — Court-fee payable.

A suit by Hindu reversioners asking that a sale-deed be declared null and void against them and that the possession of property be granted to them, is an ordinary suit for possession of property and the Court-fee payable thereon is five times the Government revenue. 2 U.P.L.R. (A) 216=18 A.L.J. 903=57 Ind. Cas. 494.

——**S. 7** (v) (**b**) **and** (**c**)—Suit for **inam** lands wrongly classed as **ryotwari**—Valuation.

A suit for possession of **inam** lands wrongly classed by Government as **ryotwari** and in respect of which **Pattas** were issued to tenants, may be valued by the plff. as **ryotwari** lands held on **patta** at five times the revenue payable (thereon under Cl. (v) (b) S. 7. The fact that after the institution of the suit, the lands are classed as **inam**, will not affect the question. 41 Ind. Cas. 167 (Mad).

——**S. 7** (v) (**b**) (**d**)—Suit for portion of a survey number—Court-fee.

The Court-fee payable in respect of a suit for recovery of land forming part of an entire area, but neither sub-divided nor separately assessed to land revenue must be computed on the market value of the land sued for, under S. 7 (v). 34 M.L.J. 558=8 L.W. 88=47 Ind. Cas. 543.

——**S. 7** (v) (**b**) **and** (**d**)—Suit for possession of specified plot sold out of a holding—Court-fee how calculated.

A suit for possession of a plot of land but not a definite fractional share, sold out of a holding is governed by S. 7 (v) (d) of the Court-fees Act and the Court-fee payable should be calculated on the market value of the land, where it is impossible to find out the actual revenue on the said plot. 33 All. 630=8 A.L.J. 798=11 Ind. Cas. 816.

——**S. 7** (v) (**b**) **and** (**d**)—Suit for land jointly owned —Sale of share—Value of individual plot, if material —Suit for possession of plot—Proportionate fraction arithmetically workable.

Where a person sues for land jointly owned by two persons, even if specific plots are sold, in law it is treated as a sale of a share of the joint property. No co-sharer has any right to sell specific plots out of the joint **khata** and, therefore, the value of an individual plot comprised in the joint **khata** is wholly immaterial in determining the point of court-fee.

Whenever a person sues for possession of a plot of land which can be arithmetically worked out as a proportion or a fraction of the property that has been assessed to land revenue and is so noted in the **jamabandi**, the provisions of S. 7, cl. (v) (**b**) are applicable and not the provisions of cl. (v) (**d**). A.I.R. 1945 Lah. 15=46 P.L.R. 350=219 Ind. Cas. 425.

——**S. 7** (v) (**b**)—Suit for partition and separate possession of interest in izara village in Berar is governed by S. 7 (v) (**b**).

A suit for partition and separate possession of the plaintiff's interest in an **izara** village in Berar is governed for the purposes of court-fees by S. 7 (v) (**b**) of the Court-fees Act. A.I.R. 1943 Nag. 315=1943 N.L.J. 445=I.L.R. (1943) Nag. 802=209 Ind. Cas. 199.

——**S. 7** (v) (b)—Remissions of revenue in any particular year, if can be considered.

The expression "such revenue is settled" in S. 7 (v) (**b**), Court-fees Act, undoubtedly refers to the revenue fixed as settlement and cannot refer to the revenue less remissions in any particular year. Consequently, in calculating the value under S. 7 (v), the calculation should be based on the revenue as fixed at settlement and remissions of revenue in any particular year are not to be considered. A.I.R. 1937 All. 657=1937 A.L.J 838=1937 A.W.R. 747=171 Ind. Cas. 528.

——**S. 7** (**v**) (**b**), (**d**)—Suit for possession of 5 annas share together with certain specified sir and khudkasht fields and also two malik makbuza fields—Court-fee payable.

A plaintiff sued for possession of a 5 anna share in a certain **Mouza** together with certain specified **Sir** and **khudkasht** fields and also two **malik makbuza** fields. He paid court-fees on $7\frac{1}{2}$ times the proportionate revenue of the 5 anna share and a 7 and a half times the revenue of the **malikmakbuza** fields. These **Sir** and **Khudkasht** fields belonged to the 5 anna share in dispute. The revenue of the entire village was fixed after taking into consideration the value of the **Sir** and **Khudkasht** fields:

Held, that plaintiff was suing for a definite share of an estate paying annual revenue to Government and the case clearly fell under S. 7 (v) (**b**) of the court-fees Act. S. 7 (v) (d) would apply only if he were suing for an indefinite share, but that he was not doing. A.I.R. 1937 Nag; 100=I.L.R. (1937) Nag. 309=169 Ind. Cas. 896.

——**S. 7** (v) (**b**)—Jamabandi, if to be treated as collector's register in the Punjab.

The expression "Collector's register" in S. 7, (v) (**b**) Court-fees Act is a general expression and it is intended to refer to the register in which the land revenue is

recorded for fiscal purposes and is maintained by the Collector. In different provinces, this register is called by different names. In Panjab the **jamabandi** should be treated as "Collector's register" for the purpose of court-fee under S. 7 (v) (b). A.I.R. 1935 Lah. 331 (332)=37 P.L.R. 41=156 Ind. Cas. 884.

——**S. 7 (v) (b)**—Khewat khata, whether an estate—Suit for possession of fractional shares of Khewat khatas.

A **Khewat khrta** though separately assessed with revenue cannot be held to be an 'estate' within the meaning of S. 7 (v), Court-fees Act, nor can it be said to be a 'definite share of an estate'.

The court-fees payable for a suit for possession of an entire **Khewat khata,** is **ad valorem** under S. 7 (v) **(b)**. Court-fees Act, upon five times the revenue assessed upon the **Khata,** inasmuch as a **Khewat khata** is a part of an estate and is separately assessed with revenue. A.I.R. 1933 All. 414=1933 A.L.J. 398 =55 All. 531=145 Ind. Cas. 332.

27. S. 7. (v) (c).

——**S. 7 (v) (c) (Madras)**—"Net profits"—Assessment of—Net profits from kudivaram interest in land—Ascertainment of.

In construing the words "net profits," the Court must have regard to the subject-matter. Where the subject-matter in dispute is the kudivaram interest in certain lands in an inam village, the value of that right can be only arrived at after deducting what the owner of the kudivaram has to pay to the land holder by way of rent and, of course, the expenses incurred by him in cultivating the land. I.L.R. (1946) Mad. 821=59 L. W. 141=1946 M.W.N. 138=A. I. R. 1946 Mad. 322= (1946) 1 M.L.J. 190. (Overrules A.I.R. 1942 Mad. 585=(1942) 1 M.L.J. 569=203 **Ind. Cas. 457.)**

——**S. 7 (v) (c)—Religious land—Profits of preceding year.**

If the subject-matter of suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is 'religious land.' 60 Ind. Cas. 5=(1920) 3 U.B.R. 236.

——**S. 7 (v) (c) and (d)—'Such revenue'**—Lands subject to fluctuating assessment.

'Such revenue' in S. 7 (v) means an annual revenue payable to Government on an entire estate or definite share or part of an estate fixed permanently or not. Lands subject to fluctuating assessment are within S. 7 (v) (c) and not within S. 7 (v) (d). 100 P.R. 1919=50 Ind. Cas. 142.

——**S. 7 (v) (c) and (e)—Suit for ejectment of mortgagor.**

A suit for ejectment of mortgagor by the vendee from the mortgagee having right to sell the property without the intervention of court is in fact a suit for possession and **ad valorem** Court-fee must be paid according to S. 7 (v) (c) or (e). 4 Ind. Cas. 755 (U.B.)

——**Ss. 7, (v) (c) 6 and 12—Pre-emption** — Valuation of suit—Appeal.

The expression 'the year next before the date of presenting the plaint' occurring in clause (c) of Sub. S. (v) of S. 7 of the Court Fees Act, 1870, denotes a period of 365 days, reckoning it backwards from the date of presentation of the plaint.—**Held**, also, that where a court has based its decision as to the valuation of a suit upon a wrong construction of the expression 'the year next before the date of presenting the plaint,' an appeal was not precluded by S. 12 of the Court Fees Act, 1870. 1906 A.W.N. 66=3 A.L.J. 244=28 A. 411.

28. S. 7 (v) (d).

——**S. 7 (v) (d)**—Where the suit is for fractional shares of khewat khatas, the fractional shares not being recorded as separately assessed with revenue, S. 7 (v) (d). applies, and the court-fee is payable on the market value of the fractional shares. A.I.R. 1933 All. 414=1933 A.L.J. 398=55 All. 531=145 Ind. Cas. 332.

——**S. 7 (v) (d)—Land with buildings**—Suit for land alone.

Where the claim in a suit is for possession of the land and not of the buildings on the land it is the market value of the land, having regard to its nature at the time of institution of the suit irrespective of the buildings, that determines the jurisdiction of the Court, and the amount of the court-fee stamp payable on the plaint is also to be calculated on the same. 110 Ind. Cas. 319=A.I.R. 1928 Lah. 852.

——**S. 7 (v) (d)—Market value**—Definite share of an estate—Recovery of.

Where the suit is for recovery of **X** and odd acres of land of a plot, a definite part of which was already sold, the suit is not for recovery of a definite share of an estate within the meaning of Cl. (v) (b) of S. 7 of the Court-fees Act and so the value for purposes of jurisdiction and Court-fees, must be calculated on the marked value of the property sought to be recovered. 19 M.L.T. 266=(1916) 1 M.W.N. 325= 33 Ind. Cas. 683.

——**S. 7 (v) (d)—Milkiat and Khudkasht.**

——Where the claim for possession is in respect only of the khudkasht lands, the case would fall under S. 7 (v) (d) of the Court Fees Act and not under S. 7 (v) (a) of that Act, that is to say, court-fees would be payable on the market value of the land. A claim for possession of Milkiat does not include a claim for possession of the khudkasht. Where possession of both khudkasht and Milkiat is claimed, separate court-fee should be paid on the value of the khudkasht, although it lies within the Milkiat share. 80 Ind. Cas. 439= 6 P. L. T. 255=A I. R. 1921 Pat. 466.

——**S. 7 (v) (d)—Parts of holding—Not separately assessed.**

If a land is assessed to land revenue and a suit is brought for a share in a specific plot of land which plot is not separately assessed to land revenue, the case is governed by S. 7 (v) (d) and not by S. 7 (v) (b) and the court-fee has to be paid on the market value of the land. 116 Ind. Cas. 209=A. I. R. 1930 Lah. 182.

——**S. 7 (v) (d) and (b)—Not separately assessed.**

In a suit to recover property which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue, but consists of individual field plots which form part of a holding but which are not separately assessed, court-fees payable are under S. 7 (v) (d) and not under S. 7 (v) (b). 75 Ind. Cas. 217=2 Bur. L. J. 39=A. I. R. 1923 Rang. 246.

——**S. 7 (v) (d)—Separate assessment.**

——Where the lands in dispute form an entire holding which is separately assessed to revenue provisions

of S. 7 (v) (b) apply and the court-fees, so far as the lands are concerned, should be assessed on five times the annual revenue. 1 Rang. 651=79 Ind. Cas. 579= A.I.R. 1924 Rang. 102

——**S. 7 (v) (d)—Suit by mortgagee,**

——In a suit for possession by a usufructuary mortgagee the suit is to be valued for court-fee purposes at the amount of mortgage money. In such a case the word "market value" in S. 7 means the market value of the subject-matter of the suit, namely, the mortgage interest in the property. 15 A. 63; 15 A. 363, Foll. 73 Ind. Cas. 244=A. I. R. 1924 Oudh. 163.

——**S. 7 (v) (d) (a), (b), and (c)—Suit for possession of lands**—Part of an estate paying revenue to Government—Not separately assessed with revenue—Court-fee payable.

In a suit for possession of land, forming an indefinite share of an estate paying revenue to Government, and not being assessed separately, Sub Cl. (d) of Cl. (v) of S. 7 of the Court-fees Act applies and the Court-fee is according to the market value of the land. 41 Cal. 812=19 C. L. J. 342=18 C. W. N. 659 =23 Ind. Cas. 89.

——**S. 7 (v) (d)**—Value of the subject-matter of suit for possession of specific immovable properties—Computation.

When a person is suing for a decree for possession of specific immovable property, the court-fee must be paid on the market value of the land notwithstanding that it had formed part of an estate paying revenue to the Government. What the Court has to look at is the relief which the plaintiff seeks. Where, he asks to be put in possession of immovable property that has fallen to his share at a partition, the boundaries of which are indicated, the case falls under S. 7 (v) (d) of the Court Fees Act. In such circumstances he is not asking for a "Share". He is asking the Court to give him possession of what has already fallen to him. It is only when he is seeking possession of property as a fractional share of a portion of an estate that the notification of the Madras Government of 1932 directing the assessment of court-fee at ten times the revenue on such lands would apply. I.L.R. (1947) Mad. 643= 230 Ind. Cas. 448=60 L.W. 183=1947 M.W.N. 169= A.I.R. 1947 Mad. 297=(1947) 1 M.L.J. 201 (F.B.)

——**S. 7 (v) (d)**—Oudh Civil Rules, R. IV—Suit by tenant for recovery of possession from trespasser—Court-fee payable—Market value of land—Measure of.

Where the object of the suit by a tenant for recovery of possession from a trespasser is the same as in the case of a suit between rival claimants the case comes under S. 7 (v) (d) of the Court-fees Act and the rule of the Oudh Civil Rules applicable is R. 4 and the market value should be calculated at either 10 times or 20 times the annual rent as stated in the rule. A.I.R. 1938 Oudh 139=1938 O.W.N. 453=1938 A.W.R. 42= 174 Ind. Cas. 550.

—**S. 7 (v) (d)—Oudh Civil Rules R. 269-A (d) (e)** —Suit for possession of land in village together with trees and building and mesne profits — Under-proprietary rights by virtue of permanent lease claimed—Court-fees for valuation of suit and for purposes of jurisdiction.

The suit was for possession of about thirty one bighas of land situated in the village together with trees and buildings situated thereon, and for Rs. 2,053-8 as damages and mesne profit. The plaintiff claimed to have under-proprietary rights in the land by virtue of a permanent lease executed in his favour by the predecessor-in-interest of the defendants. The lease was said to be for building purposes and the plaintiff claimed to have constructed a building on the land and to have planted a guava grove. The yearly rent at which the land in suit was let out to the plaintiff was Rs. 10. The plaintiff had calculated the market value of the land at twenty times the rent, that is, at Rs. 200:

Held, that suit came under S. 7 (v), (d) of the Court-fees Act, and the calculation by the plaintiff was correct. But that under S. 7 (v) (e) of the Court-fees Act, a separate court-fee should have been paid by the plaintiff on the market value of the building and the trees of which possession was sought along with the land. As he prayed for possession not only of the land but also of the building and the trees, the latter were as much the subject-matter of the suit as the land itself.

Held, further, that as regards the valuation of the suit and the appeaal for purposes of jurisdiction both cls. (d) and (e) of R. 269-A of the Oudh Civil Rules applied. Under cl. (d) the value of the land in suit for purposes of jurisdiction will have to be determined by multiplying the rental value of the land by twenty. The valuation of the appeal for purposes of jurisdiction would also be the same as that for purposes of court-fee. A.I.R. 1938 Oudh 40=1938 O.W.N. 23=172 Ind. Cas. 297.

—**S. 7 (v) (d), Sch. II, Art. 17, cl. (vi)—Ghatwali tenure**—Suit for declaration and recovery of possession —Court-fee payable.

In a suit for declaration of title to and recovery of possession of a Birbhum ghatwali tenure, the tenure was valued at Rs. 30,000 by the plaintiffs who paid Court-fee on Rs. 1,100 which was ten times the revenue payable in respect of the ghatwali and a further Court-fee of Rs. 15 was paid for the declaratory relief claimed in the suit:

Held, that the case fell within the purview of S. 7 (v) (d), Court-fees Act, and not under Art. 17, (vi) of the Second Schedule thereto.

Held, further, that the ghatwali, though it was a part of an estate paying revenue to Government was not a definite share of such an estate and was not separately assessed to Government revenue, and, therefore, the court-fee had to be calculated on the market value of the land. A.I.R. 1932 Pat. 319=13 P.L.T. 590= 140 Ind. Cas. 817.

——**S. 7 (v) (d) and xi (cc)—Valuation for jurisdiction.**

A suit to recover possession of land from a tenant is valued according to a year's rental next before date of presenting the plaint under S. 7 (xi) (cc) for purposes of jurisdiction and not the market value, under S. 14 of Madras Civil Courts Act, (III of 1873) or under S. 7 (v) (d) court-fees Act. 39. Mad. 873=18 M.L.T. 398= 2 L.W. 1031=29 M.L.J. 572=31 Ind. Cas. 104.

29. S. 7 (v) (e).

——**S. 7 (5) (e)—House—Suit for land and house thereon—Court-fee to be paid on the value of the land and the building.**

All the amenities, which are neeessary for the beneficial enjoyment of a house, can be spoken of as being part of the house itself. Where therefore a suit is brought for the recovery of a piece of land granted to the plaintiff by the Collector as a building site and the plaintiff constructed his house upon it, the subject-matter of the suit is not merely the land but also the house, and court-fee should be paid according to the market value of the land and the buildings thereon. Printed Judgments of the Bombay High Court of 1884, p. 150, not Foll. 24 S. L. R. 4, Rel. A. I. R. 1931 Sind 6=130 Ind. Cas. 550.

——S. 7, Cl. (v) (e)—"Land"—Does not include buildings—Pre-emption suit.

The term 'land' as used in the Court-Fees Act does not include buildings. A claim, therefore, for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be valued and court-fees paid thereon according to the value of the buildings constituting the factory and not according to the value of the site. Such buildings as constitute an indigo factory would be within the meaning of the term 'houses' as used in the Court-Fees Act. 1902 A.W.N. 27=24 A. 218.

——S. 7 (v) (e)—Garden land.

A suit for possession of garden land, though assessed to land revenue is governed by S. 7 (*v*) (*e*). 71 P.R. 1914=241 P.L.R. 1914=155 P.W.R. 1914=25 Ind. Cas. 545.

——S. 7 (v) (e) (a) and (b) (c)—Land with cocoanut trees—"Garden"—Question of fact—Revision.

In ascertaining the value of a piece of land on which cocoanut trees have been planted, for the purpose of determining the jurisdiction of the Court, the question whether it came under Cl. (*v*) (*c*) or Cl. (*v*) (*e*) of S. 7 of the Court-fees Act, is a question of fact to be determined on the evidence as to whether having regard to the position of the land and the number of trees thereon, the plot of land can be said to be a garden. Assessment is not the criterion in determining the question whether the land is assessed or unassessed. It will fall under Cl. (*v*) (*e*) if it can be defined as a "garden." A few isolated trees on a piece of land will not make it a garden, but where a number of trees are planted on a particular piece of land which is well defined and can be marked off from the rest of the land, that particular plot may be treated as a garden if the land is used for the cultivation of flower, fruit or vegetables. 12 Mad. 301, Expl. 18 M.L.T. 243=30 Ind. Cas. 845.

——S. 7 (v) (e)—Suit—Valuation.

The value of a suit is the value of the interest claimed by the plaintiff so that the value of the suit for establishing a right as an occupancy raiyat in a garden and for possession thereof, is that of the interest claimed and not that of the entire interest in the land, including that of the superior landlord. 23 Ind. Cas. 964 (Cal.).

——S. 7 (v) (e)—Suit for possession of temple for worship by rotation.

A temple which is devoted absolutely to religious purposes, even if it is regarded as a house, has no market value within the terms of S. 7 (*v*) (*e*), Court-fees Act, and a suit for recovery of possession of it by a person claiming as a trustee against another also claiming as a trustee falls under Art. 17 (vi), Sch. II of the same Act. It makes no difference whether it is a public or a private temple. The temple, so along as it stands as a temple dedicated to a deity installed in it, remains as a property of the deity and consequently where it is private in the sense that it is meant mainly or exclusively for the worship of the persons who founded it does not make it any more marketable than it is when the public at large are allowed to enter and worship there. In either case, the property belongs primarily to the deity and therefore it must fall within the category of **res extra commercium.** Where a person sues for possession of a temple by rotation for 12 months under an alleged agreement with the defendant, the question of ownership does not enter into the picture at all. The nature of the right which is claimed is that of a manager, a **shebait** or an **archak** and not that of an owner. A.I.R. 1938 Nag. 481=1938 N. L. J. 214=178 Ind. Cas. 97.

——S. 7 (v) (e)—Case, where subject-matter is garden, if comes under Cl. (e) of S. 7 (v).

For the purpose of computing valuation of the subject-matter in a land for possession, the Legislature has drawn a distinction between the case where the subject-matter is land, and where the subject-matter is a house or garden. If the subject-matter of the suit is a garden, it will come under S. 7 (*v*) (*e*), Court-fees Act, and the court-fee will have to be paid on the market value of the garden and not on the basis of annual revenue of the land. A.I.R. 1936 Cal. 264=162 Ind. Cas. 810.

——S. 7 (v) (e)—Suit for recovery of house with land on which it is built.

Where the Collector granted a house site to the plaintiff and cancelled the grant subsequently and the plaintiff who had begun to build a house on it sued for recovery of the house site with the house :

Held, that the subject-matter of the suit was not merely the site but the house and Court-fee should be levied under S. 7 (*v*) (*e*) of the Court-fees Act on the market value of the land and such part of the building as the plaintiff had put upon it. A.I.R. 1931 Sind 6=130 Ind. Cas. 550.

——S. 7 (v) (e)—Ejectment suit.

Tenant holding over refusing to vacate after notice to quit—Suit to eject falls under S. 7 (*xi*) (*cc*) and not S. 7 (*v*) (*e*). 20 N.L.R. 124, Overruled. 99 Ind. Cas. 438=10 N.L.J. 17=23 N.L.R. 5=A.I.R. 1927 Nag. 156.

——S 7 (v) (e)—Garden.

Where the land falls within the meaning of the expression "garden" though it may at the same time be land paying assessment to Government, it requires court-fee as provided in S. 7 (*v*) (*e*). (1884) Bom. P. J. 155, not Foll.; 40 Mad. 824, Rel. on. 117 Ind. Cas. 781=24 S.L.R. 4=A.I.R. 1930 Sind 15.

——S. 7 (v) (e)—Recital in deed of sale.

In a suit for pre-emption plaintiff described the property as land assessed to revenue and paid the Court-fees on it at ten times the **Jama.** The vendee contested the suit and pleaded that the value of the suit had been wrongly assessed. A reference to the deed of sale showed that what was sold was described as a garden together with a house and out-houses as well as trees of all kinds.

Held, that the property sold was a garden and that under S. 7 (*v*) (*e*) of the Court-Fees Act and fee payable should be an **ad valorem** one on the market value. 146 P.R. 1018; 71 P.R. 1914, Foll. 2 Lah.L.J. 362=68 Ind. Cas. 345.

——S. 7 (v) (e)—Possession.

The suit for specific performance and delivery of possession is not a combination of two suits or two or more distinct subjects, to attract the application of S. 17 of the Court-Fees Act. 38 All. 292, Foll. 11 Ind. Cas. 228 and 60 Ind. Cas. 512, Diss. 77 Ind. Cas. 542=47 Mad. 150=18 M.L.W. 333=1923 M.W.N. 726=A.I.R. 1924 Mad. 360=45 M.L.J. 431.

——S. 7 (v) (e)—Suit by permanent lessee for possession of house—Valuation.

Where the plaintiff sues as permanent lessee for possession of a portion of a house, the suit is not for **possession** of the leasehold rights—

these are intangible and are not capable of physical possession, The tangible physical object of which **possession** is sought is the house, therefore the subject-matter of the suit, **so far as possession is concerned**, is the house. The value for jurisdiction and for court-fees is the market-value of the house under S. 7 (*v*) (*e*) of the Court-Fees Act. 5 P. 631, not Foll. I.L.R. (1950) Nag. 432=A.I.R. 1950 Nag. 237=1950 N.L.J. 575.

30. S. 7 (v) (1).

——S. 7 (v) (1)—Garden, what is—Suit for lands—Valuation—If trees therein should be valued separately.

The word "garden" in S. 7 (*v*) (*l*) means chiefly ornamental, pleasure or vegetable garden. The **juxta-position** of the words "house or garden" conveys much significance in support of his view. The conversion of an assessed **arable** field into a cocoanut tope does not make the land a garden within Cl. (*v*) (*l*) of S. 7. In a suit for land, trees standing thereon need not be separately valued. A decree for land will pass also the trees standing thereon. 12 Mad. 301; 22 Mad. 39; 24 Mad. 421, Rel. on. 40 Mad. 824=5 L.W. 270=21 M.L.T. 251=39 Ind. Cas. 254.

——S 7 (v), Expl.—"Entire estate"—Single field=If can constitute.

Even where a single field is separately assessed with revenue, it can be regarded as an estate within the meaning of the explanation to S. 7 (*v*) of the Court-Fees Act, there being no other field comprised in that estated, it would constitute an estate. 50 P.L.R. 14=A.I.R. 1948 E.P. 9.

31. S. 7 (v), Provisos.

——S. 7, Cl. (v) Proviso (3).

Proviso (3), S. 7 (*v*) of the Court-Fees Act has reference only to the annual survey assessment which is remitted, that is to say, to the rate of remission at the date of suit; it has no reference to remissions previously made, but no longer existing. 7 Bom. L.R. 497=25 B. 480.

——S. 7 (v)—Value of subject-matter, valuation of.

When the property pre-empted, is under a mortgage, the amount paid to the vendor plus the value of the encumbrances, is the value of the subject-matter for purposes of court-fee. A.I.R. 1945 Oudh 135=1944 O.W.N. 501=1944 A.W.R. (C.C.) 302.

——S. 7 (vi) (U.P.)—Appeal in pre-emption suit claiming right in spite of the declaration of preferential right in another.

In respect of the same sale-deed two people filed separate suits for pre-emption, one of them was declared to have a preferential right and the other was declared to have the right in case the former did not deposit the amount. The latter appealed to enforce his claim in spite of the existence of the preferential claim in the other. On the question whether the claim was "to enforce a right of pre-emption" within the meaning of S. 7 (vi) (U.P.) of the Court-Fees Act.

Held, that the case fell within S. 7 (vi) as the Court-fee has to be determined according to the relief that the appellant claims. 1949 A.L.J. 37=A.I.R. 1949 A. 508=1949 A.W.R. 141.

——S. 7 (vi)—Appeal—Suit to pre-empt house dismissed—Appeal.

Court-fee is payable on market value of house and not on price paid by vendee. A.I.R. 1944 All. 83=1944 A.L.J. 97=I.L.R. (1944) All. 181=1944 O.W.N. 39=1944 A.W.R. 61=212 Ind. Cas. 431.

——S. 7 (iv) Appeal—Court-fee.

Where both the right to pre-empt as well as the amount was challenged, there was no change in the nature of the case and court-fee payable was same as that in the suit. A. I. R. 1944 Oudh 276=1944 O.W.N. 238=1944 A.W.R. 174=215 Ind. Cas. 243.

——S. 7 (vi) "Sale"—Interpretation.

The term 'sale' musi be construed in a wider sense as used in connection with the general law of pre-emption in India ant in a narrow sense as used in T.P. Act. A.I.R. 1939 Nag. 35=1938 N.L.J. 379=180 Ind. Cas. 963.

——S. 7 (vi)—Pre-emption suit—Improvement of site.

Suit for pre-emption of site—Improvement made on property before suit—Plaintiff should pay court-fee on the sale price given in the deed together with cost of improvement and if it be found when the suit was finally tried out, that he had paid more, he can cla m refund under S. 10. Court-fees Act. A.I.R. 1937 Lah. 239=39 P.L.R. 511=172 Ind. Cas. 392.

——S. 7 (vi) Appeal.

Court-fee payable on memorandum of appeal against a decree granting possession of a house by pre-emption on payment of Rs. 700 is ad valorem on that amount. A.I.R. 1934 Lah. 424=154 Ind Cas. 1047.

——S. 7 (vi)—Appeal by vendee.

When a decree for pre-emption is passed and the vendee appeals, if he challenges the right of the pre-emptors to bring the su t he has to pay only the same court-fee as that paid by the pre-emptor, viz., on ten times the land revenue, even though the challenge is a complete formality and not intended to be pressed. A.I.R. 1931 Lah. 490=131 Ind. Cas. 751.

——S. 7 (vi) (U. P.)—Partition suit—Finding as to possession challenged in appeal—Appellant unable to show that it was wrong—Decision as to proper court-fee payable cannot be postponed.

Where, in a partition su.t, the court-fee is paid on the basis of the plaintiff being in possession of the property but the trial Court has found that the plaintiff was out of possession and an appeal is preferred challenging this finding and appellant is unable to convince the Appellate Court from the evidence on record that the finding is erroneous, the decision of the question of the proper amount of court-fee payable cannot be postponed till the time of the hearing of the appeal and the decision of the trial Court on the question of possession for the purpose of court-fee must be regarded as prima facie correct aud the appellant must pay the deficiency according to the full value of the share which he claims on partition. A.I.R. 1945 Oudh 207=1945 O.W.N. (C.C.) 114.

——S. 7 (vi)—Appeal——Evasion of court-fee.

A suit for pre-emption was decreed. The market price of the property was fixed at Rs. 27,000. Vendees appealed alleging Rs. 43.000 to be the proper value. They sought not only enhancement of the market value but also dismissal of the plaint.ffs suit on the ground of limitiation and non-maintainability. The real object of the appeal was to have the value enhanced but to avoid payment of court-fees on a larger amount the vendees resorted to the trick of adding grounds for dismissal of the suit.

Held, that the appeal was competent. 113 Ind. Cas. 538=9 Lah. 563=A.I.R. 1929 Lah. 190.

——**S. 7 (vi)—Appeal—Qquestion as to amount.**

Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the court-fee should be calculated **ad valorem** on the difference between the amounts alleged as the sale price on the one side and the other. 6 All. 488, Foll. 117 Ind. Cas. 480=6 O.W.N. 276=A.I.R. 1929 Oudh 240.

——**S. 7 (vi)—Plots forming separate khatas.**

Plots forming a separate khata in themselves, though underproprietary, must be taken to be separately assessed with Government revenue for purposes of the Court-fee stamps, when they are so assessed with the rent which the khata as a whole is liable to pay to the superior proprietor. A.I.R. 1921 Oudh 110, Rel. on. 128 Ind. Cas. 286=7 O.W.N. 956=A.I.R. 1930 Oudh 520.

——**S. 7 (vi)—Pre-emption.**

Where appeal is by the vendees objecting that plaintiff is not entitled to the land, the Court-fee to be affixed will be in accordance with **S. 7 (vi).** 76 P.R. 1913=240 P.L.R. 1913=141 P.W.R. 1913=19 Ind. Cas. 961.

——**S. 7 (vi) (1)—Pre-emption decree—Appeal—Court-fee.**

Where a claim for pre-emption of five villages was decreed in respect of two villages only on payment of a sum and plaintiff appealed. **Held,** that the appeal was divisible into two parts. In respect of that part in which the question related only to the sale consideration, the plaintiff must pay **ad valorem** Court-fee on the difference between the amount alleged as the sale price on the one side and the amount decreed on the other. In regard to the other part in which the right of pre-emption was in dispute, he need only pay Court-fees on five times the Government revenue. 40 All. 353=16 A.L.J. 14=474 Ind. Cas, 666.

——**S. 7 (vi)—Pre-emption of equity of redemption—Court-fee.**

The equity of redemption, in a usufructuary mortgage, was sold and the plaintiff sought to pre-empt that sale without disturbing the mortgage. **Held,** that the Court-fee must be assessed upon the value of the property computed in accordance with S. 7, cl. (v). 32 All. 19=6 A.L.J. 905=3 Ind. Cas. 562 (F.B.)

—**S. 7 (vi) and (v)—Suit for pre-emption—Valuation—Market value—Point of time—Date of plaint or date of sale.**

As according to the provisions of S. 7 (vi) read with S. 7 (v) of the Court-fees Act the Court-fee in a pre-emption suit has to be paid according to the market value of the property, it follows that the value should be determined with reference to the point of time when the suit is instituted and not with reference to the date of sale giving rise to the right of pre-emption. I.L.R. (1948) All. 339 =A.I.R. 1949 All. 107=1948 A.L.W. 128=1948 A.L.J. 246=1948 A.W.R. (H.C.) 318.

——**S. 7 (vi)—Suit for pre-emption—Market value—Pre-emption suit.**

In suits for pre-emption the market value at the time of the sale is the value for purposes of Court-fee and jurisdiction and not the market value at the time of suit. 7 A. 775, Foll. 69 Ind. Cas. 650= A.I.R. 1924 Lah. 380.

——**S. 7 (vi)—Court-fee—Suit for pre-emption of Zemindari and appurtenant grove Land—Grove lands found not to be appurtenant—Dismissal of suit wrong—See PRE-EMPTION.** 1937 A.W.N. 163=4 A.L.J. 403.

——**S. 7 (vi-a) (All).—Co-ownership denied in toto or as to extent of share.**

Held, that S. 7 (vi-a) applies. A.I.R. 1944 All. 199=I.L.R. (1944) All. 478=1944 O.W.N. 82=1944 A.L.J. 367=1944 A.W.R. 166.

——**S. 7 (vi-A) (All)—Word "possession", meaning of—If restricted to actual possession—Partition suit—Plaintiff in constructive possession—Court-fee payable.**

The meaning of the word "possession" used in cl. (vi-A) to **S.** 7, Court-fees Act, cannot be restricted to actual possession. If in a case of joint property, a co-owner brings a suit for partition of a share and is able to show that he is in actual possession of a portion of the joint property, a presumption of constructive possession in respect of the property of which he is not in actual occupation can reasonably arise. His case, therefore, falls not under the second part of cl. (vi-A) to S. 7 but under the first part of that clause and the court-fee is payable according to one-fourth of the value of the plaintiff's share of the property. A.I.R. 1943 Oudh 456=1943 A.W.R. 94=1943 O.W.N. 356=209 Ind. Cas. 442.

——**S. 7 (vi-A) (All.)—Applicablity—S.** 7 (vi-A), Court-fees Act applies when there is a dispute as to share in a partition suit. A.I.R. 1943 All. 281=1943 A.W.R. 118=1943 A.L.J. 247=I.L.R. (1945) All. 507=209 Ind. Cas. 411.

——**S. 7 (vi-A) (All.)—Appeal—Court-fee.**

S. 2, Court-fees Act, as amended by U.P Court-fees Act defines 'suit' as including-appeal. In case of appeal therefore, in partition suit, **S.** 7 (vi-A), Court-fees Act should be read in the light of this definition that the court-fee payable in appeal should be the value of the share of appellant. which is in dispute in appeal. A.I.R. 1943 All. 281= 1943 A.L.J. 247=1943 A.W.R. 118=I.L.R. (1943) All. 507=209 Ind. Cas. 411.

——**S. 7 (U.P.)—Suit by S for partition of his share—Court-fee paid under unamended Act—S** dying and **M** his brother, who was one of defendants continuing suit—Amendment obtained so as to include partition of **M's** share also—Amended Act in force at such time—Court-fee on amended plaint, held should be paid under amended Act. A.I.R. 1942 All. 222=1942 A.W.R. 128 (1)=1942 A.L.J. 351=I.L.R. (1942) All. 376=201 Ind. Cas. 460.

——**S. 7 (viii) (All.)—Applicability and scope—** Attachment under Ss. 87, 88, Criminal P. C.— Suit for declaration of owner-ship—Court-fee.

S. 7 (viii) alpp es to but is not confined in its application to attachments under O. 21, Civil P. C., and also covers a suit for declaration of ownership in respect of property attached in proceedings taken under Ss. 87, 88, Criminal P. C. But in the latter class of cases, court-fee paid as for a declaratory suit is sufficient. A.I.R. 1945 Oudh 194=1944 O.W.N. 516=1944 A.W.R. 320=20 Luck. 254.

——**S. 7 (viii) (All.)— Attachment before** judgment applied for—Only injunction restraining alienation issued— Objection under O. 21. R. 58, Civil P. C. dismissed—Suit under O. 21, R. 63, Civil P. C. 1908—Court-fee payable.

The plaintiff in a suit on the basis of a promissory note applied for attachment before judgment under O. 38, R. 5, Civil P.C., The Civil Judge passeed the following order on 18th

October, 1939: "The application is supported by an affidavit. Therefore, a temporary injunction is issued against the defendant prohibiting from transferring the property till the decision of this case." The claim being admitted a decree followed. This decree granted certain instalments. The concluding portion of the decree was as follows: "The decretal amount will be a charge upon the property attached under O. 38, R. 5, Civil P.C." The defendant's wife filed an objection under O. 21, R. 58 claiming the property to be hers. Her objection was dismissed as being filed very late. The objector then filed a suit as required by O. 21, R. 63 for a declaration that the attached property belonged to her and it was not liable for attachment and sale in execution of the decree obtained against her husband:

Held, that an injunction was issued and was treated by the parties and the Court as tant-amount to an attachment. The decree which followed actually mentioned that the property was attached. In these circumstances the objector was perfectly justified in seeking her remedy under R. 58 of O. 21, and in filing a suit when the adverse order was made against her under R. 61 and hence the court-fee on the plaint was payable under S. 7 (viii) of the Court-fees Act. A.I.R. 1943 Oudh 422=1943 A.W.R. 105=1943 O.W.N. 398=19 Luck. 405=210 Ind. Cas. 191.

——**S. 7 (viii)—Joint family property.**

Suit for exemption of joint family property from sale in execution of mortgage decree—Court-fee payable by member is either on value of property or decretal amount whichever is less. 35 Cal. 202 (P. C.) and 4 P.L.J. 191, Rel. on. 120 Ind. Cas. 765=10 P.L.T. 545=A.I.R. 1929 Pat. 615.

——**S. 7 (viii)—Suit to set aside an attachment—Attachment not binding—Suit to aside sale is one to set aside attachment—Objection in appeal by defendant - appellant that plaint not properly stamped.**

A suit which is in terms to set aside a sale on the ground that on attachment is not binding is virtually a suit to set aside an attachment and court-fee should be paid on the amount of the attachment or the valne of the land attached whichever is less under S. 7 (viii) of the Court-fees Act. Where a plaint is not properly stamped and a decree is given in plaintiff's favour and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the court of first instance. 14. M.L.J. 144.

——**S. 7 (ix)—See also (1) SCH. I, 'ART.' (IV). (2) SCH. II, ART. 17.**

—S. 7. (ix) Synopsis.

1. **Appeals.**
2. **Foreclosure suit.**
3. **Jurisdiction.**
4. **Redemption suit.**
5. **Redemption of share.**
6. **Suit for possession.**
7. **Suit to enforce mortgage by sale.**
8. **Suits Valuation Act, S. 8.**
9. **Surplus Profits.**
10. **Miscellaneous.**

1. Appeals.

——**S. 7 (ix) and Sch. I, Art. 1—Appeal—Redemption suit—Court-fee payable.**

If in a suit for redemption the question raised in appeal is merely in respect of the amount which the Court of first instance has held to be payable court-fee is payable ad valorem on the sum in dispute in accordance with Art. 1 of Sch. I of the Court-Fees Act. If however the suit was dismissed, the value for purposes of court-fees should be computed in accordance with S. 7 (ix) of the Court-fees Act (i. e.) according to the principal money secured by the mortgage, for in that case the subject-matter in appeal would be the right to redeem. 32 P.L.R, 591, approved. 51 P.L.R. 7=A.I.R. 1949 E.P. 336.

——**S. 7 (ix) (U. P.) and Sch. I, Art. 1—Appeal against decree in suit for enforcement of charge—Valuation—Pendente lite interest decreed, if to be included.**

Where an appeal is preferred against a decree in a suit for the enforcement of a charge and the decree provides for future interest pendente lite, the proper valuation for purposes of court-fee would be the amount due up to the date of the decree together with interest due up to that date, namely, pendente lite interest. 1947 A.W.R. (H. C.) 256=1947 A.L.W. 533=A.I.R. 1947 All. 295=1947 A.L.J. 243.

——**S. 7 (ix) (U. P.)—Appeal by defendant in redemption suit claiming pendente lite interest and cost—Court-fee payable.**

A defendant in a suit for redemption in which the court-fee was paid on the sum secured by the mortgage, namely, Rs. 2,000 appealed against the decree claiming a further sum of Rs. 500 for pendente lite interest and costs not allowed and paid ad valorem court-fee on this amount. On a question as to the proper court-fee payable.

Held, that the fee should be paid on Rs. 2000, the sum secured by the original mortgage. I.L.R. (1946) All. 359=222 Ind. Cas. 616=1946 A.W.R. (H.C.) 55=1946 A.L.J. 43=1946 A.L.W. 69=1949 O.W.N. (H.C.) 69=A.I.R. 1946 All. 303.

——**S. 7 (ix) (U.P)—Appeal against redemption decree—Valuation—Appellant claiming certain minimum amount as due to him on redemption without limiting maximum—Court-fee paid on minimum—There is no valuation at all.**

Where in an appeal against a decree for redemption the appellant avoids setting out any exact sum as due to him on redemption but puts it in the form that a certain minimum sum is due to him without limiting the maximum and values the appeal on the minimum sum offering to make up the court-fee if a larger sum is awarded to him, this does not amount to a valuation at all. A.I.R. 1946 All. 304=222 Ind. Cas. 621

——**S. 7 (ix) and Sch. I, Art. 2 (b) (U.P.)—Appeal under S. 23, U.P. Agriculturists' Relief Act—Valuation—Test is subject-matter in dispute in appeal—S. 7 (ix) is not applicable to such appeal.**

The effect of Art. 2 (b) is that the Legislature has made a special provision to deal with appeals under S. 23, U.P. Agriculturists' Relief Act, and the test to be applied is the "subject-matter in dispute." Section 7 (ix) has no application at all to such appeals in the face of the clear provisions of the Article. Hence the valuation of an appeal under S. 23 should be based not on the full amount of the principal sum secured by a mortgage, but on the amount or value in dispute in the appeal. A.I.R. 1946 All. 304=222 Ind. Cas. 621.

——**S. 7 (ix) and Sch. I, Art. 1—Appeal—Claim only for reduction in redemption amount**—Ad valorem Court-fee on difference is necessary.

Where the mortgagor in appeal contests only the price of redemption fixed by the decree and claims reduction, he is liable to pay ad valorem court-fee on the difference, and not on the principal sum secured by the mortgage. A.I.R. 1946 Nag. 160=1946 Nag. L.J. 110=222 Ind. Cas. 194.

——**S. 7 (ix)—Appeal—Decree for payment of mortgage money**—Appeal for taking accounts under Dekkhan Agriculturists Relief Act.

Where a decree is passed for payment of mortgage amount and an appeal is made for taking account of the mortgage under the provisions of the Dekkhan Agriculturist's Relief Act on the basis that the appellant is an agriculturist, the court-fee for the appeal is to be assessed on the amount of the decree. A.I.R. 1945 Bom. 504=47 Bom. L.R. 400=I.L.R. (1945) Bom. 629=222 Ind. Cas. 110—See also A.I.R. 1935 Bom. 69=36 Bom. L.R. 1234=154 Ind. Cas. 550.

——**S. 7 (ix) and Sch. I, Art. 1--Appeal—Appellant seeking to reduce his liability.**

Where, in an appeal on a redemption suit, the appellant only seeks to reduce his liability imposed by the trial Court upon him, without disputing the right of redemption, the appeal is governed, not by S. 7 (ix) but by Sch. I, Art. 1, and the appellant must pay court-fee on the amount in respect of which he seeks to avoid liability. A.I.R. 1945 Bom. 504=47 Bom. L.R. 400=I.L.R. (1945) Bom. 629=222 Ind. Cas. 110.

——**S. 7 (ix)—Appeal—Redemption suit—Appeal—Court-fee—Substance and form of appeal must be looked at—Appeal contesting amount payable or both right of redemption and amount payable—Court-fee payable.**

In assessing court-fee it is not the form but the substance of the appeal that has to be considered.

If an appeal against a decree in a suit brought for redemption relates only to the amount payable and not to the right of redemption, court-fee must be paid ad valorem on the amount claimed to be payable. If the appeal purports to dispute both the right of redemption and the amount payable but in substance relates only to the amount payable, again court-fee must be paid ad valorem on the amount claimed; but if the right of redemption and the amount payable are disputed in appeal and both grounds are grounds in substance and not merely in form, the court-fee payable will be as for a suit under S. 7, cl. (ix), Court-fees Act. A.I.R. 1943 Mad. 146=(1942) 2 M.L.J. 785=1943 M.W.N. 14 (2)=56 L.W. 778=I.L.R. (1938) Mad. 819=208 Ind. Cas. 87.

——**S. 7 (ix) (U.P.)—Appeal—Redemption suit—Court-fee.**

In a second or first appeal from a decree in a suit against a mortgagee for the recovery of the property mortgaged, the court-fees must be calculated ad valorem according to the principal money expressed to be secured by the instrument of mortgage. A.I.R. 1941 All. 357=I.L.R. (1941) All. 469=1941 A.L.J. 409=1941 A.W.R. 249=197 Ind. Cas. 582.

——**S. 7 (ix) Appeal—Redemption suit—Cour-fee.**

If a redemption suit is decreed and the defendant-appellant merely challenges the right to redeem, the Court-fee payable on the memorandum of appeal ought also to be computed in accordance with the provision of cl. (ix) of S. 7, Court-fees Act, while if a plaintiff or defendant in appeal merely challenges the amount to be paid on redemption without questioning the right to redeem, the court-fee payable on the memorandum of appeal ought to be on the subject-matter in dispute, **i. e.**, on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability. A.I.R. 1931 Lah. 633=32 P.L.R. 591=134 Ind. Cas. 24.

——**S. 7 (ix), Sch. I, Art. 1.—Appeal—Decree for redemption and surplus profits—Appellant challenging bona fide right of redemption and amount of profits.**

In an appeal from a decree for redemption and surplus profits, where the appellant challenges **bona fide** both the right of redemption and the amount of profits, court-fee should be paid only upon the principal sum secured by the mortgage and not upon the amount by which the appellant seeks to reduce the sum decreed as profits, when such amount exceeds the principal sum secured by the mortgage. A.I.R. 1937 Nag. 295=I.L.R. (1937) Nag. 49 (F.B.) Overrules A.I.R. 1931 Nag. 180=135 Ind. Cas. 404.

——**S. 7 (ix)—Appeal against decree directing redemption and payment of definite amount as of surplus profits.**

Held. that the appellant cannot put a tentative value on the amount of surplus profits. A.I.R. 1937 Nag. 295 =I.L.R. (1937) Nag. 49 (F.B.).

——**S. 7 (ix)—Appeal—Relief sought in suit is same as that in appeal.**

The value of a particular relief once correctly found for the purpose of stamping a plaint in a suit, remains unchanged in all subsequent stages of the **lis**. If the relief sought in the claim is the same as the relief sought in appeal the court-fee payable on appeal is the same. Further, the value of a particular relief in appeal remains constant whether the appeal be against its grant or its refusal by the lower Court. The nature of the dispute is not changed in appeal but remains the same. A.I.R. 1937 Nag. 295=I.L.R. 1937 Nag. 49 (F.B.).

——**S. 7 (ix)—Appeal.**

The expression "suits" in S. 7 (ix) means "appeals" as well. In the case of a mortgage where right to redeem or foreclose is challenged court-fee payable in appeal is provided for by S. 7 (ix). A.I.R. 1937 Nag. 6=167 Ind. Cas. 577.

——**S. 7 (ix)—Appeal—Redemption Suit—Court-fee**—Value of improvements exceeding Rs. 5,000—Appeal, whether lies to District Court or High Court.

A suit for possession of a house by redemption of a mortgage for Rs. 99 was defended by the mortgagees on the ground that the mortgaged property had been sold to them. In the alternative, it was claimed by the defendants that they had made considerable improvements, the value of such improvements being alleged to be more than Rs. 5,000. The trial court held that the sale of the equity of redemption in favour of the mortgagees had been proved and dismissed the suit. On appeal, the suit was remanded under O. 41, R. 25, to the trial Court for report as to the value of the improvements alleged to have been made by the mortgagees. The trial Court having reported that the value of such improvements was Rs. 5,000, when the case camp up for consideration before the District Judge, an objection was taken by the defendants-respondents that the appeal lay to the High Court and not to the District Judge. The District Judge upheld this objection and returned the memorandum of appeal for presentation to the High Court.

Held, that even if the value of the improvements was Rs. 5,000 or more, that fact did not oust the jurisdiction of the District Judge to entertain the

appeal and to decree the amount in favour of the mortgagees as a condition precedent to the redemption of the mortgage if he ultimately found that the mortgagor was bound to pay for the improvement. A.I.R. 1931 Lah. 584=32 P. L. R. 102=135 Ind. Cas. 49.

——S. 7 (ix)—**Appeal**—Foreclosure suit— Appeal by defendants—Court-fee—Criterion.

The defendants appellants in a foreclosure suit did not raise any objection against the correctness of the amount calculated by the lower Court to be due on the deed of mortgage but contested the validity of the decree for foreclosure passed, on the ground that the deeds in suit were not genuine and were invalid for want of registration. They also disputed the findings that the said deeds were executed for legal necessity. The appellants paid court-fee on the principal amount secured by the mortgage:

Held, that the court-fee paid was correct and the appellants need not pay court-fee upon the amount which had been found due under the deeds. A.I.R. 1931 Oudh 353=8 O.W.N. 836=134 Ind. Cas. 604.

——S. 7 (ix)—**Appeals—Diminution of amount for redemption.**

In an appeal from a suit for redemption by the plaintiff, qua the amount which the trial Court decrees payable to defendant as a condition precedent to redemption, the court-fee payable is ad valorem on the diminution claimed in the appeal. 1 Lah. 234, Rel. on. 122 Ind. Cas. 736=31 P.L.R. 173=A.I.R. 1930 Lah. 601.

——S 7 (ix)—Appeals—Future interest.

In case of appeals or cross-objection in suits for redemption or foreclosure in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross objections should be valued and future interest should not be taken into account. 36 All. 40 (F.B.); 17 Bom. 41; 3 P.L.J. 443, Foll.; 22 O C. 1, not Foll. 7 O.W.N. 585=A.I.R. 1930 Oudh 329.

——S. 7 (ix)—Appeal—Redemption suit—Appeal against portion of decree.

In a suit for redemption of a kanom the plaintiff obtained a decree for recovery of possession of property, subject to payment of the kanom amount and the value of improvements. Plaintiff appealed only against the value allowed for improvements:

Held, the proper court-fee payable on the memorandum of appeal must be determined in accordance with the value of improvements which the party seeks to avoid. 23 Mad. 84, Foll. 92 Ind. Cas. 624=22 M.L.W. 691=1926 M.W.N. 169=A.I.R. 1926 Mad. 225.

——S. 7 (ix)—Appeal.

On a memorandum of appeal by a plaintiff whose suit for forelosure of a mortgage has been dismissed the court-fee payable is an *ad valorem* court-fee on the value of the subject-matter of the appeal. 1922 Oudh 82, Diss.; 36 All. 40 (F.B.), Foll. 88 Ind. Cas. 888=47 All. 926=23 A.L.J. 853=6 L. R.A. Civ. 457=A.I.R. 1925 All. 734.

——S. 7 (ix)—Appeal—Redemption suit.

Preliminary and final decrees were passed in a suit for redemption and according to the former the plaintiff deposited the sum in Court. He however filed an appeal against the preliminary decree for reduction of redemption amount and paid *ad valorem* court-fee on it. In an appeal for the final decree he paid only Rs. 2 as court-fee:

Held, as the final decree was merely formal and as no adjudication is required, the court-fee paid is proper. 75 Ind. Cas. 375=4 Lah. 406=6 Lah. L. J. 72=A.I.R. 1923 Lah. 632.

——S. 7 (ix)—Appeal—Reduction in, in redemption amount.

Where the appellant in an appeal from a redemption decree claimed to redeem for a lesser amount than that decreed, he must pay court-fee on the difference between the sum decreed and the sum admitted in appeal as due. 3 L.L.J. 370, Foll. 75 Ind. Cas. 667=A.I.R. 1923 Lah. 369.

——S. 7 (ix)—Appeal—Appellant interested with others—Joint Hindu family.

Members of a joint Mitakshara family have no specified shares in the family property and where some of them appeal against a decree in a suit to enforce a mortgage of the family property, court-fees must be paid on the amount decreed and not on the appellant's share of that amount. 55 Ind. Cas. 233 (Pat.).

——Ss. 7 (ix) and 12—Appeal—Suit for redemption or foreclosure—Appeal—Court-fee payable on.

In a redemption or foreclosure suit, where the question raised in appeal is the right to redeem or foreclose for an adjudged sum, court-fee payable on memorandum of appeal is on the mortgage money. If, however, the appeal challenges the amount to be paid or received by appellant, the fee will be assessed on the difference between the sum awarded as payable or receivable by the lower Court and that claimed as due in the memorandum of appeal. 22 O.C. 289=54 Ind. Cas. 733.

——S. 7 (ix)—Appeal—Decree declaring priority of a mortgage—Appeal—Court-fee.

In an appeal from a mortgage decree which declared that third defendant had a prior mortgage for Rs. 14 000 the appellant prayed that the decree should be modified by removing the conditions as to priority of the defendant No. 3 and its redemption by the appellant:

Held, that an *ad valorem* court-fee on Rs. 14,000 should have been paid. 4 Pat. L.J. 323=51 Ind. Cas. 786.

——S. 7 (ix) and Sch. II, Art. 17 (vi)—Appeal—Ad valorem fee.

If the object of appeal is to get the final decree in a mortgage suit set aside memo. of appeal must bear *ad valorem* court-fee. 50 Ind. Cas. 279 (Pat.).

——S. 7 (ix)—Appeal from preliminary decree and the order fixing the amount for redemption—Consolidation.

In a redemption suit, the mortgagee denied the right to redeem and also the amount of redemption. The Court decreed plaintiff's suit and directed accounts. Defenant appealed against the decree in the meanwhile the trial Court took accounts and fixed a certain sum. The defendant appealed claiming a higher sum:

He'd, the two appeals should be consolidated and the full amount of court-fee shoud be levied as if the two appeals were one appeal. 39 All. 452=15 A.L.J. 464=41 Ind. Cas. 346.

——S. 7 (ix) and Sch. I, Art. 1—Appeal from final decree.

If any proceedings, which have terminated in a

final decree under O. 34, R. 3, are made the subject of appeal, the appeal must be treated as an appeal from the decree and must be stamped accordingly and an *ad valorem* fee should be paid. 18 O.C. 114=30 Ind. Cas. 492.

——S. 7 (ix)—Appeal—Redemption — Appeal for reduction of mortgage-money.

The court-fee. payable on an appeal by a mortgagor in which he claims to redeem on payment of a smaller sum than that allowed by the lower Court, is the difference between the amount admitted by him and the amount decreed by the lower Court. 166 P.W.R. (1915)=58 P.R. 1915=58 P.L.R. 1916 =30 Ind. Cas. 104.

——S. 7 (ix)—Redemption suit—Appeal against —Subject matter for purposes of Court-fee.

Where there are two mortgages upon the same property in favour of the same person and one of the mortgages is declared to be not genuine, the subject-matter for the purpose of determining the court-fee payable on any appeal against the decree is the value of the mortgage found to be genuine by the Court in appeal. In redemption suits, the subject-matter in dispute for the purposes of Court-Fees Act is the existence of the right to redeem. (1914) M.W. N. 231=1 L.W. 102=22 Ind. Cas. 609.

——S. 7 (ix)—Appeal—Mortgagee decree for sale—Different properties separately charged—Appeal in respect of one—Court-fee.

Where a mortgage decree for sale declares the separate liabilities of different properties for "different sums of money" the court-fee on appeal by one of the defendants, whose property had been held liable for a specific sum of money. must be calculated on the sum for which the property had been held liable. 35 All. 92=11 A.L.J. 33=18 Ind. Cas. 577.

——S. 7 (ix)—Appeal—Mortgage decree—Appeal by defendant—Court-fee.

The value of the subject-matter of the appeal by the defendant against a mortgage decree is the amount declared by the Court as due to the plaintiff on the date fixed for payment exclusive of costs. 35 All. 94=11 A.L.J. 20=18 Ind. Cas. 365.

——S. 7. Cl. (ix)—Appeal—Redemption suit—Appeal—Court-fee—Ad valorem-fee.

The memo. of appeal in a suit to set aside a decree for redemption on payment of a certain sum sholud bear *ad valorem* Court-fee on the amount on payment of which the redemption is ordered 44 P.R. 1888: 5 P.R. 1911. Foll. 54 P.R. 1912=122 P.W.R. 1912 =14 Ind. Cas. 78.

——S. 7, (ix)—Appeal—Decree against portion of mortgaged property—Appeal by mortgagors—Cross-objections by mortgagee respondent paying for decree against entire property—Ad valorem fee.

In a mortgage suit the Court passed a decree against a portion of the mortgaged properties. The mortgagor appealed and the mortgagee filed a memo. of cross objections praying that the decree might be made executable against the entire property and paid a Court-fee of Rs. 2 only. *Held*, on a reference by the Taxing Officer that the cross objections must be stamped *ad valorem* as per value of the property sought to be brought within the operation of the decree, even though the amount of the debt, was the same. 33 All. 20=7 A.L.J. 842=7 Ind. Cas. 315.

——S. 7 (ix)—Appeal for reduction of decretal amount.

In an appeal for reduction of the amount of decree in a foreclosure suit, Court-fee is to be calculated on the amount sought to be reduced and not on the original amount. 5 N.L.R. 130=3 Ind. Cas. 920.

——S. 7 (ix) and Sch. I, Art. 1—Appeal—Redemption—Appeal—Denial of right to redeem, and an alternative plea that the larger amount is payable in appeal.

The subject-matter in dispute in a suit for redemption is the right to redeem, and any question as to the amount payable as the condition of redemption is merely incidental to that right. In an appeal from the decree in such a suit, directing redemptoin on payment of the amount mentioned in the plaint, where the defendant contests the right of redemption or claims, in the alternative, a larger amunt than that mentioned in the plaint the Court-fee payable is the same as that paid on plaint or appeal in a redemption suit can only come under Sch. I, Art. 1 and under S. 7, Cl. ix. The fee in such a suit should be computed according to the principal money secured by mortgage.

Obiter:—Even where the only question in an appeal against a redemption decree is as to the amount payable, the Court-fee is computed on the amount in dispute. 20 M.L.J. 121=6 M.L.T. 245=3 Ind. Cas. 459.

——S. 7 (ix)—Appeal by reversioner—Court-fee.

Memo. of appeal on the ground that a reversioner is not liable for mortgages by widow, should be stamped on the amount of the mortgagee by the widow. 12 O.C. 130=2 Ind. Cas. 600.

——S. 7 (ix), Sch. I, Art. 1—Appeals in mortgage suits for redemption.

In appeals arising in mortgage suits for redemption the Court-fee is to be calculated with reference to the value of the subject-matter in dispute in appeal, whether the appeal is by the mortgagor or by the mortgagee. The word "suit" in S. 7 (*ix*) of the Court-fees Act doeh not include appeals; and appeals unless otherwise provided for are governed by Art. 1 of the first Schedule Art. 1 applies to appetals in suits for redemption and the words "subject-matter in dispute" therein mean "subject-matter in dispute" in appeal. 16 M.L.J. 287=29 M. 367.

——S. 7 (ix), Sch. I, Art. 1—Applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in appeal.

Held, that the Court-fee in an appeal arising out of a suit for foreclosure is payable on the subject-matter in dispute in appeal and not on the principal money secured by the mortgage. 27 A. 447, Reference under Court-fees Act, 29 M. 367, foll. 1908 A.W.N. 247=5 A.L.L. 531=30 A. 547. *See also* 1905 A.W.N. 37=27 A. 440.

——S. 7 (ix), Sch. I—Appeal in redemption suit—Appeal in respect of a specified portion of the sum declared payable for redemption.

In an appeal by the mortgagor objecting to the amount mentioned in the decree of the lower Court as payable by him, the appeal is to be valued according

to the sum which the appellant claims to have deducted from the decree. 13 A. 94, diss. from 2 A.L.J. 105=1905 A.W.N. 40=27 A. 447.

——S. 7 (ix)—Appeal—Suit by reversioner for possession and also for redemption—Court-fee.

A reversioner sued for possession of property and in the alternative for redemption, the Courts below gave him a decree for redemption on payment of a certain sum which the plaintiff disputed in appeal. *Held,* that the plaintiff must pay *ad valorem* Court fee on the amount which he was ordered to pay. 13 O.C. 62. Foll.; 12 O.C, 130, Not foll. 15 Ind. Cas. 746 (Oudh).

——S. 7 (ix)—Appeal—Decree for redemption on payment of principal money—Appeal denying right of redemption and claiming further amounts due—Court-fee.

Where in a suit for redemption, a decree was passed directing redemption on payment of the principal money, and an appeal was filed by the defendant denying the plaintiff's right to redeem and claiming sums due on other charges on the property the Court-fee payable on such appeal is on the amount claimed by them in excess of the amount awarded by the Court of first instance, though they claimed that amount only as a last resort, in case their plea of denial of the plaintiffs', right to redeem was not accepted. 16 O.C. 354=22 Ind. Cas. 642.

——S. 7 (ix)—Appeal—Defendant pleading extinguishment of mortgage.

An appeal against a foreclosure decree not merely disputing the amount found payable for redemption but against the whole decree should bear *ad valorem* stamp on the same valuation as the foreclosure suit though the amount found payable for redemption exceeds this valuation. A defendant pleading that the mortgage forming the basis of the suit has been extinguished by novation before suit, so as to put an end to the relation of mortgagor and mortgagee, directly disputes and denies the relief of foreclosure but it is doubtful, whether a mortgagor, who says that a mortgage has been paid off can be said to deny the right to foreclose. 5 N.L.R. 130, Diss. 6 N.L.R. 164=8 Ind. Cas. 1125.

——S. 7 (ix)—Appeal—Enhancement in redemption suit.

The Court-fee payable on the memorandum of second appeal is to be calculated on the difference between the sum alleged by the mortgagor as payable and the sum fixed by the Appellant Court. Such a question arises in a redemption suit when the sum is enhanced in first appeal. 166 P.W.R. 1910=55 Ind. Cas. 477.

——S. 7 (ix)—Appeal—Redemption decree—Cross-objections by mortgagor for reduction of amount payable—Power of appellate Court to reduce amount.

In an appeal by the mortgagee in a redemption files cross-objections for reduction otf the amount payable to him for redemption, he must pay *ad* decree where the respondent files cross-objections for reduction of the amount payable to him for redemption, he must pay *ad valorem* Court-fee on the sum by which he seeks to have the amount reduced; and the Appellant Court has no power to reduce the amount by a sum greater than that in respect of which Court-fee has been paid on the cross objections. 134 P.W.R. 1911=213 P.L.R. 1911=11 Ind. Cas. 198.

2. Foreclosure suits.

——S. 7 (ix)—Fee payable on foreclosure and redemption suits.

S. 7 (*ix*) is applicable to suits as well as to appeals, 27-A. 447 and 29 M. 367, not approved.

The words 'not otherwise provided for in this Act, in Art. 1, Sch. I apply to special provisions for plaints and memo. of appeals made in other articles of the schedule.

But the Court-fee payable on appeal need not be the same as on the plaint. The following are the different cases and conclusions:—

(1) If a suit for redemption or foreclosure has been dismissed the Court-fee payable by the plaintiff appellant on his memorandum of appeal will be computed in accordance with the provisions of S. 7 (*ix*) of the Court-fees Act, *i.e.*, according to principal money, expressed to be secured by the instrument of mortgage.

(2) If a suit to redeem has been decreed and the defendant-appellant merely challenges the right to redeetm the Court-fee payable on the memorandum of appeal will be computed in accordance with the provisions of S. 7 (*ix*).

(3) If a suit to redeem or foreclose has been decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem or foreclose the Court-fee payable on the memorandum of appeal will be on the subject-matter in dispute, *i.e.*, on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability.

(4) Where in a foreclosure suit a decree has been passed for a certain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denied the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed, the Court-fee payable on the memorandum of appeal be calculated *ad valorem* on the subject-matter in dispute according to Art. 1, Sch. I, *i.e.*, on the amount of the decree payment of which the defendant by his appeal seeks to avoid.

(5) Where a decree has been passed for redemption on payment of certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on a payment of a larger sum than fixed by the Court of first instance, the Court-fee will be paid on the relief which is liable to pay the higher fee; on the former the fee would be computed in accordance with the provisions of S. 7 (*ix*) read with Art. 1, Sch. I and on the latter the Court-fee would be *ad valorem* on the difference between the amount found due by the Lower Court and that claimed by the appellant. 67 Ind. Cas. 968=25 O.C. 30=A.I.R. 1922 Oudh 82.

——S. 7 (ix), Sch. I, Art. 1—Foreclosure suit.

Where in a foreclosure suit, the plaintiff decree-holder was ordered to pay up a prior mortgage of Rs. 5,941-6-5 and the plaintiff appealed against this order, it was held that the memorandum of appeal should bear an *ad valorem* fee on that amount. 6 A.L.J. 155=31 All. 265=1 Ind. Cas. 1000.

——S. 7 (ix)—Foreclosure—Court-fee.

Where, in a claim for foreclosure, there is no dispute as to the price of redemption; but only as to the right to foreclosure of the whole or a portion of the property, the value of the suit or an appeal for purposes of court-fee is the principal sum secured

by the mortgage. 3 I.C. 920, Dist.; 8 I.C. 1125, Rel. on. 9 N.L.R. 86=20 Ind. Cas. 257.

——S. 7 (ix)—Foreclosure suit.

In a suit for foreclosure of a mortgage, when the value of the mortgaged property is not less than the amount of the charge, the value of the suit for purposes of jurisdiction is the sum claimed as due for principal and interest under the mortgage. 8 N.L.R. 179=17 Ind. Cas. 886.

——S. 7 (ix) and (j)—Foreclosure suit—Appeal for enhancement of mortgage money—Court-fee.

Appellants sued to forclosure a mortgage and joined as one of the defendants a co-mortgagee, who they alleged had parted with his rights to their predecessors-in-title. The co-mortgagee also filed a suit admitting appellant's right to a half share making them defendants as they refused to join with him as co-plaintiffs. The suits were tried jointly and two different decrees were passed. On the appellant's appealing for an enhancement of the mortgage-money: *Held,* they must pay *ad valorem* Court-fees on the amount of the enhancement sought by them. 11 N.L.R. 83=29 Ind. Cas. 609.

——S. 7 (ix)—Foreclosure suit—Plaintiff ordered to discharge prior mortgage—Validity of mortgage challenged in appeal—Ad valorem fee.

In a suit for foreclosure the plaintiff was ordered, as a condition precedent, to redeem a prior mortgage on payment of a certain amount which on review was raised to Rs. 5,941-6-3. In the memorandum of appeal he challenged the validity of the mortgage he had been ordered to redeem, but he paid court-fee only on the original amount of his mortgage.

Held, that he was bound to pay an *ad valorem* court-fee on the amount he had been ordered to pay, in as much as he sought to get rid of a liability imposed on him by the decree. (1905) A.W.N. 40, foll. 6 A.L.J. 155=31 A. 265=1 Ind. Cas. 1000.

3. Jurisdiction.

——S. 7 (ix)—Jurisdiction—Redemption suit.

Although for purposes of court-fees the value of suits for the recovery of the property mortgaged is "the principal money expressed to be secured by the instrument of mortgage," the mortgage-money is not the basis of the valuation for purposes of jurisdiction. In such cases the value of the mortgaged property should be the basis. 5 L.B.R. 208 and 1 L.R. 96, Appr. A.I.R. 1927 Rang. 304=5 Rang. 499 =105 Ind. Cas. 412.

4. Redemption suit.

——S. 7 (ix)—Redemption suit—Usufructuary mortgage—Prayer for account regarding surplus deficiencies—Separate court-fee is payable.

Where the main relief claimed in the suit is one for redemption of a usufructuary mortgage but the plaintiff prays that the mortgagee should account for surplus deficiencies caused by him during the course of his management of the mortgaged property, the suit is substantially one for redemption and is leviable to court-fee under S. 7 (ix) of the Court-Fees Act and no separate court-fee is payable on the prayer for account regarding surplus deficiencies. I.L.R. (1948) Mad. 103=60 L.W. 290=1947 M.W.N. 367=A.I.R. 1947 Mad. 411=(1947) 1 M.L.J. 333.

——S. 7 (ix) and Sch. I, Art. 1—Redemption suit—Separate claim for damages—Court-fee.

The petitioner sued for redemption of a mortgage and paid court-fee under S. 7 (*ix*) of the Court-Fees Act. In the body of the plaint the petitioner alleged that owing to the delay on the part of the respondent in paying the debts for which the consideration for the mortgage was retained by him, a suit had been filed against the petitioner, that insolvency proceedings had been instituted against him and that he had been arrested for debt. The petitioner further stated that for the worry, inconvenience, ignominy and mental distress apart from pecuniary loss which the proceedings had caused him, the petitioner was entitled to recover a specified amount as damages. The plaintiff however merely prayed for a decree for redemption on payment of any sum that may be found due by him on an account being taken.

Held, that the claim for damages was a separate relief from the claim to be entitled to redeem the mortgage and that hence separate court-fee was payable thereon. 60 L.W. 229=1947 M.W.N. 202 =A.I.R. 1947 Mad. 435=(1947) 1 M.L.J. 231.

——S. 7 (ix)—Redemption suit—Decree directing payment of fixed amount—Appeal disputing amount directed to be paid—Court-fee—Art. 1, Sch. I. I.L.R. (1945) Bom. 629=222 Ind. Cas. 110=47 Bom. L.R. 400=A.I.R. 1945 Bom. 504.

——S. 7 (ix)—Redemption suit—Counter-claim by mortgagee for different remedy—Court-fee on counter-claim.

A 'suit' covers also appeals. But it is plain that because the plaintiff seeks recovery against a mortgagee, S. 7 (*ix*), Court-fees Act, would not fix the Court-fee payable by the mortgagee who counter-claims for some different remedy. Such a counter-claim would have to be scrutinized to see what cause of action is being litigated and the Court-fee on the counter-claim would have to be paid on that basis, and not on the basis fit for the plaintiff's claim. A I.R. 1937 Nag. 295=I.L.R. (1937) Nag. 49 (F.B.).

——S. 7 (ix)—Redemption suit.

In a suit for the redemption of immoveable property the value for purposes of jurisdiction is the amount found by the Court to be the value of the mortgagee's charge on the property and not the amount alleged by the paintiff to be due to the mortgagee. 63 P.R. 1891; 106 P.R. 1895 (F.B.), Overruled; 31 All. 44 and 39 Mad. 447, Diss., and 44 P.R. 1888, Expl. 96 Ind. Cas. 890=7 Lah. 570= 27 P.L.R. 605=9 Lah.L.J. 68=A.I.R. 1926 Lah. 376 (F.B.).

——S. 7 (ix)—Redemption suit—Kanom mortgage.

In suits to redeem a kanom mortgage the Court-fee payable by the plaintiff should be in accordance with provisions of S. 7 (*ix*). The fact the plaintiff refers to his title in the plaint does not make it obligatory on him to pay any additional Court-fee. The question litigated is his right to redeem. 95 Ind. Cas. 26=1926 M.W.N. 324=23 M.L.W. 758=A.I.R. 1926 Mad. 667.

——S. 7 (ix)—Redemption suit — Damages—Deduction of.

Where plaintiff sued for redemption of kanom and also prayed for a deduction of certain amount claimed as damages.

Held, that he must pay Court-fee on the amount of the kanom as well as *ad valorem* fee on the amount of the damages. 94 Ind Cas. 557=A.I.R. 1926 Mad. 542=50 M.L.J. 213.

——S. 7 (ix)—Redemption suit—Purangadam.

In a suit for the redemption of a Malabar kanom and purangadam, wherein paddy valued at a certain amount is fixed as the amount of the purangadam the Court-fee is payable under S. 7 (ix) on the amount as stated in the document and not the current market value of the paddy at the time of the plaint. 91 Ind. Cas. 81=22 M.L.W. 408=1925 M.W.N. 747 =A.I.R. 1925 Mad. 1254.

——S. 7 (ix)—Redemption suit.

In a redemption suit, the jurisdiction is to be determined with reference to the claim made and not to the decision upon it. 106 P. R. 1895 (F.B.). Foll. and 54 P.R. 1912, not Foll. 72 Ind. Cas. 405 =5 Lah. L. J. 143=A.I.R. 1923 Lah. 568.

——S. 7 (ix) — Redemption — Larger amount claimed.

Mortgagee in appeal claiming a larger amount than that awarded by the decree of the lower Court allowing redemption, must pay *ad valorem* fee on his memo. of appeal calculated on the difference between the amount found due by the lower Court and that claimed by him in appeal. 1922 Oudh 82 Foll. 74 Ind. Cas. 88=A.I.R. 1924 Oudh 170.

——S. 7 (ix)—Redemption suit—Validity of redemption by co-mortgagors.

Where in an alleged redemption suit, the plaintiff did not admit the validity of the redemption effected by some of the mortgagors and he described in his plaint the proceedings taken by those mortgagors as collusive, and asked for a decree for redemption of the entire property.

Held, that his suit cannot be treated as a suit for recovery of his share of the property mortgaged as one brought against his co-mortgagors who had already redeemed the property but that his suit was purely a suit for redemption of the entire mortgaged property. 94 Ind. Cas. 784=2 Luck. 221= 3 O.W.N. 467=13 O.L.J. 622=A.I.R. 1926 Oudh 346.

——S. 7 (ix)—Redemption suit.

Under S. 7, (ix) of the Court-fees Act the amount of Court-fee payable in respect of a suit for redemption is to be calculated on the principal sum secured by the mortgage.

When a suit is brought for redemption and a certain amount is claimed by plaintiff as surplus mesne profits, the plaintiff is not bound to pay Court-fee upon the surplus amount claimed in addition to the Court-fee on the principal secured by the mortgage. 79 Ind. Cas. 303=80 Ind. Cas. 1021=45 All. 154 A.I.R. 1923 All. 261.

——S. 7 (ix)—Redemption suit.

In a redemption suit the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them on taking of the accounts, a relief to which they would be entitled under the ordinary decree for redemption, did not alter the nature of the suit so as to necessitate the payment of an additional fee. 76 Ind. Cas. 131=A.I.R. 1924 Nag. 346.

——S. 7 (ix)—Redemption suit without stating the amount to be paid.

Where plaintiff seeks to redeem mortgaged property without stating the amount he is willing to pay, the value of the suit for jurisdiction and Court-fees is the principal amount stated in the mortgage deed. 57 Ind. Cas. 673 (Nag.).

——S. 7 (ix), Sch. I, Art. 1—Redemption.

The plaintiff asked for redemption, either without payment or on receipt of what was due to him on appeal from the decree on payment of a certain sum, it was held that Court-fees were payable *ad valorem* on the amount of mortgage money. 1 Lah. 234=57 Ind. Cas. 215.

——S. 7 (ix)—Redemption—Subject-matter.

Where in an appeal in a suit for redemption the mortgagor seeks to establish that he is not liable to pay the money which has been adjudged by the Court below to be due to the mortgagee he is liable to pay the Court-fee on the amount of the subject-matter in dispute in the appeal. 2 O.L.J. 257=30 Ind. Cas. 322.

——S. 7 (ix)—Redemption suit.

A suit merely to redeem mortgage without praying for additional relief falls under S. 7 Cl. (ix). But if there is also a prayer for payment of money found due on accounts taken, additional Court-fees should be paid on the amount so claimed. 12 M.L.T. 493=17 Ind. Cas. 442.

——S. 7 (ix)—Redemption suit—Valuation.

The proper valuation of a suit for redemption is the amount of the mortgage admitted by the plaintiff to be binding on him, and not that of the mortgages set up by defendant. The question of jurisdiction must be decided on the allegations in the plaint, and not with reference to the pleas of the defendant. 9 Mad. 208, Foll. 37 Mad. 420=13 M.L.T. 118= 15 Ind. Cas. 587.

——S. 7 (ix) — Redemption suit — Accounts—Jurisdiction.

In a suit for redemption and surplus money which may be found due on taking accounts, the value for Court-fees and jurisdiction is determined by the amount of mortgage money. If the plaintiff joins a claim for recovery of a specified sum of money along with a claim for redemption, the question of jurisdiction would depend on the aggregate value of the claims. 13 O. C. 32=5 Ind. Cas. 444.

——S. 7 (ix)—Redemption suit—Additional sum demanded in taking accounts—Whether court-fee necessary.

In a suit for redemption the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them on the taking of accounts, a relief to which they would be entitled under the ordinary decree for redemption, does not alter the nature of the suit so as to necessitate the payment of an additional fee on the plaint. 29 A. 471=1907 A.W.N. 133=4 A.L.J. 375.

——S. 7 (ix)—Redemption suit—Value for jurisdiction.

The value for jurisdiction in a suit for redemption of mortgage is the amount secured by the mortgage and not the market value of the property. 5 All. 332; 8 All. 438, Foll. 31 All. 44=(1908) A.W.N. 276=5 A.L.J. 713=1 Ind. Cas. 703. *See* Contra. (1910) 1 U.B.R. 10=4 Bur.L.T. 226=8 Ind. Cas. 464.

5. Redemption of share.

——S. 7 (ix)—Suit for redemption of a share of property which was mortgaged—Mortgagee in possession of whole—Court-fee.

Where a mortgage is by one who had only ½ a share in a property which is separately mortgaged but the defendant is in possession of the whole and the mortgagor sues for redemption, it does not involve partition. The mortgagor is entitled to redeem what

he had mortgaged and what is separately mortgaged can be separately redeemed and for that Court-fee only on the amount of mortgage is payable. A I.R. 1950 Kut. 42.

——S. 7 (ix)—Suit for redemption of his share by a co-mortgagor—Court-fee.

In a suit for redemption by a co-mortgagor of his share of the mortgaged property, the Court-fee is to be calculated on the amount of the mortgage debt charged on his share of the property. 5 O.L.J. 43 =45 Ind. Cas. 300.

——S. 7 (ix)—Suit by part mortgagee—Court-fee.

In a suit by a mortgagee interested in part only of the mortgaged property for the recovery of his share by the sale of the whole property, it is sufficient if the Court-fee is paid on the plaintiff's share only of the amount due. 32 M.L.W. 901=A.I.R. 1930 Mad. 985=59 M.L.J. 928.

6. Suit for possession.

——S. 7 (ix)—Suit for possession — Conditional decree—Appeal as to liability.

Where a plaintiff in a suit for possession appeals on the ground that he is not liable to pay a certain sum ordered by the Court he must pay Court-fees on the amount ordered. 13 O. C. 62=5 Ind. Cas. 941.

——S. 7 (ix)—Suit for possession — Condition of plaintiff paying off incumbrances—Appeal.

A suit for possession was decreed conditionally on payment of incumbrances and plaintiff appealed against that part of the decree which required him to pay off the incumbrances. *Held*, that Court-fees on the memo. of appeal were payable *ad valorem* on the value of the incumbrances. 4 Ind. Cas. 941. Foll. 5 Pat. L.T. 455=1 Pat.L.J. 738=57 Ind. Cas. 481.

7. Suit to enforce mortgage by sale.

——S. 7 (ix)—Suit to enforce mortgage by sale—Whether falls under S. 7 (ix).

A suit to enforce a mortgage by a decree for sale obviously does not come within the purview of S. 7 (ix). A.I.R 1942 Mad 205=54 L.W. 679=(1941) 2 M.L.J. 986=1941 M.W.N. 1055=I. L. R. (1942) Mad. 438=201 Ind. Cas. 103. [Overrules A.I.R. 1930 Mad. 985=59 M.L.J. 928=129 Ind. Cas. 45.]

——S. 7 (ix)—Suit to enforce mortgage by sale—Court-fees—Interest.

The plaint in a suit brought by a mortgagee to recover the amount of principal and interest by sale of the mortgaged property only and not from the defendant personally or from his other property, must bear a Court-fee stamp sufficient to cover the whole amount of the claim inclusive of interest and not the principal amount alone. 7 Bom. L.R. 194.

8. Suits Valuation Act, S. 8.

——S. 7 (ix)—S. 8, Suits Valuation Act, does not include cases coming under S. 7 (ix), Court-fees Act. 164 Ind. Cas. 1042=62 C.L.J. 405=40 C. W. N. 90=63 Cal. 657.

9. Surplus profits.

——Ss. 7 (ix) and 17 — Surplus profits—Reliefs for redemption and mesne profits based on right to redeem and arising out of same cause of action.

A suit for redemption of a mortgage in which the reliefs claimed by the plaintiff, both for redemption and for recovery of mesne profits are based on his right to redeem and arise out of the same cause of action, falls under S. 7 (ix) and not under S. 17. Since the main relief claimed is one for redemption the prayers for surplus profits or for accounts are only subservient to the main relief and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff on relief for redemption covers the relief in regard to surplus profits also. The fact that the plaintiff asks for surplus profits separately and states the amount which would be according to him due by the mortgagee is immaterial. A.I.R. 1941 Mad. 115=(1940) 2 M.L.J. 867=1940 M.W.N. 1153.

——Ss. 7 (ix) and 17—Surplus profits—Suit for redemption and also for surplus profits.

When a plaintiff-mortgagor under a usufructuary mortgage seeks to recover possession and also claims surplus profits, the suit is not multifarious but embraces only one subject-matter and it comes under S. 7 (*ix*), Court-fees Act. A.I.R. 1937 Nag. 295= I.L.R (1937) Nag. 49 (F.B.).

——S. 7 (ix)—Surplus profits—Decree for mesne profits and for redemption—Appeal, if to be stamped for both reliefs.

Where a decree has been given for mesne profits as well as for redemption, then the appeal must be stamped for both the reliefs. 154 Ind. Cas. 460=A. I.R. 1935 Pesh. 8.

——S. 7 (ix)—Surplus profits—Suit for redemption and recovery of surplus profits—Valuation for court-fee and jurisdiction — Criterion.

A suit for redemption in which the mortgagor seeks to recover not only the corpus of the property but also the profits which were realised by the mortgagee in excess of what was due to him is a suit for the recovery of the property mortgaged within the purview of Cl. (*ix*) of S. 7, Court-fees Act, and the proper Court-fee payable by the plaintiff is on the principal amount secured by the mortgage bond, no additional Court-fee need be paid on the amount of surplus profits sought to be recovered after an account is taken.

The valuation of such a suit for the purposes of jurisdiction is the same as the valuation for purposes of Court-fee and depends on the principal amount of the mortgage. A.I.R. 1931 Mad. 479=33 L.W. 785 =60 M.L.J. 698=132 Ind. Cas. 317.

——S. 7 (ix)—Surplus profits—Suit for redemption.

The value of a suit for redemption, even when surplus profits are also claimed, is for jurisdiction and Court-fee, the amount of principal expressed in the instrument of mortgage. 113 Ind. Cas. 34=24 N. L.R. 197=11 N.L.J. 232=A.I.R. 1929 Nag. 1.

10. Miscellaneous.

——S. 7 (ix)—Miscellaneous—Plaintiff coming with case that only a definite sum is due and to have property freed from mortgage—Suit, if one for redemption—'Recovery of the property mortgaged', meaning of.

The plaintiff borrowed Rs. 10,000 from the defendant's father and executed a mortgage bond in his favour providing for compound interest. There were part payments and an adjustment of accounts and the defendant granted some remission and agreed to release the mortgage and to deliver up the bond if plaintiff paid Rs. 7,200 only. He paid Rs. 6,900 on two occasions

and tendered the balance of Rs. 300 but the defendant refused to accept the same and to deliver up the mortgage bond with an endorsement on its back that it was satisfied. Thereafter the defendant assigned the mortgage to a third party. This assignment was challenged in the plaint as fictitious but an alternative prayer was also made, if the said assignment were found to be real. In the plaint it was prayed (1) that on a declaration that the assignment was fictitious, the defendant might be directed to receive Rs. 300 from the plaintiff and to deliver to him the bond with endorsement of satisfaction; (2) that the same relief be granted against the assignee if the assignment were found to be real, and (3) that if the defendants do not make the endorsement of satisfaction on the mortgage bond within a time to be fixed by the Court, the Court may make the said endorsement on the bond and return it to the plaintiff;

Held, that the suit in substance was a suit for redemption, the plaintiff coming with a case that a definite sum, namely Rs. 300 only was due upon the mortgage and he wanted to have the property freed of the mortgage on payment of the said sum of Rs. 300. If the Court found that a larger amount than Rs. 300 was due on the mortgage, it would not be debarred from making a redemption decree in the usual form under general prayer and that the case fell within the first paragraph of S. 7, Cl. (*ix*) of the Court-fees Act, and a Court-fee on Rs. 10,000 had to be paid. The phrase "recovery of the property mortgaged" does not mean recovery of possession of the mortgaged property from the mortgagee, but is a phrase convertible with the word "redeem." The ordinary significance of the words to redeem is to recover a pledge to get property freed from a charge or mortgage. 164 Ind. Cas. 1042=62 C.L.J. 405=40 C.W.N. 90=63 Cal. 657.

——Ss. 7 (x) (a) and 17—Contract of sale—Specific performance and possession—Court-fees payable.

In a suit for specific performance, the relief for specific performance is the main relief and the relief of possession is ancillary to it. They do not form distinct subjects within the meaning of S. 17 of the Court-fees Act. The Court-fee payable is on the amount of the consideration under S. 7 (*x*) (*a*) of the Act.

Under S. 8 of the Suits Valuation Act, the valuation in such cases for purposes of Court-fee and jurisdiction is the same. 6 A. 231; 38 A. 292, 47 M. 150; 5 L. 75, foll. A.I.R. 1920 Oudh 167, diss., from. I.L.R. (1950) Nag. 336=A.I.R. 1950 Nag. 226=1950 N.L.J. 201.

——S. 7 (x) (a) and Sch. II, Art. 17 (iii)—Contract of sale by some of several co-sharers—Decree for execution of sale-deed in respect of shares of executants alone—Appeal by plaintiff and memo. of objections by defendants—Court-fee payable—Criterion.

In determining the amount of Court-fees payable in a suit for specific performance of a contract of sale of land, the criterion is the amount of consideration, and not the value of the property concerned. Where all that the plaintiffs require in an appeal is a declaration, a Court-fee on that basis would be sufficient and no *ad valorem* fee ought to be levied.

A contract of sale was entered into by three out of the six defendants in the suit, the interest of these defendants being seven-twelfths of the whole property. The amount of the consideration for the contract was Rs. 5,800. The trial Court passed a decree requiring the three defendants to perform the contract to the extent to which they were in a position to do so, that is so say to execute a sale deed conveying their seven-twelfths interest to the plaintiffs on payment of Rs. 5,800. The plaintiffs appealed, and the defendants preferred a memorandum of cross-objections. The appeal and cross-objection were valued for purposes of Court-fee proportionately according to the extent for which the decree for specific performance of the contract was passed in favour of each party. The Stamp Reporter objected to the valuation and contended that the appeal and cross-objection were under-valued and understamped.

Held, on a reference: (1) that so far as the memorandum of appeal was concerned, all that the plaintiffs now required was a declaration and that a Court-fee of Rs. 15 would have been sufficient and in any case the Court-fee paid was sufficient;

(2) that as to the cross-objection, since both sets of defendants had joined in the cross-objections the Court-fee paid was insufficient and Court-fee must be paid on the full amount of the consideration for the contract, namely, Rs. 5,800. 33 All. 20; 30 Mad. 96 (F.B.), not foll. 27 Pat. 887.

——S. 7 (x) (a)—Contract of sale—Suit for specific performance with alternative prayer for refund of advance paid and for damages — Separate court-fee for alternative reliefs—If payable.

In the case of alternative reliefs arising out of the same contract only one Court-fee is payable on the relief which is more highly valued. That is the existing practice and it cannot be said in a suit for specific performance of a contract of sale with an alternative prayer for refund of the advance paid and for damages, that the claim for damages arose not out of the contract but out of the breach of the contract. 1949 M.W.N. 171 (2)=A.I.R. 1949 Mad. 448=(1948) 2 M.L.J. 645.

——S. 7 (x) (a)—Contract of sale—Suit for possession on the basis of specific performance—Court-fee.

A suit for possession of land on the basis of a specific performance of a contract is for purpose of Court-fee governed by S. 7 (*x*) (*a*) and not by S. 7 (*v*). A.I.R. 1945 Bom. 81=46 Bom.L.R. 731=I.L.R. (1945) Bom. 32=220 Ind. Cas. 439.

——S. 7 (x) (a), Sch. II, Art. 17-B—Contract to sell property in lieu of mortgage debt—Suit for specific performance — Court-fee is payable, not under Art. 17-B but under S. 7 (x) (a).

The plaintiff had a mortgage right over certain properties and it was arranged in 1937 that in view of the amount due under the mortgage, the properties which were the subject-matter of the suit should be conveyed to him. Subsequently before the conveyance could be executed, the Mad. Agri. Relief Act was passed and if the amount payable to the mortgagee was scaled down, it entitled the plaintiff to recover only Rs. 4,000. The mortgagors refused to execute a conveyance, and a suit was filed for specific performance of the contract for sale or in the alternative for recovery of the amount due as scaled down. The plaintiff valued the claim at Rs. 4,000 and paid Court-fee thereon. The lower Court

held that Court-fee on the claim for specific performance was payable on the amount due on the mortgage bond on the date of the contract for sale, *viz.* Rs. 24,000:

Held, that the contract was clearly a case of sale and the value was capable of being ascertained in the money, *viz.*, the amount under the mortgage on that date and it could not be said that relief was one which was not capable of being valued so as to attract the provisions of Art. 17-B of Sch. II, Court-fees Act. Court-fee was payable under S. 7, Cl. (*x-a*) on Rs. 24,000. A.I.R. 1943 Mad. 372=(1943) 1 M.L.J. 82=56 M.L.W. 91=1943 M.W.N. 55=210 Ind. Cas. 157.

——S. 7 (x)—Contract of sale.

Dispute to title of property compromised—In consideration of certain sum, defendant No. 2 conveyed two-thirds of certain properties and defendant No. 1 one-third of some other property to plaintiff—Subsequently, by mutual arrangement most of the properties intended to be conveyed by defendant No. 2 sold—Plaintiff's suit to enforce original arrangement with possession—Prayer that defendant No. 2 should execute conveyance:

Held, that the suit so far as a conveyance respecting defendant No. 2's interest was sought was essentially one for specific performance of a contract and Court-fee payable was on the sum agreed to be paid to defendant No. 2 under S. 7 (*x*) though many of the properties agreed to be conveyed had been disposed of. A.I.R. 1937 Mad. 831=1937 M.W.N. 236 =176 Ind. Cas. 777.

——S. 7 (x) (a)—Contract of sale.

Suit to enforce an agreement with a prayer to get a release deed executed by defendants in favour of plaintiff or in the alternative for partition of plaint properties:

Held, that the suit must be considered as one for specific performance of contract of sale and hence came within S. 7 (*x*) (*a*), Court-fees Act, and that Court-fee was to be paid on relief which is higher in value. 1936 M.W.N. 1073.

——S. 7 (x) (a)—Contract of sale.

In a suit for specific performance of contract for sale of land the proper valuation is the price agreed to be paid for the same. A.I.R. 1924 Lah. 439; and A.I.R. 1924 Mad. 360, Foll.; 60 Ind. Cas. 512 and 128 P.W.R. 1918, Diss. from 111 Ind. Cas. 72=A.I.R. 1928 Lah. 635.

——S. 7 (x)—Contract of sale—Prayer for sale-deed.

A suit to have a sale-deed executed and completed or for recovery of a sale-deed already executed is a suit for specific performance of a contract though there is no prayer for possession of the property sold. 80 Ind. Cas. 953=5 Lah. 75=A.I.R. 1924 Lah. 439.

——S. 7 (x) (a)—Contract of sale.

The value of a suit for specific performance of a contract of sale for the purposes of Court-fee is the amount of the consideration under S. 7 (*x*) (*a*) of the Court-fees Act. In such a suit the valuation for the purposes of jurisdiction will be the same under S. 8 of the Suits Valuation Act (7 of 1887). 77 Ind. Cas. 874=A.I.R. 1923 Oudh 252.

——S. 7 (x) (a)—Contract of sale—Specific performance.

The suit for specific performance and delivery of possession is not a combination of two suits or two or more distinct subjects, to attract the application of S. 17 of the Court-fees Act. 38 All. 292, Foll.; 11 Ind. Cas. 228 and 60 Ind. Cas. 512, Diss. 77 Ind. Cas. 542=47 Mad. 150=18 M.L.W. 333= 1923 M.W.N. 726=A.I.R. 1924 Mad. 360=45 M. L.J. 431.

——S. 7 (x) (a)—Contract of sale—Specific performance and possession.

A suit for specific performance and delivery of possession clearly falls within the description of a suit for specific performance, under Cl. X (*a*) and the addition of the prayer for possession makes no difference. The suit cannot be properly described as a suit for possession of property and brought under Cl. V of Court-fees Act, simply because a prayer for possession is added any more than, for example a suit for redemption of usufructuary mortgage, wherein also there will be a prayer for possession, can be so described and brought under the clause. 77 Ind. Cas. 542=47 Mad. 150=18 M.L.W. 333= 1923 M.W.N. 726=A.I.R. 1924 Mad. 360=45 M. L. J. 431.

——S. 7 (x) (a)—Contract of sale.

Court-fees payable in suits for the specific performance of sale of immovable property will be levied according to the amount of the consideration. The suit is not a suit for possession of immovable property so as to be liable to a stamp of value ten times the jama. 73 Ind. Cas. 709=A.I.R. 1923 Lah. 456.

——S. 7 (x) (a)—Contract of sale—Suit for possession—Unconditional decree.

Ad valorem Court-fee on five times the Government revenue of the lands in an appeal by the mortgagee for an unconditional decree for possession of the property, is sufficient. 50 Ind. Cas. 353 (Oudh).

——S. 7 (x) (a)—Contract of sale—Suit for specific performance and for possession—Court-fee.

A suit for specific performance of a contract of sale by execution of a sale deed and for possession of land sold is governed by S. 7, (v) and not by (x) (a). 14 C.L.J. 159, Foll. 128 P.W.R. 1918 =46 Ind. Cas. 534.

——S. 7 (x) (a)—Contract of sale—Specific performance—Possession in addition to execution and registration of sale-deed.

A suit for the specific performance of a contract to sell, in which the plaintiff seeks to force the vendor to execute and register a sale-deed and also to hand over possession of the property should be stamped only under S. 7 (x) (a). 38 All. 292= 14 A.L.J. 434=35 Ind. Cas. 275.

——S. 7 (x) (a)—Contract of sale—Suit for both specific performance and possession, whether lies—Value of subject-matter.

A suit lies for specific performance of an executory contract to convey and also for possession, the right to which springs out of the contract, such a suit for purposes of the Court-fees Act, is one for possession of the property and ought under S. 7, Cl. (v), be valued according to the real value of the subject-matter. 14 C.L.J. 159=11 Ind. Cas. 228.

——S. 7 (x) (a)—Exchange.

A suit for specific performance of a contract for exchange of immovable property is not one for specific performance of a contract of sale within S. 7 (x) (a), Court-fees Act. A.I.R. 1944 Mad. 252= (1944) 1 M.L.J. 187=57 L.W. 130=1944 M.W.N. 133=219 Ind. Cas. 329.

——S. 7 (x) (a)—Exchange.

The framers of clause (x) of S. 7 of the Court-fees Act contemplated that for the purposes of Court-fee under this clause an exchange is to be dealt with as a sale. 73 Ind. Cas. 709=A.I.R. 1923 Lah. 456.

——S. 7 (x) (c)—Applicability—Suit by lessee to get back lease deed and registration receipt on cancellation of same by lessor—Lessee not paying any consideration at all for deed—Court-fee—Suit, if one for specific performance. *See* COURT-FEES ACT, S. 7 (iv) (a) AND (x) (c). 28 Pat. 313=A.I.R. 1949 Pat. 520.

——S. 7 (x) (c)—Suit by lessee against lessor and others alleged to be in possession in collusion with lessor, for specific performance and possession—Suit held in substance for possession and Court-fee payable was under S. 7 (v) and not under S. 7 (x) (c). A.I.R. 1939 Mad. 360=1939 M.W.N. 152=49 L.W. 196=(1939) 1 M.L.J. 268=I.L.R. (1939) Mad. 367=180 Ind. Cas. 640.

——S. 7 (x) (c)—Landlord executing lease of certain property in favour of plaintiff—Lease to take effect from certain date—Landlord dying — Property going to heir—Heir under Court of Wards —Lease of same property executed in favour of other persons—Suit by plaintiff for possession—S. 7 (x) (c), whether applies.

One *M* had, by certain documents, conveyed his rights in the property to the plaintiffs on a lease which was to take effect from 1931-1932. When the time for the lease arrived, *M* was dead and his heir had taken the protection of the Court of Wards. Instead of putting the plaintiffs in possession of the lands in dispute, the Court of Wards gave a lease of the same lands to defendants. The plaintiffs then instituted a suit for possession of property leased to them:

Held, that the landlord had covenanted to put the lessees in possession of the property when the time arrived. He being dead, his heirs were represented by the Court of Wards and it was the duty of the Court of Wards to put them in possession provided, of course, the lease was not invalid. If the Court of Wards had to perform that part of the contract, the right of the plaintiffs was to sue for specific performance of that part of the contract. The suit, therefore, fell clearly within the provisions of S. 7 (x) (c), Court-fees Act, as the suit was in effect one for specific performance of the lease. A.I.R. 1937 Sind 93=168 Ind. Cas. 471.

——S. 7 (x) (c)—Lease on annual rent of Rs. 51 —Suits Valuation Act, S. 8.

Plaintiff prayed for declaration of his *mourase mokurari* right in certain lands and for directing the defendant to grant him a lease, the yearly rent payable on which, was Rs. 51. The suit was arbitrarily valued for the purposes of jurisdiction at Rs. 11 000. *Held*, that under S. 7 Cl. X (c) and S. 8 of the Suits Valuation Act, the suit should have been valued at Rs. 7 for purposes of Court-fee and jurisdiction, and it ought to have been filed in the Munsiff's Court. 17 C.W.N. 160=15 Ind. Cas. 46.

——S. 7 (xi) — 'Year' — Meaning—Agricultural land—Income for 'year' before the filing of plaint —Computation — Basis — "Revenue year" or "calendar year"—Definition of 'year' in General Clauses Act—If applicable — Question of valuation—Revision—When lies.

In a suit relating to agricultural land the income for the "year" before the filing of plaint for purposes of Court-fee and jurisdiction is to be computed for the revenue or the agricultural cultivation year and not the calendar year. It can be taken as the calendar "year" according to the General Clauses Act only if there is nothing else in the context to guide the Court.

When the matter involves a question of jurisdiction of the lower Court also and is not one affecting Court-fee alone, a revision lies to the High Court. 61 Mad. L.W. 789=1948 M.W.N. 832=A.I.R. 1949 Mad. 415=(1948) 2 M.L.J. 523.

——S. 7 (xi)—Oudh Rent Act (22 of 1886), Ss. 108 (2), 127, sub-S. (2), 119—Suit for arrears of rent—Decree — Decree for defendant's ejectment on application of plaintiff—Appeal—Second appeal by defendant — Court-fee, if to be paid on relief relating to ejectment.

A suit was instituted under S. 108, Cl. (2) read with S. 127, sub-S. (1), Oudh Rent Act, for arrears of rent. Under S. 127, sub-S. (2), the Court passed a decree for arrears of rent and upon the application of the plaintiff passed a decree for ejectment of the defendant. The defendant's appeal to the District Judge was dismissed. He then filed a second appeal in the High Court:

Held, that although the decree was both for arrears of rent and for ejectment, the defendant-appellant could not be considered to be appealing against the decree for ejectment as no such appeal would lie either to the District Judge or to the Chief Court under S. 119, Oudh Rent Act, and hence no Court-fee was payable on the relief relating to ejectment. A.I.R. 1936 Oudh 13=1935 O.W.N. 966=1935 R.D. 434 =158 Ind. Cas. 49 (2).

——S. 7 (xi)—Suit under Ss. 44 and 88, Agra Tenancy Act—Court-fee payable is *ad valorem*—Value for Court-fees and for jurisdiction should be the same as the amount of rent in the next preceding year. A.I.R. 1934 All. 825=18 R. D. 222=1934 A.L.J. 708=3 A.W.R. 174=152 Ind. Cas. 115.

——S. 7 (xi)—If applicable.

Where an applicant seeks for an alteration of the rent as recorded in the Record-of-Rights, the value of the relief for purposes of Court-fee should be ten times the difference between the rent recorded and that claimed in respect of each tenancy, and it cannot be valued according to the mode of valuation indicated in S. 7 (xi), Court-fees Act. A.I.R. 1932 Cal. 674=55 C.L.J. 303=59 C. 997=143 Ind. Cas. 37.

——S. 7 (xi)—Court-fee.

In a suit for ejectment of a person in the occupation of some rooms on one of the floors of a building, it will not be unreasonable for the plaintiff to value the relief at twelve times the monthly rent which the portion in the occupation of the defendants would yield. A.I.R. 1932 Sind 73=26 S.L.R. 29=139 Ind. Cas. 95.

——S. 7 (xi)—Applicability—Suit for assessment of rent.

In a suit for assessment of rent, there being no rent payable previously, Cl. (xi) of S. 7 does not apply. 100 Ind. Cas. 913=6 Pat. 17=8 P.L.T. 366 =A.I.R. 1927 Pat. 123.

——S. 7 (xi)—Declaration of title.

Where the suit asks for a declaration of title and also for a relief against one of the defendants on the footing that he is a trespasser the suit is not strictly

within the contemplation of S. 7 (xi). 91 Ind. Cas. 488=A.I.R. 1926 Cal. 504.

——S. 7 (xi)—Ejectment.

Where plaintiff is in possession of part of a house and wants to recover another part from his alleged tenant, Court-fee on 12 times monthly rent would be reasonable. 104 Ind. Cas. 412=A.I.R. 1927 Sind 248.

——S. 7 (xi) (b)—Tenure-holder, if a tenant within S. 7 (xi) (b)—"Right of occupancy", if includes right of tenure-holder.

A tenure-holder is a tenant within the meaning of S. 7 (xi), Court-fees Act, and the words "right of occupancy" used in Cl. (b) of the section are to be understood in the popular and more general sense of a right by virtue of which a tenant remains in actual and physical possession as it were of the tenancy and so does not include the right of a tenure-holder. A tenure-holder occupying any portion of his tenure is included in the term but this would not make him any the less a tenure-holder. *vide* S. 7, sub-S. (4), Bengal Tenancy Act, which speaks of a tenure-holder himself occupying a portion of the land. A.I.R. 1934 Cal. 674=38 C.W.N. 527=61 C. 513=152 Ind. Cas. 753.

——S. 7 (xi) (b) (i), (ii), (iv), (c)—Suit for enhancement of rent—No prayer for recovery of rent.

Where in a suit for enhancement of rent of tenure, there was no prayer for recovery of any rent:

Held, that for the purposes of Court-fees, the value of the suit was the amount to which the rent was prayed to be enhanced. Neither S. 7 (i) nor (ii) nor (iv) (c) of the Court-fees Act governs such a suit. A.I.R. 1934 Cal. 674=38 C.W.N. 527=61 C. 513=152 Ind. Cas. 753.

——Ss. 7 (xi) (b), 17—Madras Estates Land Act (1 of 1908), S. 193—Suit under S. 193 against several ryots for enhancement of rent—Court-fee payable—'Distinct subjects', meaning of.

A suit under S. 193, Madras Estates Land Act, for enhancement of rent against the *ryots* of a village does not embrace 'distinct subjects' within the meaning of S. 17 of the Court-fees Act, and requires only a Court-fee on the total amount of the rents to which the suit relates. It is not necessary to pay the aggregate amount of Court-fees separately payable in respect of the rent of the holding of each particular ryot. A.I.R. 1932 Mad. 667=63 M.L.J. 73=36 L.W. 191=1932 M.W.N. 777=130 Ind. Cas. 102.

——S. 7 (xi) (cc)—Applicability — Suit by new tenant against landlord and old tenant—Court-fee payable — Basis — Government kist directed to be paid by tenant—Whether need be taken into account.

S. 7, Cl. (xi) (cc) of the Court-fees Act is intended to enable a landlord to bring a cheap suit against a tenant guilty of holding over after the determination of his tenancy. The word "landlord" in the clause should not be taken too literally. Where a new lessee of the property sues for recovery of possession of the property and impleads the landlord and the previous lessee whose lease had been terminated.,

Held, that (i) the suit was governed by Cl. (xi) (cc) of S. 7 of the Court-fees Act, and (ii) for purposes of calculating Court-fee under Cl. (xi) (cc) the Court should take into account only the rent payable to the landlord and not also the Government kist agreed to be paid by the tenant to the Government. 1948 M.W.N. 316=A.I.R. 1948 Mad. 409=61 L.W. 421=(1948) 1 M.L.J. 338.

——S. 7 (xi) (cc)—Applicability — Suit for possession by purchaser of property—Property in possession of defendant as lessee of vendor at time of purchase—Suit brought after determination of lease—Court-fee payable.

The plaintiff brought a suit against the defendant for recovery of possession of certain lands and for compensation for their use and occupation. According to the plaintiff, he had purchased the property in dispute from one *D* by a sale-deed at a time when the defendant was a tenant of *D*, in pursuance of a compromise decree which *D* had obtained in a suit instituted by him against the defendant. Under the terms of the compromise decree, the defendant was recognised by *D* as his tenant for a further period of one year, and the defendant was to vacate the property thereafter. The deftndant however did not vacate the property, as agreed, and continued to remain in occupation,

Hctld, that the plaintiff who acquired title by the property during the continuance in possession of the defendant as lessee of *D*, was invested with all the rights of *D* in respect of the tenancy under S. 109, T. P. Act, and that the plaintiff's suit therefore, in substance was a suit by a landlord against a tenant holding over, notwithstanding the allegation made in the plaint that the defendant was a trespasser and that to such a suit the provisions of S. 7 (*xi*) (*cc*), and not S. 7 (*v*) of the Court-fees Act are applicable. 1937 Mad. 91, rel. on. A.I.R. 1949 Assam 64.

——S. 7 (xi) (cc)—Suit to eject tenant.

Where a tenant who has taken a house on lease for a fixed period continues in possession after the expiry of the period of lease, he does not become a trespasser but remains a tenant by sufferance. The relationship of landlord and tenant, therefore, exists between the parties and a suit to eject the tenant is maintainable and falls within the purview of S. 7 (*xi*) (*cc*) and it is not necessary for the landlord to bring a suit for possession paying *ad valorem* Court-fee on the value of the property. A.I.R. 1945 Pesh. 16=220 Ind. Cas. 227=1945 Pesh.L.J. 16.

——S. 7 (xi) (cc)—Tenant refusing to vacate after notice to quit—Ejectment suit falls under S. 7 (xi) (cc).

Even though a notice of ejectment is served on a tenant, he does not cease to be a tenant "holding over" for the purposes of S. 7 (*xi*) (*cc*), Court-fees Act. Consequently, a suit to eject him falls under S. 7 (*xi*) (*cc*) and cannot be treated as a suit against a trespasser. A.I.R. 1941 Lah. 39=42 P.L.R. 784=194 Ind. Cas. 262.

——S. 7 (xi) (cc)—Applicability — Tenant setting up adverse title in himself and refusing to consider himself as tenant—Termination of tenancy—Suit by landlord for possession.

S. 7 (*xi*) (*cc*), Court-fees Act, applies only if the suit is by a landlord for recovery of immovable property from his tenant, which includes a tenant holding over after the determination of the tenancy. When a person is a tenant holding over, he continues in his character as a tenant and the law implies a contract of tenancy which the parties have not actually made. This, of course, cannot obtain when the tenancy has been determined because the tenant sets up an adverse title in himself and refuses to consider himself a tenant. In such a case, S. 7 (*xi*) (*cc*) of

Court-fees Act, does not apply to a suit by landlord for possession of the property. If it does not apply, then the other alternative comes into operation, *viz.*, that the Court-fees must be paid on the market value of the property and then that becomes the value for purposes of jurisdiction under S. 8, Suits Valuation Act. A.I.R. 1938 Nag. 162=I.L.R. (1940) Nag. 391=174 Ind. Cas. 895.

——S. 7, Cls. (xi) (cc), (v)—Suit by assignee of landlord against tenant holding over.

A suit by a person claiming to be an assignee of the lessor's rights for recovery of possession from the lessee who holds over in spite of the termination of the tenancy is a suit by a landlord against a tenant to recover possession within S. 7, Cl. (*xi*) (*cc*) of the Court-fees Act and is not governed by S. 7, Cl. (*v*). A.I.R. 1937 Mad. 91=1936 M.W.N. 1374 =44 L.W. 800=71 M.L.J. 842=168 Ind. Cas. 462.

——S. 7 (xi) (cc)—'Holding over after the determination of a tenancy', scope of—Suit for ejectment of such tenant.

The expression "holding over after the determination of a tenancy" is wide enough to cover a case where a tenant continues to be in occupation even though the tenancy had been determined. Consequently, a suit for ejectment of such a tenant is governed by S. 7 (*xi*) (*cc*), Court-fees Act. A.I.R. 1935 Pat. 90=1 B.R. 333=154 Ind. Cas. 615.

——S. 7 (xi) (cc)—Suit for recovery of immovable property from tenant holding over.

The provision contained in S. 7, (*xi*), (*cc*), Court-fees Act covers those cases where a person was a tenant before but his tenancy has been determined since.

For a suit for recovery of immovable property from a tenant including a tenant holding over Court-fee is leviable according to the provisions of S. 7, (*xi*) (*cc*) of the Act A.I.R. 1933 Pat. 661 =14 P.L.T. 616=147 Ind. Cas. 1177.

——S. 7 (xi) (cc)—Suit to recover immovable property from alleged tenant—Ad valorem fee, if payable.

The Court-fee payable for a suit has to be determined on the nature of the allegations in the plaint and not on what is set up or pleaded in the defence.

In a suit based on the alleged relationship of landlord and tenant, Court-fee need not be paid *ad valorem*, but only under S. 7 (*xi*) (*cc*), Court-fees Act. A.I.R. 1932 Mad. 409=35 L.W. 393=138 Ind. Cas. 88.

——S. 7 (xi) (cc)—Applicability.

Under S. 7 (*xi*) (*cc*), Court-fees Act, one year's rent is the proper valuation of a siut for recovery of immovable property from a tenant, including a tenant holding over after the determination of the tenancy. A.I.R. 1931 Bom. 234=33 Bom.L.R. 263= 136 Ind. Cas. 176.

——S. 7 (xi) (cc)—Applicability—Declaration of title.

Where a plaintiff instead of merely claiming to be the landlord wants a declaration of his title also, the prayer as to declaration cannot be called unnecessary and so the suit will be governed by S. 7 (*iv*) (*c*) and not by S. 7 (*xi*) (*cc*). 119 Ind. Cas. 577=29 M.L.W. 760=1929 M.W.N. 239=A.I.R. 1929 Mad. 529.

——S. 7 (xi) (cc)—Ejectment—Trespasser.

A tenant whose tenancy has been determined and is not a tenant holding over, is a trespasser holding over. A suit for ejectment of such a tenant does not fall within the meaning of S. 7 (*xi*) (*cc*) and the suit must be valued otherwise than under its provisions. 116 Ind. Cas. 374=32 C.W.N. 1113=A. I.R. 1928 Cal. 753.

——S. 7 (xi) (cc)—Ejectment—Trespasser.

Where the defendant remained in possession after the end of the period of tenancy, with the express disagreement of plaintiff, which was evidenced by the act that the latter gave him written notice to quit.

Held, the defendant could not be called a tenant holding over but that the suit was clearly for the possession of land held by a trespasser, and fell under Clause (*v*) and not under Cl. (*xi*) (*cc*) of S. 7. 74 Ind. Cas. 93=8 N.L.J. 63=A.I.R. 1923 Nag. 310.

——S. 7 (xi) (cc)—Ejectment—Valuation.

The Court-fee payable on a suit for ejectment from a house against a tenant is chargeable on one year's rent under S. 7 (*xi*) (*cc*) of the Court-fees Act and not on the market value of the house. In such suits the valuation for purposes of jurisdiction and Court-fees is the same. 93 Ind. Cas. 291=13 O.L.J. 473.

——S. 7 (xi) (cc)—Ejectment—Valuation.

Where in a suit for ejectment the plaintiff put up a valuation of Rs. 1,080 and Rs. 15,000 for Court-fee and jurisdiction respectively but the defendant on appeal adopted only the former valuation for both.

Held, for the purpose of pleaders' fees, the actual value of the house should be taken. 46 Bom. 396= 64 Ind. Cas. 1000=23 Bom.L.R. 1183=A.I.R. 1923 Bom. 171.

——S. 7 (xi) (cc)—Ejectment after notice.

A suit for ejectment after notice to quit has been served upon the tenant, although the suit may involve the determination of the title, and the tenancy may have been determined, is governed by S. 7, Cl. (*xi*) (*cc*) and should be valued at the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the suit. 57 Cal. 349=33 C.W.N. 769=A. I.R. 1930 Cal. 42.

——S. 7 (xi) (cc)—Ejectment.

Although a tenant or a tenant holding over is a trespasser and not a tenant of any one kind after he has refused to comply with a proper notice to quit, the claim in a suit for ejectment of such a tenant must be regarded with reference to the facts existing when the cause of action accrued and not to the state of things when the suit was filed. Up to the moment he gives rise to a cause of action by refusing to quit on demand, a tenant is still a tenant, and that is the point of time to which the suit for ejectment in consequence of that refusal must be referred. Hence a suit to eject such a tenant comes under S. 7 (*xi*) (*cc*) and not S. 7 (*v*) (*c*). 20 N. L.R. 124, Overruled. 99 Ind. Cas. 438 (2)=23 N. L.R. 5=10 N.L.J. 17=A.I.R. 1927 Nag. 156.

[Overrules 20 N.L.R. 124=84 Ind. Cas. 202=A.I. R. 1925 Nag. 121.]

——S. 7 (xi) (cc)—Ejectment — Tenant holding over.

The word 'tenant' uesd in Cl. (*xi*) (*cc*) seems to include a person to whom the description would apply immediately before the commencement of the suit but whose tenancy has terminated entitling the landlord to eject him. A tenant, who was the *thikadar*

and whose *thikadari,* interest has expired but who refuses to quit, whatever the reason may be, comes within the Clause (*cc*) of paragraph (*xi*) of the section, and that section applies where in such circumstances the landlord brings a suit to eject him. 74 Ind. Cas. 619=2 Pat. 260=4 P.L.T. 666=A.I.R. 1923 Pat. 380.

——S. 7 (xi) (cc) — Ejectment—Tenant holding over.

Suit to recover immoveable property from a tenant including the tenant holding over after the determination of tenancy is to be valued according to the rent for the next year before suit. 27 P.R. 1910=30 P.W.R. 1910=210 P.L.R. 1910=5 Ind. Cas. 910.

——S. 7 (xi) (cc)—Forfeiture.

Value of a suit for possession of lease property on the ground of termination of tenancy by forfeiture is not the value of the property itself but amount of rent payable for the year next before the date of the plaint. 83 Ind. Cas. 1=5 L.R.A. (Civ.) 709=A.I.R. 1925 All. 142.

——S. 7 (xi) (cc)—Interpretation.

The word "tenant' means an ex-tenant that is a person who was a tenant but has now ceased to be so. The words "including a tenant, etc.," after the word "tenant" amplify the meanng of the word "tenant" rather than restrict it. 33 C.W.N. 769=57 Cal. 349=A.I.R. 1930 Cal. 42.

——S. 7 (xi) (cc)—Scope—Cases where tenancy can be denied by the defendant—Procedure.

S. 7 (*xi*) (*cc*), is not confined to cases where the defendant is clearly estopped from denying the plaintiff's title. If a landlord sues a tenant for the possession of immoveable property, the Court-fee must bt assessed under S. 7 (*xi*) (*cc*). It is then open to the defendant to deny that the relationship of landlord and tenant exists between him and, the plaintiff. If he succeeds the plaintiff will be unsuited; and cannot in a suit of this character, fall back upon an alternative plea that defendant is a trespasser liable in damages for use and occupation. If the defendant fails to establish his contention the landlord will be entitled to his remedy. 35 M.L.J. 281, Rel. on. The mere fact that the defendant denies the relationship of landlord and tenant does not remove the suit from the category of one assessable under S. 7 (*xi*) (*cc*) necessitating the rejection of the suit and leaving the plaintiff to bring a fresh suit for a declaration of title as landlord and consequent remedies, and if thre is some technical Court-fee difficulty, it can be got over by allowing plaintiff to pay the necessary additional sum. 24 C.W.N. 151, Rel. on. 25 M.L.W. 76=99 Ind. Cas. 981=A.I.R. 1927 Mad. 331=52 M.L.J. 100.

——S. 7 (xi) (cc)—Suit against tenants and other holding over.

In a suit by a landlord against his tenants and others, who were holding over after the period of their tenancy, for recovery of possession of immoveable property, the Court-fee is to be paid on the amount of the rent of the property in suit payable for year next before the date of presenting the plaint. Suit by a landlord against several persons for *khas* possession cannot proceed without a prayer for declaration of title, if some of them do not stand in the relation of tenants. 24 C.W.N. 151=55 Ind. Cas. 178.

——S. 7 (xi) (cc)—Madras Civil Courts Act.

The valuation for purposes of jurisdiction of a suit to recover possession of land from a tenant is not its market value under S. 14 but one year's rental payable by the tenant, for the year next before the date of presenting the plaint under S. 7 (*xi*) (*cc*), of the Court-fees Act. 39 Mad. 873=28 M.L.T. 398=2 L.W. 1031=29 M.L.J. 572=31 Ind. Cas. 104.

——S. 7 (xi) (cc)—Suit in ejectment—Competency of Court to enquire into title.

Where plaintiffs—landlords instituted a suit for ejectment and arrears of rent against defendants-tenants by paying a stamp duty calculated on one year's rent under S. 7 (*xi*) (*cc*) the Court will not go into the question of title. 1 L.W. 641=27 M.L.J. 475=27 Ind. Cas. 162.

——S. 7 (xi) (cc) and Sch. II, Art. 17 (iii)—Suit for possession on expiry of lease—Decree but with direction that it should remain suspended for a period—Appeal against the direction—Court-fee payable.

Where in a suit for possession on the failure of a lessee to deliver vacant possession on the expiry of the lease a decree is passed for ejectment with a direction that it should remain suspended for such time as an order passed under the Defence of India Rules remained in force and the plaintiff appeals against the direction the Court-fee payable is the same as that which was payable upon the plaint. I.L.R. (1947) A. 225=1946 A.L.W. 597=1946 A.W.R. (H.C.) 617=1946 A.L.J. 480=A. I. R. 1947 A. 170.

——S. 7 (xi) (cc)—Suit—Valuation.

Suits between landlord and tenant have to be valued for Court-fees upon the rent for the previous year and the valuation for the jurisdiction is the valuation for the Court-fees. 12 A.L.J. 933=25 Ind. Cas. 975.

——S. 7 (xi) (cc)—Suit for recovery of immovable property from tenant—Valuation for court-fees and jurisdiction.

In a suit for the recovery of immoveable property from a tenant the valuation is the same for Court-fees as well as for jurisdiction. 38 Mad. 795=26 M.L.J. 573=24 Ind. Cas. 374.

——S 7 (xi) (cc)—Valuation.

The proper way for determining the value of a suit for declaration in respect of immoveable property for jurisdiction purposes is to adopt the mode of valuation of a suit brought by a landholder for the recovery of possession of immoveable property from a tenant holding over after the period of the tenancy under S. 7, Cl. (*xi*) (*cc*). 12 Mad. 223 and 5 Pat.L.J. 397, Rel. on. The plaintiffs cannot value the suit as they like or ask the Court to take the market value of the land as the value for the purposes of jurisdiction. 25 M.L.W. 367=101 Ind. Cas. 85=A.I.R. 1927 Mad. 568=52 M.L.J. 323.

——S. 7 (xi) (e). *See* SCH. II, ART. 5.

——S. 7 (xi) (e)—S. 7 (xi) (e) does not apply to suit brought against landholder along with trespasser. (Per Rajamannar, J., in the Order of Reference).

A suit for possession by plaintiff alleging that he is entitled to occupancy rights in the land and that the first defendant landholder is not entitled to lease the land to defendant 2 and to put him in possession does not fall under S. 7 (*xi*) (*e*) as the suit is not only against landholder but also against another person who according to plaintiff is in the position of a trespasser. A.I.R. 1946 Mad. 322=(1946) 1 Mad.L.J. 190=59 M.L.W. 141=1946 M. W. N. 138.

——S. 7 (xi) (e)—Applicability.

Where a suit was instituted by a person alleging that he was a tenant who was dispossessed by his landlord, against landlord and a third person who was in possession of property:

Held, that the suit was not one between landlord and tenant governed by S. 7 (*xi*) (*e*). A.I.R. 1933 Nag. 312=29 N.L.R. 367=147 Ind. Cas. 749.

——S. 7 (xi) (e)—Applicability—Person inducted by landlord joined as a party.

The Court-Fees Act being a fiscal enactment must in cases of ambiguity be construed in favour of the public, Cl. (*xi*) refers to suits between the landlord and the tenant. There is no reason why Cl. (*xi*) should be limited to suit where the landlord and the tenant alone are parties and should not apply to a suit, where in order to avoid any unnecessary delay in execution proceedings a person inducted by the landlord is joined as second defendant to the suit. 32 Cal. 268, Not appr. 87 Ind. Cas. 1002=A.I.R. 1925 Sind 275.

——S. 7 (xi) (e)—Scope—Suit by tenant under S. 87 (3) of Bengal Tenancy Act—Proper valuation.

S. 7 (*xi*) (*e*) of the Court-Fees Act exactly covers the type of suit which the tenant can bring under S. 87 (3) of the Bengal Tenancy Act. The proper valuation of such suit is the amount of annual rent paid immediately before the institution of the suit. I.L.R. (1948) 2 Cal. 386=A.I.R. 1948 Cal. 200.

——S. 7 (xi) (e)—Suit by tenant against landlord and others in possession for possession of holding.

S. 7 (*xi*) (*e*) of the Court-Fees Act does not apply to a suit for possession of an occupancy-holding by a tenant against his landlord and others whom the landlord had inducted upon the land, and the court-fee on it must be computed on the market value of the property. 32 C. 268.

——S. 7, Cl. (xi) (e) (v)—Suit to recover possession of land—Landlord and tenant—"Occupancy of land"—'Ejected"—Suits against landlord and persons claiming melwaram under the landlord.

A suit by a tenant for possession as against his landlord and other persons in possession claiming under the landlord does not fall under Cl. (*xi*) (*e*) of S. 7 of the Court-fees Act, especially where the persons claiming under the landlord are not persons in actual possession; but merely lay claim to the melwaram rights in the land. The suits fall under Cl. (v) of S. 7 and is a "suit for possession of lands, houses, etc."—*Semble*:—The words "occupancy of land" and "ejected" in Cl. (*xi*) (*e*) are applicable to cases where the defendants are ryots or persons in actual physical occupatioon and not to cases where the defendants lay claim only to the melvaram in the land. 17 M.L.J. 478=31 M. 14 =3 M.L.T. 8.

——S. 7 (xi) (f)—Applicability—Periodical payments.

A suit for a declaration that plaintiff is liable to pay *Achu palisha* a kind of royalty payable to a hill owner, at a rate lower than that claimed by the defendants does not fall within S. 7, cl. (1) or cl. (*iv*) (*e*) or cl. (*xi*) (*f*). It is a pure suit for a declaratory decree without any consequential relief and plaintiff cannot be allowed to put for jurisdictional value anything more than the value of the subject-matter in dispute which is the capitalised value of the difference between plaintiff and defendant's claims. 79 Ind. Cas. 343=19 M.L.W. 668=34 M.L.T. 271=A.I.R. 1924 Mad. 621 =46 M.L.J. 377.

——S. 8—*See also* COURT-FEES ACT, SCH. II, ART 17, (IV).

——S. 8. *See also* COURT-FEES ACT, SCH. II,

The phrase "acquisition of land" in S. 8 of the Court-Fees Act is equally applicable to the acquisition of a limited interest (*e.g.*) an occupancy raiyat's interest in the land, or a tenure-holder's interest together with the right to khas possession. The term 'acquisition' in the section also includes temporary acquisition for a limited period. I.L.R. (1946) 2 Cal. 547=225 Ind. Cas. 606=50 C.W.N. 820=81 C.L.J. 118=A. I. R. 1946 Cal. 524.

——S. 8—Act for acquisition of land for public purposes—What is.

Any Act which authorises the acquisition of land for public purposes and provides the machinery for assessment and payment of compensation, is an Act for the acquisition of land for public purposes within the meaning of S. 8 of the Court-Fees Act even if the greater part of fits provisions deals with other objects. I.L.R. (1946) 2 Cal. 547=225 Ind. Cas. 606=50 C.W.N. 820=81 C.L.J. 118=A.I.R. 1946 Cal. 524.

——S. 8 and Sch. II, Art. 17 (vi)—Appeal against order awarding compensation for debottar property acquired under Land Acquisition Act—Court-fee payable.

In an appeal filed against an order awarding compensation for *debottar* property acquired under the Land Acquisition Act, the Court-fee payable is *ad valorem* on the amount determined under S. 8 of the Court-Fees Act. It is for the party in the first place, to state the valuation and the Registrar may investigate as far as he thinks necessary. If the appellant claims the entire compensation money as executor to the will of a person who created the *debottar* and has no personal interest in the money, the difference in the amount awarded so far as he is concerned, namely, *nil* and the amount claimed so far as he is concerned would appear to be also *nil*. If it can be shown that he has some personal interest in the matter in any way, it may be that some value should be placed on that and that he should pay Court-fee accordingly. The estimated amount of the value to the executor of the order he seeks to obtain, whatever that may be, cannot be the full amount of the compensation awarded for the property. The Court-fee payable is clearly not governed by Sch. II, Art. 17 (*vi*) of the Court-Fees Act. 54 C.W.N. 496=A.I.R. 1950 Cal. 434.

——Ss. 8 and 11—Appeal—Amendment of valuation.

Generally, an appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed, and the additional court-fee paid in. 30 C. 516.

——Ss. 8, 11—Appeal under Land Acquisition Act—Valuation.

In cases under the Land Acquisition Act, the decree awarded in appeal must be limited to the amount for which court-fee has been paid on the memorandum of appeal; for such cases do not come within S. 11 of the Court-Fees Act. 30 C. 501.

——S. 8—Applicability—Award for requisition under S. 19, Defence of India Act.

A memorandum of appeal from an award made by an arbitrator under the provisions of S. 19 of the Defence of India Act for requisition of land, is governed by S. 8 of the Court-Fees Act. The award is neither a decree nor an order having the force of a decree. I.L.R. (1946) 2 Cal. 547=225 Ind. Cas. 606=50 C.W.N. 820=81 C.L.J. 118=A.I.R. 1946 Cal. 524.

——S. 8 and Sch. II, Art. 11—Applicability—Arbitrator under Defence of India Act—Award, if an order—Appeal—Court-fee.

The Court-fees Act itself does not define the word "order" for the purposes of S. 8, but the word must be taken to mean an order as defined in S. 2 (14), C. P. Code.

There is no provision in S. 19, Defence of India Act or in the Rules made thereunder, by which the award of the arbitrator can be deemed to be an award of the Court under the Land Acquisition Act. It cannot be regarded as an "order" within the meaning of S. 8, Court-fees Act also. And an appeal from such an order will, therefore, fall under Art. 11 of Sch. II of Court.fees Act. A.I.R. 1945 Bom. 348=47 Bom.L.R. 327=I.L.R (1946) Bom. 707.

——S. 8—Applicability—S. 8 is not itself a charging section. It merely provides a rule for computing *ad valorem* fee payable under the Act in certain classes of cases on the assumption that under some other provision of the Act an *ad valorem* fee and not a fixed fee is chargeable. A.I.R. 1945 Bom. 348 =47 Bom.L.R. 327=I.L.R. (1946) Bom. 707.

——S. 8, Sch. II, Art. 11—Applicability—Appeal under S. 30, Workmen's Compensation Act, against order awarding compensation—Court-fee payable.

In an appeal under S. 30, Workmen's Compensation Act, against the order of the Commissioner awarding compensation under the Act, the court-fee payable is that fixed by Art. 11 of Sch. II of the Court-fees Act, for such an order has not the force of a decree. S. 8 of the Court-fees Act has no application. A.I.R. 1944 Oudh 83=19 Luck. 460=1943 O.W.N. 427=1943 A.W.R. 137=210 Ind. Cas. 288.

——S. 8, Sch. II, Art. 17 (iv)—Applicability—Order of compensation by Tribunal constituted under U. P. Towns Improvement Act (8 of 1919)—Appeal against such order, if comes under S. 8—Court-fee payable—Sch. I, Art. 1, applicability of.

An order of compensation passed by a Tribunal constituted under U. P. Towns Improvement Act is an order of a Civil Court and the court-fee payable on a memorandum of appeal against such an order comes under S. 8, Court-fees Act, and is to be paid on the difference between the amount awarded and the amount claimed by the appellant and it should not be a fixed court-fee under Sch. II, Art. 17 (*iv*), Court-fees Act. S. 8 will apply whether the appellant is the person claiming compensation or whether the appellant is the Secretary of State. A.I.R. 1939 All. 127=1938 A.L.J. 1124 =I.L.R. (1939) All. 142=1938 A.W.R. 843=180 Ind. Cas. 73.

——Ss. 8, 7 (iv) (c)—Applicability—Property sold by widow acquirel compulsorily—Claim to compensation by reversioners and purchaser—Appeal—The case fell under Ss. 8 and 7 (*iv*) (*c*), Court-fees Act. A.I.R. 1935 Cal. 243=60 C.L.J. 216=39 C.W. N. 110=62 C. 331=155 Ind. Cas. 817.

——S. 8—Applicability.

S. 8 governs an appeal from an order deciding the question of apportionment in a reference under S. 18, Land Acquisition Act, where the appellant claims a larger share than that awarded. A.I.R. 1935 Lah. 448=38 P.L.R. 582=17 L. 122=159 Ind. Cas. 274.

——S. 8, Sch. I, Art. 1—Appeal from award of Calcutta Improvement Tribunal—Dispute only as to apportionment—No excess compensation claimed—Court-fee.

Held, that the appeal was governed by S. 8 and Art. 1, Sch. I of the Court-fees Act, and an *ad valorem* fee was chargeable on the memorandum of appeal under that Article.

The object of S. 8, Court-fees Act, is not to impose an *ad valorem* charge; it assumes that that has already been done. The purpose of that section is to say that the appellant is to be charged in the most favourable way. A.I.R. 1932 Cal. 346=35 C.W.N. 1103=59 Cal. 528=137 Ind. Cas. 469.

——S. 8—Applicability—Appellant not claiming amount of compensation.

S. 8. Court-fees Act, does not apply when the party does not lay claim to any amount in the land acquisition proceedings. A.I.R. 1932 Oudh 224= 9 O.W.N. 396=8 Luck. 85=139 Ind. Cas. 199.

——S. 8—Applicability—Dispute regarding apportionment of compensation—Appeal by claimant—Court-fee.

Where the appellant definitely claims a share in the compensation awarded for land acquired by Government under the Land Acquisition Act, court-fee is payable on the *ad valorem* scale on the value of the appellant's claim. A.I.R. 1931 Lah. 343 =32 P.L.R. 251=134 Ind. Cas. 127.

——S. 8—Appeal by Crown.

The inference drawn from the discrimination made between the claimant and the Secretary of State in the matter of Court-fees to be paid on appeal from the award of the Land Acquisition Judge in S. 8, Court-Fees Act, is no longer warranted by reason of the Land Acquisition Amendment Act [(1921) S. 2 (2)] making the Judge's decision a decree. 97 Ind. Cas. 140=A.I.R. 1927 Cal. 45.

——S. 8—Does not apply to appeal by Government against award by Judge under Land Acquisition Act. 78 Ind.Cas. 435=19 M.L.W. 207=1924 M. W.N. 108=34 M.L.T. 357=A.I.R. 1924 Mad. 489 =46 M.L.J. 150.

——S. 8—Determination of court-fee.

Where a person being dissatisfied with the amount of compensation awarded to him under S. 18 Land Acquisition Act, wants to appeal, insisting in case of his success that not only the excess market value but also 15 per cent. of the same should be decreed in his favour, he must pay court-fees not only on the excess market value but also on 15 per cent. thereon. 122 Ind. Cas. 523=53 Mad. 48=30 M.L. W. 242=1929 M.W.N. 599=A.I.R. 1930 Mad. 45 =57 M.L.J. 357.

——S 8—Effect.

In the matter of appeals relating to award of compensation under the Land Acquisition Act by parties claiming compensation money S. 8 of the Court-Fees Act, being a special provision, overrides the general provisions of Sch. II, Art. 17 (*iv*). 27 P.L.R. 91=92 Ind. Cas. 991=A.I.R. 1926 Lah, 343.

——S. 8—Interest in land claimed by Government—Apportionment.

Per *Shah and Hayward, JJ.*—When the Government claims an interest in the land, the so-called apportionment between the Government and the private claimant of the total compensation payable in respect of the property, is in substance the same thing as the determination of the amount payable by the Government to the claimant under the circumstances of the particular case, and so an appeal relating to such matter must be stamped *ad valorem* under S. 8 of the Court-Fees Act. 45 Bom. 277= 23 Bom.L.R. 148=64 Ind. Cas. 582=A.I.R. 1921 Bom. 325.

——S. 8—Interpretation—"Amount claimed by appellant."

In the case of an appeal by the Crown the words "the amount claimed by the appellant" in S. 8 mean "the amount the appellant claims should have been awarded". That is certainly not the natural meaning of the words, but if the section does apply to the case of an appeal by the Crown, then it is the only interpretation of the closing words of the section in such a case. 6 Rang. 281= 110 Ind. Cas. 870=A.I.R. 1928 Rang. 197.

——S. 8-B (3) (Bengal)—Deficit court-fee not paid within time fixed—Proper order to be passed.

Proper order for the Court to pass, when the deficit court-fee is not paid within time fixed by the Court, is an order for dismissal under the provisions of S. 8-B (3), Court-Fees Act, and not an order rejecting the plaint under the provisions of O. 7, R. 11, C. P. Code. A.I.R. 1940 Cal. 451=193 Ind. Cas. 144=I.L.R. (1940) 2 Cal. 166=44 C.W. N. 745.

——S. 8-C—Applicability.

S. 8-C, Court-Fees Act, is applicable to a case falling within S. 7 (*iv*) (*c*). A.I.R. 1940 Cal. 451= I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=193 Ind. Cas. 144.

——S. 8-C (Bengal)—Valuation of suit by Court—Defendant and not plaintiff before Court—Procedure.

The proper procedure in cases where the defendant and not the plaintiff is before the Court is for the Court to serve a notice on the plaintiff to appear in Court for the limited purpose of assessment of Court-fees, and if the plaintiff fails to appear in spite of such service of notice, the Court is authorised to put a valuation as best as it can in the circumstances of each particular case. 54 C.W.N. 139=A.I.R. 1950 Cal. 85.

——Ss. 8-C and 8-D (Bengal)—Enquiry by Court into market-value of land—Prayer for local investigation not allowed—Material irregularity—Revision.

For a proper assessment of the market-value of land, it is essential that a local investigation should be held. The value of the land, like the value of almost every other commodity, depends on its quality. In the case of land, this quality is made up, among other things, of its situation, its character whether it is firm land, or tank-filled land, whether it is high land or low, whether it is in a compact block or made up of small bits here and there and other features which need not be mentioned in detail. Satisfactory evidence on some of these points may perhaps be obtained by direct evidence; but no proper idea of the shape or situation of the land can really be obtained by a Court without the assistance of a map carefuly and correctly prepared as the result of a survey. In these circumstances, even where any party does not make a prayer for local investigation it is desirable that the Court holding enquiry, should either inspect the land itself, or have a proper map prepared by means of a local investigation by Commissioner appointed under the provisions of law. But where a party does make a prayer for local investigation, the Court acts with material irregulaity in not allowing that prayer and the High Court can exercise its powers under S. 115, C. P. Code. A.I.R. 1949 Cal. 659.

——S. 8-C (Bengal)—Scope.

It is open to trial Court to revise under S. 8-C, Court-Fees Act the valuation of relief under S. 7 (*iv*) (*c*). A.I.R. 1941 Cal. 509=197 Ind. Cas. 128.

——S. 8-C (Bengal)—Scope.

Trial Court accepting valuation in plaint and holding that exact value of claim cannot be ascertained and that S. 8-C (Bengal amendment) cannot help—Decision affecting jurisdiction—Decision can be revised under S. 115, C. P. Code. A.I.R. 1938 Cal. 161=42 C.W.N. 192=177 Ind. Cas. 893.

——S. 8-C (Bengal)—Suit falling under S. 7 (iv)—Court finding plaintiff's valuation to be wrong—Court must estimate correct and reasonable valuation under S. 8-C—Suit to set aside decree—Standard of valuing relief stated.

Although a satisfactory valuation may not be possible in the majority of the cases, when once the Court has formed the opinion that the plaintiff's estimate is wrong, it becomems the duty of the Court to estimate a correct and reasonable valuation of the relief claimed and it follows that it will be for the Court to decide, on the merits of each particular case whether the provisions of S. 8-C of the Act should be invoked for the purpose of revising the plaintiff's valuation. If the relief claimed is impossible to value, the Court is, of course, not in a position to say that such relief has been wrongly valued and there is consequently no scope for the operation of S. 8-C, Court-Fees Act, but in a suit where it is sought to set aside a decree such valuation, although difficult, is not impossible. In a suit to set aside a decree, *prima facie* the value of the relief claimed by the plaintiffs would be the value of the decree and the onus would clearly lie on them to show that this relief should be valued at some smaller amount. If in the course of the enquiry the assets of the plaintiffs are found to exceed the value of the decree, the relief claimed should be valued at the amount of the decree and, if they are of a smaller value than the amount of the decree, the value of the relief will be the market-value of the assets. A.I.R. 1940 Cal. 482=I.L.R. (1940) 1 Cal. 409=192 Ind. Cas. 574.

——S. 8-C (Bengal)—Suit for declaration that plaintiffs were entitled to perform religious ceremonies every year in courtyards of defendant's palace—Enquiry under S. 8-C, if justified.

The plaintiff's instituted a suit against a Ruling Chief for a declaration to the effect that they were entitled to perform certain religious cermonies on the occasion of the Moharrum every year in one of the courtyards attached to the defendant's palace and they also asked for a perpetual injunction prohibiting the defendant from interfering with the plaintiffs by alleging his own title:

Held, that there was no difficulty in forming an estimate as to the extent of the loss which would be

incurred by the defendant if the plaintiffs succeeded in their suit. Obviously, in a case of this sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiffs seek to obtain if they succeed in their suit. From this point of view, therefore, there was objective standard of valuation which would justify the Court in holding an enquiry under S. 8-C, Court-Fees Act. A.I.R. 1939 Cal. 743=I.L.R. (1939) 2 Cal. 20=187 Ind. Cas. 51.

——S. 8-C (Bengal)—In a suit to obtain a declaratory decree or order in which consequential reliefs prayed, if plaintiff puts an entirely unreasonable valuation, the valuation may be revised by the Court by adopting the procedure laid down in S. 8-C (Bengal). 68 C.L.J. 144.

——S. 8-C (Bengal)—Suit for declaration of title to amount of Provident Fund—Prayer for injunction—Exact money value of claim—No distinction between right to money itself and right to recover money.

Where a suit for declaration of title to Provident Fund money amounting to a certain definite sum is brought with a prayer for injunction restraining the defendant from withdrawing such amount, there is no real distinction between the right to the money itself and the right to recover the money and, therefore, the exact money value of the claim can be ascertained under S. 8-C. (Bengal) that value being the amount of the Provident Fund. A.I.R. 1938 Cal. 161=42 C.W.N. 192=177 Ind. Cas. 893.

——S. 8-C (Bengal)—Suit wrongly valued—Court's duty to hold inquiry.

S. 8-C, Court-Fees Act, being a section in the taxing statute, it is the duty of the Court when the defendant pleads that the suit has been wrongly valued by the plaintiff, to hold a necessary enquiry and come to a decision after necessary enquiry whether the suit has been wrongly valued. It is true where there is no objective valuation, it is not possible to say that the plaintiff's valuation is wrong, but every case must be judged on its own facts. A.I.R. 1937 Cal. 748=41 C.W.N. 1339=I.L.R. (1938) 1 Cal. 196=174 Ind. Cas. 80.

——S. 8-D (Bengal)—Valuation of property—District Court's instruction to Subordinate Courts.

Issue of a chart by the District Judge setting valuation of different classes of lands in the district, and sent round to all Subordinate Courts is a serious interference with Court's judicial discretion and entirely unwarranted by the provisions of the Act. The propriety of such chart is questionable inasmuch as the Act provides that the Court may, if it questions the valuation, issue a commission for such local investigation as is necessary. 49 C.L.J. 562 =33 C.W.N. 845=A.I.R. 1929 Cal. 717.

——S. 9—Appointment of Commissioners—Powers of Court—Costs—Who is to bear.

The Court has power under S. 9 of the Court-Fees Act to appoint a Commissioner and if the appointment is warranted by the provisions of the section, the plaintiff would have to pay his costs though he may not have been appointed at the instance of either party. 61 L.W. 280=1948 M.W.N. 257= A.I.R. 1948 Mad. 345=(1948) 1 M.L.J. 269.

——S. 9—Costs of commission.

If a commission is ordered under S. 9 not at the instance of the plaintiff there is no power to make the plaintiff deposit the costs of the commission. 122 Ind. Cas. 630=50 C.L.J. 164=33 C.W.N. 952 =A.I.R. 1930 Cal. 65.

——Ss. 9, 10—Deficiency of court-fee not paid—Procedure.

A Munsif's procedure in hearing a suit on the merits before the court-fees which he regarded as insufficient were paid is not correct. 28 C. 334.

——S. 9—Procedure.

In a case depending upon valuation of property in dispute the proper course if the plaint is undervalued is to admit the plaint or memorandum and take steps under S. 9. 122 Ind. Cas. 630=50 C. L.J. 164=33 C.W.N. 952=A.I.R. 1930 Cal. 65.

——S. 9—Redemption suit—Valuation for jurisdiction.

Value for the purposes of jurisdiction of a suit for redemption of a mortgage is not the principal amount of the mortgage nor the value of the mortgaged property but the amount ultimately found to be due to the mortgagee-defendant. S. 8 of the Suits Valuation Act expressly excludes redemption suits from its operation. 78 Ind. Cas. 747=51 Cal. 737=28 C.W.N. 710=A.I.R. 1924 Cal. 783.

——S. 9—Scope—Appellant need not substantiate his valuation.

It is not in the power of the Court to call upon the appellant to produce evidence to substantiate the value which he has assessed upon the property in question. If the Court is of opinion that the value has been wrongly assessed, the Court can proceed under S. 9 but there is no provision whatever in the Court-Fees Act under which the Court can call on a party to prove that the Court-fee is what the party alleged to be and on his failure to do so dismiss his appeal for non-prosecution. 49 C.L.J. 562=33 C. W.N. 845=A.I.R. 1929 Cal. 717.

——S. 10—Pre-emption suit—Refund of Court-fee.

Suit for pre-emption of site—Improvement made before suit—Court-fee should be paid on sale price given in deed together with cost of improvements and if it is found when the suit was finally tried out that he had paid more, he can claim refund under S. 10. A.I.R. 1937 Lah. 239=39 P.L.R. 511=172 Ind. Cas. 392.

——S. 10—Case decided on merits and dismissed—Plaintiff asked to make good deficiency in court-fees—Procedure, if proper—Punjab Pre-emption Act (1 of 1913), S. 22.

The Judge, while dismissing the suit on the merits, is not justified in requiring the plaintiff to make good the deficiency in court-fee. The question of court-fee should be determmined at the earliest possible opportunity. If, on examining the plaint, the Court finds that the relief claimed was under-valued, it should require the plaintiff to correct the valuation within a time to be fixed by it, and if he failed to do so, the plaint should be rejected under O. 7, R. 11, C. P. Code. If the matter requires investigation, the Court should record the evidence of the parties bearing on the point and if it finds that the court-fee paid was insufficient, it should stay further proceedings in the suit and require the plaintiff to make good the deficiency within a specified time, and on his failure to do so, it should dismiss the suit under S. 10 of the Court-Fees Act. But where in a pre-emption suit, the Court proceeds to record findings on all issues and dismissing the suit against plaintiff on merits, directs him to pay the deficiency of court-fees within time, the procedure is not proper. This being so, the subsequent order directing that the

amount be deducted from the one-fifth of the purchase-price which had been deposited by the plaintiff under S. 22 of the Pre-emption Act cannot stand. A.I.R. 1935 Lah. 75=152 Ind. Cas. 799.

——S. 10—Non-payment.

S. 10 allows a Court to dismiss a suit for non-payment of the additional court-fee when it has jurisdiction to dismiss the suit. 51 Bom. 236=29 Bom. L.R. 280=101 Ind. Cas. 343=A.I.R. 1927 Bom. 257.

——S. 10—Deficiency in court-fee—Procedure.

Where in a suit for specific performance of a contract of sale, and for possession of the property agreed to be sold, the relief for specific performance is the main relief and not ancillary to the claim for possession, a separate court-fee must be paid in the Original Court as well as in the Appellate Court. Where on appeal, the court-fee is found to be deficient, an order should be made to make good the deficiency and in case of non-compliance the suit or appeal should stand dismissed. 60 Ind. Cas. 654 =23 O.C. 388.

——S. 10—Deficiency in court-fee—Procedure.

Where a Court finds a deficit in court-fee, the plaintiff should be ordered to make it up and on his failure to do so his suit should be dismissed as enjoined by Court-Fees Act, S. 10. 4 Pat. L.J. 703=56 Ind. Cas. 316.

——S. 10 (2)—Reduction of claim.

Quaere.—Whether an Appellate Court has power to allow a valuation of a claim in the Court below to be reduced in order to relieve a party from liability to pay the proper court-fee. 3 Pat. L. J. 101=43 Ind. Cas. 489.

——S. 10 and C. P. Code, O. 7, R. 11.

A plaintiff who fails to pay additional court-fee within the time allowed by the Court is liable to have his suit dismissed under S. 10 and not to have his plaint rejected under O. 7, R. 11. And he cannot be allowed the option to abandon part of his claim and retain that part for which he has paid court-fee, especially at the last moment. 16 Bom. L. R. 763=26 Ind. Cas. 746.

——S. 10—Deficient court-fee—Abandonment of portion of claim in respect of which the court-fee was deficient—Dismissal of suit.

When a plaintiff in the initial stage of the litigation abandons a portion of his claim, he is not compellable to pay court-fees in respect of the portion abandoned under penalty of having the whole of his suit dismissed. 1904 A.W.N. 198=1 A.L.J. 577=27 A. 151.

——Ss. 10 (2) and 12 (2)—Procedure—Court-fee paid on plaint found deficient at stage of second appeal—Proper order to be made—Order for payment within two weeks and in default appeal to stand dismissed—Propriety—Interpretation—Non-payment of deficit court-fee—Application for restoration — Competency — Inherent powers.

Where in a second appeal in a partition suit, it was found that the court-fee paid on the plaint in the suit in the lower Courts was insufficient, and an order was made directing payment of the deficit court-fee within two weeks and also directing that in default of such payment the appeal would stand dismissed, and the order having become final on default in payment of the deficit court-fee, an application for restoration of the second appeal under S. 151, C. P. Code, was made:

Held, (*i*) that under S. 10 (*ii*) read with S. 12 (*ii*) of the Court-Fees Act, the proper and correct order to be passed would be to direct the dismissal of the suit on default in payment and to direct the dismissal of the appeal as having become infructuous in consequence and not to direct the dismissal of the appeal only;

(*ii*) that the order actually passed not having taken that form, it should be interpreted on its own terms as an order of dismissal for default, in respect of which an application for restoration under S. 151, C. P. Code, could be entertained by the Court. A.I.R. 1950 Pat. 358.

——Ss. 10 (ii) and 12 (ii)—Deficiency in court-fee in lower Court—Proper procedure in appeal.

Where in an appeal which comes for hearing the appellate Court discovers that the court-fee paid by the appellant in the Court below was insufficient, the appellate Court should under S. 12 (*ii*) read with S. 10 (*ii*) of the Court-Fees Act stay the hearing of the appeal until the deficit is paid by the appellant. There is a duty cast on the appellate Court to realise the deficit when the suit comes before it in appeal and to stay the appeal till the additional fee is paid; and if it is not paid within the time fixed, it must dismiss the appeal, even when the appeal is posted under O. 41, R. 11, C. P. Code. If the appeal comes to be dismissed under O. 41, R. 11, C. P. Code, the Court has no power thereafter to realise the deficit court-fee. 5 P.L.J. 508; 106 Ind. Cas. 335, foll. 29 Pat. 14=A.I.R. 1950 Pat. 239.

——S. 10 (2)—Court-fee—Net profits or market-value wrongly estimated—Limitation—C. P. Code, S. 54.

Where acton is taken by a Court under S. 10 of the Court-Fees Act, 1870, the Court is not bound as in the case of action taken under S. 54, C. P. Code, to fix a time within the period of limitaton for the suit within which the deficiency in the court-fee must be made good, that section applying to a different stage of the suit from that contemplated by S. 54, C. P. Code. 2 M. 308, Foll. (1903) 1904 A.W.N. 224=1 A.L.J. 641=27 A. 197.

——Ss. 10 and 12—Deficiency in the lower Court—Rejection of appeal under O. 41, R. 11, C. P. Code.

After an appeal is dismissed by the High Court under O. 41, R. 11 the Court has no power to recover from the respondent a deficiency in the court-fee due on a memo. of appeal filed by him in the lower Court. If in such a case the second appeal resulted in a decree in the respondent's favour, the High Court would refrain from signing the decree until payment of the deficit court-fee. When it is intended to recover a deficit from the respondent before the High Court in respect of something due in the lower Court, the appeal should be admitted for hearing and action taken under S. 12 read with S. 10. 5 Pat. L.J. 508=58 Ind. Cas. 271.

——Ss. 10 and 12—Deficiency in court-fee on plaint—Power of Appellate Court to call upon respondent to pay deficiency—C. P. Code, O. 7, R. 11—Applicability of.

If a plaintiff-respondent fails to make good a deficiency in the court-fee paid on the plaint, it is competent to the Appellate Court to call upon him to pay the deficit; and in the event of his failure to dismiss the suit. O. 7, R. 11 of the C. P. Code is not applicable to a case in which an Appellate Court acts under S. 12 of the Court-fees Act. In such a case the rejection of the plaint is inappropriate and the

law enjoins a dismissal without option, though it may be that the result of the dismissal, from the point of view of *res judicata*, is the same as a rejection. 4 Pat. L.J. 703=56 Ind. Cas. 316.

——S. 10—Deficient Court-fee—Objection in appeal by defendant appellant that plaint not properly stamped.

Where a plaint is not properly stamped and a decree is given in plaintiff's favour and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the Court of first instance. 14 M.L.J. 144.

——S. 10, 12—Court-fee—Procedure—Second appeal to lower appellate Court by respondent in High Court insufficiently stamped.

Where it was discovered in second appeal in the High Court that the respondents, when appellants in the lower appellate Court had not paid a sufficient court-fee on their memorandum of appeal in that Court, and, up to the date of the hearing of the plaintiff's appeal in the Court, though called upon to do so, had not made good the deficiency,

Held, that the proper procedure was not to dismiss the respondent's appeal to the lower appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondents until such time as the additional court-fee due by them might be paid. 20 A. 362, foll.; 1905 A.W.N. 277=1 A.L.J. 392, overruled. 1905 A.W.N. 280 =28 A. 270=2 A.L.J. 839 (F.B.).

——S. 10, Cl. (2)—Deficiency of court-fee found on the day of presentation—Deficiency made good within time fixed—Limitation—Suit not barred.

A Munsif returned a plaint for want of jurisdiction to be presented to the proper Court. Next day it was presented to the Sub-Judge's Court but the *Munsarim* of that Court reported that the court-fee was deficient. The Sub-Judge heard the parties on a date fixed and being satisfied as to the deficiency, granted further time to make it good. The deficiency was paid up within time and then the suit was registered:

Held, that the Sub-Judge rightly acted under S. 10 in staying the suit until the deficiency had been made good within the time granted by him. The principles laid down in the Full Bench ruling, in 29 All. 749 (F.B.), applied to the case and the suit was not barred. 6 M.L.T. 360=3 Ind. Cas. 830.

——S. 10 (2)—Reference in S. 10 (2) to the "suit" must be read as a reference to "appeal". A.I.R. 1942 Bom. 151=44 Bom. L.R. 117=200 Ind. Cas. 323.

——S. 11.

Synopsis.

1. Administration suit.
2. Appeal in mortgage suit.
3. Applicability.
4. "Decree".
5. Decree with condition that it cannot be executed unless court-fee paid.
6. Decree for payment of court-fee.
7. Decree in excess of claim.
8. Effect of non-payment.
9. Execution on payment of extra court-fee.
10. Extension of time.
11. Interest.
12. Mortgage suit.
13. Order to pay additional court-fee and dismissing suit in default.
14. Suit for accounts.
15. Suit on tort.
16. Suit for dissolution of partnership.
17. Valuation of suit.
18. Value of relief ascertained after trial.
19. Scope.

1. Administration suit.

——S. 11—Administration suit—Ad valorem-fee.

Every creditor, putting his claim after the preliminary decree and the settlement of the claims of other creditors, must pay *ad valorem* fee. 44 Cal. 890=24 C.L.J. 448=21 C.W.N. 310=38 Ind. Cas. 835.

2. Appeal in mortgage suit.

——S. 11—Appeal in mortgage suit—Appellate Court giving higher amount than original Court

In a suit on mortgage a decree was passed by lower Court for an amount less than the amount claimed in plaint. On appeal the High Court decreed the full claim with interest and the amount according to High Court's decree came to much in excess:

Held, that there is no provision in the Court-Fees Act under which a party may be called upon to pay additional court-fee upon the excess found due by the appellate Court, and the judgment having been passed, the office cannot refuse to draw up the decree in terms of the judgment. 8 P.L.T. 331=105 Ind. Cas. 395=A.I.R. 1928 Pat. 58.

——S. 11, Sch. II, Art. 17 (vi)—Appeal in mortgage suits.

The plaintiffs, in whose favour a decree for sale on a mortgage had been passed allowing interest up to the date fixed by the decree for payment of the mortgage money, appealed on the ground that interest should have been allowed up to the date of realization:

Held, that the proper court-fee payable on the memorandum of appeal was ten rupees, as provided by Art. 17 (*vi*) of the second schedule to the Court-Fees Act. (12 Bom. H.C.R. 227, foll.) 1905 A.W.N. 84=1 A.L.J. 263=27 A. 559.

3. Applicability.

——S. 11—Applicability.

The principle of S. 11 is equally applicable to an appeal as to a suit, and the principle is that when the value of the relief sought has been ascertained, the uncertainty vanishes, and the party who has to pay the court-fee must pay the full court-fee upon the ascertained amount. A.I.R. 1938 Rang. 23= 1937 Rang. L.R. 369=174 Ind. Cas. 663.

——S. 11—Applicability.

S. 11, Court-Fees Act, also applies to appeals. A.I.R. 1936 Lah. 458=160 Ind. Cas. 642.

——S. 11—Applicability of final provision to first paragraph.

The final provision of S. 11 of the Court-Fees Act does not apply to the conditions set forth in the first paragraph of that section. 11 Ind. Cas. 73 (Cal.).

——S. 11, Applicability—Proceedings under O. 20, R. 12, Civil P. C.—S. 11, Part 2 has no application.

Under O. 20, R. 12, C. P. Code, the mesne profits have not to be determined in execution proceedings but have to be determined before the passing of the final decree. Section 11, second part, Court-

Fees Act, has, therefore, no application to such a case but part I applies. A.I.R. 1946 Sind 58=I. L.R. (1945) Kar. 313=223 Ind. Cas. 611.

——S. 11—Applicability — Suit for possession and mesne profits—Decree fixing rate of future mesne profits — Execution application for future profits at rate fixed—Court-fee.

Where the decree in a suit for possession awards possession and fixes the mesne profits or rents from the date of suit at a certain fixed amount per year it is partly preliminary and partly final. An execution application claiming the mesne profits calculated at the rate fixed for several years is leviable to court-fee under S. 11, Court-Fees Act. I.L.R. (1945) Kar. 313=223 Ind. Cas. 611=A.I.R. 1946 Sind 58.

——S. 11—Applicability—Mesne profits—Plaint specifically claiming future mesne profits—No tentative valuation made nor any Court-fee paid on that claim — O. 7, R. 2, Civil P. C. does not apply—Separate Court-fee not payable.

O. 7, R. 2, C. P. Code, has no application to future mesne profits so as to compel the plaintiff to give a tentative valuation to such relief in his plaint. This is so because, in view of the provisions of O. 20, R. 12, C. P. Code, the Court has got power to award future mesne profits even if they are not specifically claimed. This is a relief which can be granted without being asked. Consequently no question of putting a separate valuation upon that relief can arise when the claim is specifically included in the plaint; and no separate court-fee is required to be paid. A.I.R. 1946 Oudh 59=1945 O.W.N. 398.

——S. 11 (Sind)—Applicability — Decree fixing rate of future mesne profits—Application for execution for amount of profits at such rate—Court-fee.

Where the decree in a suit for possession of immoveable property and mesne profits, past and future, fixes mesne profits from date of suit at a certain figure, the declaration as to the right to recover, at a particular date, future mesne profits is not the same thing as passing a final decree for such mesne profits. The decree in so far as it declares the payment of mesne profits at a particular rate per year is only preliminary and court-fee is leviable under S. 11, Court-Fees Act, if the decree-holder applies to execute the decree for the amount of future profits calculated at the rate fixed or declared. I. L.R. (1945) Kar. 310=222 Ind. Cas. 499=A.I.R. 1946 Sind 19.

——S. 11—Applicability.

In a suit for mesne profits, on 6th January, 1936, Court accepting report of Commissioner and ordering drawing up final decree and also observing that decree should not be prepared until deficit court-fee was paid—Deficit made good on 1st December, 1938—Decree drawn up on 30th January, 1939, and signed on 11th January, 1939—Execution application on 17th January, 1940:

Held, that the date of decree must be taken to be date of the judgment, *i.e.*, 6th January, 1936. The question of court-fee payable was a mere matter of calculation. The application made on 10th September, 1938, for assessment of deficit court-fee and for preparation of final decree was not a step-in-aid.

Per *Rowland, J.*—S. 11, Court-Fees Act in no way requires the Court to postpone the passing or the drawing up of a decree for mesne profits. What the section says is that the decree shall not be executed until the court-fee is paid. Ordinarily, the Court is expected to follow the provisions of C. P. Code, for example, S. 30. A.I.R. 1942 Pat. 410=21 Pat. 366=23 P.L.T. 202=8 B.R. 631=199 Ind. Cas. 818.

——S. 11 (Beng.)—Applicability—Suit for possession and future mesne profits—Claim for mesne profits neither tentatively valued nor court-fee paid—Prayer for amendment of plaint by valuation of claim and payment of court-fee can be granted at any stage of suit. A.I.R. 1941 Cal. 1=72 C.L.J. 14=193 Ind. Cas. 578.

——S. 11—Applicability—Section, if applies also to cases governed by para. 2—No order fixing time for payment of additional Court-fee—Dismissal of suit—Propriety of.

In cases within the first paragraph of S. 11, Court-fees Act, non-payment of the balance of court-fee merely postpones the date on which the decree can be executed, while the second paragraph is only applicable where the amount of mesne profits is left to be ascertained in the course of the execution of the decree. The concluding sentence of the second paragraph does not apply to the cases mentioned in the first paragraph as well as to those governed by the second. Where the account directed by the decree is not an account of mesne profits nor is it so described, second paragraph does not apply.

The statute does not forbid the Court to extend time for payment or require the Court to act unreasonably. Where at no time was there in existence an order fixing the amount and limiting a time for payment, still less was there a peremptory order on the footing that the plaintiff was in default, an order dismissing the suit with costs by reason that additional court-fee had not been paid is not a reasonable one and cannot be allowed to stand. A. I.R. 1937 P.C. 163=1937 A.W.R. 1021=3 B.R. 503=18 P.L.T. 445=1937 M.W.N. 678=41 C.W. N. 814=39 P.L.R. 472=39 Bom.L.R. 787=46 L. W. 152=I.L.R. (1937) Lah. 502=65 C.L.J. 387 =1937 A.L.J. 1000=1937 O.W.N. 699=31 S.L. R. 367=64 I. A. 191=(1937) 2 M. L. J. 1=168 Ind. Cas. 427 (P.C.).

——S. 11—Applicability—Claim for future mesne profits—Court-fee—Claim disallowed by trial Court—Appeal—Necessity of Court-fee.

In respect of future mesne profits, no portion of court-fee is payable before the final decree is passed and even then, if the plaintiff does not seek to execute the decree which he has obtained he need not pay court-fee.

Where the plaintiff omitted to claim in his plaint future mesne profits and subsequently applied for permission to amend the plaint by including a claim for such profits which was disallowed by the trial Court and in an appeal by the defendant he preferred a memorandum of objection claiming future mesne profits:

Held, that the plaintiff-respondent was not bound to pay *ad valorem* court-fee in respect of his claim for future mesne profits.

The power of a Court to grant future mesne profits and future interest is an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of filing the suit.

The power of the Court to award mesne profits subsequent to suit is discretionary. A.I.R. 1937 Mad. 46=1936 M.W.N. 1081=71 M.L.J. 677=44 L.W. 763=I.L.R. (1937) Mad. 284=165 Ind. Cas. 972.

——S. 11—Applicability—Decree for possession and mesne profits—Amount of mesne profits not specified — Court-fee for mesne profits, when to be paid—Civil P. C., O. 20, R. 12.

Where a suit is decreed for possession and for the mesne profits claimed without specifying any amount, court-fee need not be paid until the Court of first instance has ascertained under O. 20, R. 12, C. P. Code, the amount of mesne profits due to the plaintiff. A.I.R. 1935 All. 206=1935 A.W.R. 31=1935 A.L.J. 254=153 Ind. Cas. 476.

——S. 11—Applicability—Suit for mesne profits—Preliminary decree jointly against defendants—Appeal by some defendants—Court-fee required — Final decree—Appeal against final decree—Valuation—Court-fee payable—Entire decree, if value of appeal—Allowance for payment made twice over—Applicability of S. 11.

A suit for mesne profits was valued at Rs. 13,000 and a final decree for Rs. 16,011-5-0 was passed as against all the defendants jointly. Some of the defendants preferred an appeal from the preliminary decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff had been dispossessed. Subsequently when the final decree was passed, they preferred an appeal therefrom valuing their appeal in the same way and paying *ad valorem* court-fee on the difference between this value and that of the appeal from the preliminary decree. On a reference by the Taxing Officer:

Held, (*i*) the decree being joint, the value of the decree was the value of the whole decree, that the liability of the defendants could not be split up and apportioned and the value of the appeal being therefore Rs. 16,011-5-0, court-fee must be calculated on this amount;

(*ii*) that the defendants were not to pay court-fee twice over and allowance should be made for court-fee already paid over the memo. of appeal from the preliminary decree;

(*iii*) that unless court-fee were paid *ad valorem* in this appeal, the memo. of appeal from the preliminary decree would be considered to be insufficiently stamped.

The second part of S. 11 of the Court-Fees Act, whether it applies to appeals or not, applies only to a claim for mesne profits accruing subsequently to the date of suit, of which the plaintiff is unable to calculate the approximate value, because he cannot say for how long a period he is likely to be kept out of possession, and to a case like this, in which the mesne profits calculated in execution exceed the original claim. The rule applies to the present case only to this extent that the plaintiff must pay additional court-fee before he can execute his decree but it does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint. A.I.R. 1933 Pat. 81=13 P.L.T. 810=12 Pat. 188=142 Ind. Cas. 617.

——S. 11—Applicability—Decree for possession and future mesne profits—Execution of decree for possession, without paying Court-fees on future mesne profits, competency of.

Where a decree for possession of immovable property with future mesne profits has been passed the decree-holder would be entitled to execute his decree with reference to possession of immovable property, irrespective of the question whether court-fee has or has not been paid on the future mesne profits decreed to him by the same decree. A.I.R. 1931 Mad. 717=61 M.L.J. 424=34 L.W. 99=54 Mad. 980=134 Ind. Cas. 181.

——S. 11—Applicability—Future mesne profits—Court-fee is payable on future mesne profits.

A court-fee is payable on future mesne profits but it can only be exacted after the amount has been ascertained by enquiry; A.I.R. 1926 Pat. 218 at p. 227, Foll. A.I.R. 1930 Rang. 246.

——S. 11—Applicability—Claim for mesne profits.

Where the applicant for the recovery of mesne profits appeals from the decision of the trial Court awarding him a smaller amount than what he claimed, he is not bound to pay *ad valorem* fee on the amount of his claim. No court-fee apart from the fixed fee, can be claimed from him until the amount of mesne profits actually due to him has been ascertained. 3 Pat. L.J. 67, Not foll.; 7 Pat. L. T. 313, Foll. 11 Pat. L.T. 703=129 Ind. Cas. 662.

——S. 11—Applicability—Mesne profits—Determination of Court-fee.

In a suit for mesne profits, it is not necessary to value the claim for mesne profits. Court-fees will become payable when mesne profits have been ascertained. A.I.R 1926 Pat. 218 (F.B.), Foll. 108 Ind. Cas. 801=9 Pat. L.T. 657.

——S. 11—Applicability.

Under the present Code, the Court can determine past and future mesne profits in the suit itself and make a decree called a final decree for the mesne profits capable of execution. The first paragraph would apply to such a decree also. 5 Pat. 361=7 P. L.T. 313=1926 P.H.C.C. 49=93 Ind. Cas. 939=A.I.R. 1926 Pat. 218 (F.B.).

——S. 11—Applicability.

Ordinarily a plaintiff cannot recover more than what he claims in the plaint but in a suit for accounts or mesne profits, S. 11 permits the plaintiff to make an estimate of what he considers to be due to him and to pay the court-fee thereon and allows the Court to pass a decree for more than the amount at which the plaintiff valued his relief, if the profits or the amount decreed are found to be in excess of the profits claimed or the amount at which the relief sought is valued, provided the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer. 64 Ind. Cas. 101=24 O.C. 209=8 O. L.J. 477=A.I.R. 1921 Oudh 108.

——S. 11—Applicability—Future mesne profits.

Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L.B.R. 276=62 Ind. Cas. 175=13 Bur. L.T. 165.

——S. 11—Applicability—Mesne profits—Application for—Ad valorem fee.

On an application for mesne profits the court-fee payable is an *ad valorem* fee. 1 Pat. L.T. 235=55 Ind. Cas. 24.

——S. 11—Applicability—Mesne profits before suit and pendente lite.

Court-fee is not leviable on a claim for mesne profits *pendente lite*. 21 Mad. 171; 13 C.W.N. 815, Rel. on. But where the mesne profits had accrued due before suit and the plaintiff is in a position to value it even approximately he is bound to state the amount under O. 7, R. 2 (2), C. P. Code. 24 Ind. Cas. 232 (Cal.).

——S. 11—Applicability—Mesne profits—Decree for—When becomes operative.

A decree for mesne profits does not become operative till after the amount has been ascertained by the Court and the court-fee under S. 11 has been paid by the decree-holder. A decree to be operative must define the extent of the liability for mesne profits. 27 Ind. Cas. 300 (Cal.).

——S. 11—Applicability — Mesne profits — Suit for possession and mesne profits—Appeal —Court-fee on valuation — Subsequent assessment of mesne profits—No fee payable.

In a suit for possession and profits, plaintiff valued the relief for lands at Rs. 1,020 and the mesne profits antecedent to the suit at Rs. 4,199. The Courts below made a decree in favour of the plaintiff. Defendants appealed to the High Court and valued their appeal at Rs. 5,291 and paid court-fees on their memorandum of appeal *ad valorem*. During the pendency of this appeal mesne profits were assessed at Rs. 2,570 and a decree made in favour of the plaintiff for this amount:

Held, that as the defendant had already paid court-fees upon the claim for mesne profits valued at Rs. 4,199, they could not be called upon to pay court-fee a second time, and that their appeal against the assessment of mesne profits should be filed without any court-fee being paid on the memorandum of appeal. 16 C.L.J. 564=15 Ind. Cas. 572.

——S. 11—Applicability—Future mesne profits.

No court-fee is payable on future mesne profits, decreed, from the date of suit to the recovery of property. 20 M.L.J. 98=5 Ind. Cas. 880.

——S. 11—Applicability—Past and future mesne profits.

Where a plaintiff asked for past as well as future mesne profits and paid court-fees on the amount claimed for past mesne profits only, the provisions or S. 11 of the Court-fees Act are applicable in respect of the whole suit. 6 C.L.J. 255=11 C. W.N. 1133=34 C. 954 (F.B.).

——S. 11—Applicability—Claim for future mesne profits.

S. 11, Cl. 2, applies to cases of suits wherein both past as well as future mesne profits are asked for and an amount is claimed, and court-fee is paid in respect of past mesne profits only.

Semble.—S. 11 will apply to claims for future mesne profits only. There is no anology between interest awarded under S. 209 and mesne profits awarded under Ss. 211, 212, C. P. Code. Such interest is no part of the claim or relief as in the case of mesne profits. 33 C. 1232.

4. "Decree."

——S. 11—'Decree'.

Under S. 11 of the Court-fees Act in the case of a suit for partition and mesne profits, the term "decree" should be taken to refer to the final, and not the interim decree in the suit. 59 Ind. Cas. 385 (Mad.).

5. Decree with condition that it cannot be executed unless court-fee paid.

——S. 11—Decree with condition that it should not be executed unless additional court-fee was paid—Defendant depositing decretal amount in Court—Plaintiff allowed to withdraw amount on payment of additional court-fee—Plaintiff held could recover amount of additional court-fee by execution against defendant. A.I.R. 1943 Mad. 145=(1942) 2 M.L.J. 673=1942 M.W.N. 713=55 M.L.W. 786=207 Ind. Cas. 397.

——S. 11, Cl. (1) (Madras)—Decree finally determining amount of profits payable subsequent to suit, if can be passed without directing inquiry—Suit for possesssion of immovable property together with past and future profits—Future mesne profits ascertained and determined—S. 11, Cl. (1), applies—Court-fees on future mesne profits, when to be paid.

It is perfectly competent to the Court, without directing an inquiry to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit if it is made out that it is not necessary to make such an enquiry and it cannot be said that such a decree is not final or is incapable of execution, nor would it be in contravention of the provisions of O. 20, R. 12, C.P. Code.

Where a claim is for possession of immovable property and past profits or where a claim is for possession of immovable property and for past and future profits, and future mesne profits are decreed, a court-fee will be leviable on such profits under S. 11, Court-fees Act, before decree in respect thereof can be executed. It is no doubt true that a claim for mesne profits subsequent to the date of suit is upon a cause of action which was not existing on the date of the suit, but nevertheless the Legislature has made an exception to the general rule by permitting a claim in respect thereof in order to avoid multiplicity of suits. A.I.R. 1938 Mad. 727=47 L.W. 808=1938 M.W.N. 286 =(1938) 1 M.L.J. 750=I. L. R. (1938) Mad. 1050=182 Ind. Cas. 14.

6. Decree for payment of court-fee.

——S. 11—Decree ordering payment of court-fee — Court-fee not paid — Decree not executable — Execution application, if still maintainable.

The mere fact that court-fee is not paid on a decree granted does not prevent the decree-holder from making an application for execution. All that S. 11, Court-fees Act, provides is that the decree should not be executed. A.I.R. 1938 Lah. 326=178 Ind. Cas. 202.

7. Decree in excess of claim.

——S. 11—Decree in excess of claim.

Under S. 11, if the amount decreed is in excess of the amount claimed, the determination of the amount of court-fee cannot be left at the option of the plaintiff but he should be called upon to pay court-fee on the difference between the sum decreed and the value tentatively fixed by him in the plaint. 30 P.L.R. 503=A.I.R. 1929 Lah. 853.

8. Effect of non-payment.

——S. 11—Effect of non-payment—Court cannot impose penalty for non-payment.

Per Full Bench.—Court-fees is payable, in respect of a claim for future mesne profits; that is to say mesne profits from the date of the institution of the suit up to the date of realization. The Court has no jurisdiction to require the plaintiff to pay additional Court-fee upon his claim for future mesne profits as a condition for proceeding with the investigation of the claim, and has no jurisdiction to dismiss the proceedings if the additional Court-fee is not paid. 3 P.L.J. 67; 1 P.L.T. 235, Cons. 15 Bom. 416, not Foll.; 33 Cal. 1232, Foll. 5 Pat. 361=7 P.L.T. 313=1926 P.H.C C. 49=93 Ind. Cas. 939=A.I.R. 1926 Pat. 218 (F.B.).

——S. 11—Effect of non-payment.

In a suit for partition and mesne profits the Court decreed the claim and awarded specific sum on account of such profits on the plaintiff paying the additional court-fee if any, due in respect of the profits, held, the Court had no power to fix any time for payment and the only penalty which the plaintiff incurs in the event of his not paying the Court-fees is that he cannot execute the decree until he pays the fee. 59 Ind. Cas. 385 (Mad.).

——S. 11—Effect of non-payment—Ascertainment and recovery of profits — Partition suit—Order directing payment of additional Court-fee within fixed time.

No special procedure for dismissal for default in payment of Court-fee is prescribed by S. 11 or elsewhere, and no special procedure need be insisted on, so long as it is clear that the parties have had fair notice of the nature of proceedings. An Appellate Court has no power to extend the time fixed by the first Court, for payment of Court-fee or to reduce the amount fixed on the amount of mesne profits ascertained by the Lower Court either under S. 148 or S. 149, C. P. Code. 28 Ind. Cas. 890 (Mad.).

9. Execution on payment of extra court-fee.

——S. 11—Execution on payment of extra court-fee.

The intention of the first part of S. 11 of the Court-fees Act is not that a time should be fixed for the payment of extra court-fee, but merely that execution should be stayed until the extra court-fee payable is paid. 16 M.L.J. 543=30 M. 32=2 M.L.T. 23.

10. Extension of time.

——S. 11—Extension of time.

A Court has power under S. 11 to enlarge the time originally fixed for the payment of the Court-fees, even when application to enlarge the time is made after the expiry of the time originally granted. 13 C.L.J. 432=10 Ind. Cas. 268.

11. Interest.

——S. 11—Interest accruing after institution of suit—Plaintiff, if can be called upon to pay court-fee on the interest.

There is no provision in the Court-fees Act under which a plaintiff can be called upon to pay court-fee on the amount of interest which accrues after the institution of the suit. A.I.R. 1934 Pat. 571=15 P.L.T. 548=14 Pat. 4=1 B.R. 16 =152 Ind. Cas. 244 (S.B.). [Overrules A.I R. 1922 Pat. 387=77 Ind. Cas. 1039].

——S. 11—Interest.

There is no provision of law authorising the assessment of additional Court-fee by reason of the accrual of interest pendente lite. 8 P.L.T. 355=103 Ind. Cas. 592=A.I.R. 1927 Pat. 230.

——S. 11—Interest—Appeal as to future interest.

S. 11 does not include a claim for future interest in respect of a mortgage debt which is sought to be enforced by sale. The claim falls under Cl. (6) of Art. 17, Sch. 2. 1905 A.W.N. 84=1 A.L.J. 263=27 A. 559. See also 7 Bom.L.R. 194.

12. Mortgage suit.

——S. 11—Mortgage suit.

Where in a suit on a mortgage, a decree was passed for a larger amount than that on which Court-fee had been paid and the decree was sought to be executed without paying Court-fee on the excess amount decreed.

Held, that the mortgage-suit cannot be treated as a suit for execution and that S. 11 does not apply. 70 Ind. Cas. 483=3 Pat.L.T. 146=A. I.R. 1922 Pat. 59.

13. Order to pay additional court-fee and dismissing suit in default.

——S. 11—Order to pay additional Court-fee with direction that petition should stand dismissed on failure to pay the same by a fixed date—Propriety —Order if revisable.

S. 11 of the Court-fees Act confers, quite apart from S. 148 of the C. P. Code, a statutory discretion on a Court to extend the time for payment, if the court-fee is not paid within the time prescribed. A Court cannot and should not deprive itself of this discretion in anticipation by stipulating that in any circumstances the suit or petition will be dismissed if the additional court-fee is not paid within the time prescribed. For the discretion conferred by the section to come into operation there must be an application for extension tendering a sufficient cause, on which a judicial mind has to be brought to bear. Therefore, an order to pay additional court-fee with the direction that if the same is not paid by a fixed date, the suit or petition should stand dismissed is improper and not contemplated by S. 11 of the Court-fees Act.

Where the jurisdiction of the Court is invoked under S. 151 of the Code, the order of the Court dismissing the petition on the ground that the Court had no power to extend the time or excuse the delay would be revisable by the High Court. 62 L.W. 189=A.I.R. 1949 Mad. 855=1949 M. W.N. 125=(1949) 1 M.L.J. 233.

14. Suit for accounts.

——S. 11—Suit for account of rents—Relief not valued should be deemed to be valued at zero and court-fee would be payable under S. 11, on amount found due from date of suit.

Where the plaint shows that the plaintiff asked

for relief as to accounts of rents realised by the defendant but it was not valued, the relief must be deemed to be valued at zero up to the date of suit and court-fee would be payable upon the sum that would be determined to be due to the plaintiff after the date of the suit in accordance with the provisions of S. 11. A.I.R. 1946 Sind 58= I.L.R. (1945) Kar. 313=223 Ind. Cas. 611.

——S. 11—Suit for accounts—Excess sum decreed —Duty of executing Court to levy court-fee on excess—Power of executing Court to determine who should bear cost of additional fee.

The provision contained in S. 11, Court-fees Act, is a mandatory provision which the executing Court is to carry out when the decree-holder applies for the recovery of the excess amount by way of execution of the decree.

Though this additional court-fee may, in one sense, be deemed to be part of the stamp duty to be paid on the plaint itself, still the payment of that sum in the course of execution of the decree which is necessitated by S. 11 of the Court-fees Act would be the payment of costs necessary for realising the fruits of the decree by execution. The costs so incurred by the decree-holder by reason of the payment of the additional court-fee may well nigh be deemed to be costs relating to execution and, therefore, the executing Court has jurisdiction to pass any order regarding it.

Any direction for the payment of the additional court-fee for the excess sum decreed if given in the final decree, should be deemed to be a mere surplusage. A.I.R. 1933 Mad. 787=38 L.W. 572 =65 M.L.J. 526=1933 M.W.N. 1116=57 Mad. 303=145 Ind. Cas. 946.

——S. 11—Suit for accounts—Plaintiff can value relief at his own figure—If he recovers more, he pays the extra fees under S. 11. A.I.R. 1935 Bom. 212=37 Bom.L.R. 148=156 Ind. Cas. 424. **[Overrules** A.I.R. 1928 Bom. 476].

——S. 11—Suit for accounts—Properly laid in Munsiff's court as originally valued — Petition to increase valuation after finding by Commissioner —Valuation increased to amount exceeding Court's jurisdiction — Return of plaint for presentation to the proper court—Material irregularity.

A suit for account was filed in a Munsif's court. The Munsif appointed a Commissioner to take an account, and it was found that the plaintiff would be entitled to a larger sum. Plaintiff amended the plaint with the leave of the court, and the valuation of the suit was accordingly increased. The Munsif returned the plaint for presentation to the proper court.

Held, that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised, and that he ought to have tried the case. 12 M.L.J. 35=25 M. 543.

——S. 11—Suit for account — Portion of a suit claiming the relief.

The words "suit for account" in the first para. of S. 11 of the Court-fees Act, 1870, are applicable to such portion of any suit as claims the relief, viz., relief by way of account. 6 Bom.L.R. 1102.

15. Suit on tort.

——S. 11—Suit on tort — Damages for fraud— Assessment of damages in plaint—Large amount found due—More due.

Even in a suit for damages based on fraud, it is open to the plaintiff to enter in his plaint an approximate estimate of damages paying court-fee thereon and offer to pay additional court-fee in case a larger amount is found to be due before the decree is passed. S. 11 of the Court-fees Act will not apply to the case, and consequently the plaintiff cannot be allowed to pay court-fee after the decree is passed and before execution. 17 M.L.J. 625.

16. Suit for dissolution of partnership.

——Ss. 11 and 12 (1)—Suit for dissolution of partnership and accounts — Decree—Appeal by defendant on basis of the tentative valuation in plaint—Appeal directed to be numbered—Subsequent order for payment of deficit court-fee on the basis of decree amount—Jurisdiction of Court to pass.

In a suit for dissolution of partnership and accounts, a decree was passed against the defendant (petitioner here). In the appeal against the decree, the defendant paid court-fee adopting the tentative valuation in the plaint. The District Judge accepted the valuation and directed the appeal to be numbered. But subsequently on the objection of the Court-fee Examiner, the District Judge upholding his viewpoint directed the deficit court-fee to be paid. In revision against the order,

Held, that the original order of the District Judge, directing the appeal to be numbered cannot be deemed to be a considered order; otherwise the Court-fee Examiner's work would be pointless. Moreover it is open for the question of Court-fee to be raised at any time during suit or appeal and it has to be determined in a considered order after hearing the parties. This is the kind of decision contemplated by section 12 (1) of the Court-fees Act. 1949 M.W.N. 285 (1)=A.I.R. 1949 Mad. 750=62 L.W. 385=(1949) 1 M.L.J. 513.

——S. 11—Suit for dissolution of partnership and rendition of accounts—Preliminary decree for taking accounts—Defendant disputing—Valuation of appeal—Section 11, held does not apply. A.I.R. 1937 Lah. 694=I.L.R. (1937) Lah. 196=39 P.L.R. 884=171 Ind. Cas. 837.

——S. 11—Suit for dissolution of partnership and its accounts—Award—Decree for a certain amount —Suit valued at Rs. 100—Difference of court-fee to be paid by plaintiff before execution—Extent of —Valuation of suit.

During the pendency of a suit for dissolution of partnership and its accounts, an arbitrator was appointed and he gave an award dividing the partnership and awarded a decree for Rs. 3,892-1-0 in favour of the plaintiff. The plaintiff had valued his relief in the plaint at Rs. 100 and had paid court-fee on that amount:

Held, that under S. 11 of the Court-fees Act, the plaintiff was bound, before executing the dec-

ree to pay the difference between the amount of court-fee paid by him on the plaint and the court-fee payable on the amount decreed in his favour, and court-fee on the sum of Rs. 3,892-1-0 only could be levied and not that on the value of the plaintiff's share in the whole of the joint partnership property which was divided between the parties. A.I.R. 1935 Lah. 40=152 Ind. Cas. 608.

17. Valuation of suit.

——**S. 11**—Valuation of suit—Execution of decree—Deficiency made good—Appeal—Jurisdiction. See BENGAL CIVIL COURTS ACT, S. 21. 7 A.L.J. 203=32 A. 222=5 Ind. Cas. 875.

18. Value of relief ascertained after trial.

——**S. 11—Value of relief ascertained after trial—Court-fee payable.**

Where the value of the relief is ascertained after trial, the Court-fee on the difference between the plaint valuation and the amount decreed should be paid. 1 O.L.J. 281=24 Ind. Cas. 643.

19. Scope.

——**S. 11—Scope.**

Where the obstacle to execution lies not in the application itself, but in a statutory prohibition such as is contained in S. 11, Court-fees Act, the objection is even stronger. A.I.R. 1937 Sind 108=31 S.L.R. 14=170 Ind. Cas. 493.

——**S. 12.**

Synopsis.

1. Appeal.
2. Appellate Court.
3. Applicability.
4. Compromise between Court and parties.
5. Decision as to Court-fee.
6. Decision of trial Court—Finality.
7. Deficiency in Court-fee—See also Court Fees Act, S. 12—Appellate Court and Appeal.
8. Doubtful question of Court-fee—Reference.
9. Duty of trial Court to fix Court-fee.
10. Effect of admission of document.
11. Extension of time.
12. Fictitious valuation.
13. Finality of decision.
14. Fraud.
15. High Court—Duty of.
16. High Court—Powers of.
17. Interlocutory orders.
18. Interpretation.
19. Objection about court-fee—When to be taken.
20. Revision.
21. Scope.
22. Valuation—Basis.
23. Written statement claiming set-off.
24. Miscellaneous.

1. Appeal.

——**S. 12—Appeal — Order rejecting plaint for failure to make up deficiency in court-fee.**

A right of appeal from an order rejecting a plaint for failure to make up deficiency in court-fee is given only where the case is not governed by S. 12 of the Court-fees Act (i.e.), it does not involve merely a question of valuation of the claim, but involves the question of the category or class under which the suit falls. 50 P.L.R. 272=A.I.R. 1949 E.P. 107.

——**S. 12, Sch. 1, Art. 1—Appeal—Court-fee payable—Ad valorem fee — Sufficiency of stamp on memo. of appeal.**

Where an appellant wants to avoid a liability or seeks to enhance the value of his decree, he should pay **ad valorem** court-fee under Sch. 1, Art. 1, Court-fees Act, on the amount for which he seeks to avoid liability or that by which he seeks to enhance the value of the decree. The rule applies to all appeals from decisions determining the amount of **mesne profits,** whether the profits may have accrued before suit, or after the date of the institution of the suit. The question of the sufficiency of the stamp on the memorandum of appeal must always be regarded as open until the appeal is finally heard and disposed of in view of the provisions of the first part of S. 12 of the Court-fees Act, which directs that every question relating to valuation for the purpose of determining the amount of any fee chargeable on a memorandum of appeal shall be decided by the Court in which such memorandum is filed. A.I.R. 1933 Pat. 234=14 P.L.T. 180=12 Pat. 694=144 Ind. Cas. 684.

——**S. 12—Appeal—Court-fee not covering entire amount—Dismissal of appeal—Propriety.**

Where the plaintiff appealed against the interest disallowed in the mortgage-decree passed in his favour but did not pay the full **ad valorem** court-fee covering the entire claim in appeal, the appeal should not be dismissed for non-payment of court-fee but be heard to the extent of the amount of court-fee paid. 40 P.L.R. 123.

——**S. 12—Appeal comprising only part of subject-matter in suit—Deficit court-fee, if can be levied only in respect thereof or whole of subject-matter.**

Where in the appeal before the appellate Court, a part of the subject-matter of the suit only is comprised, deficit court-fee only in respect of that part of the suit can be levied and not in respect of the entire subject-matter of the suit.

S. 12, Court-fees Act, is not happily worded. A.I.R. 1938 Mad. 278=47 L.W. 70=1938 M.W.N. 169=I.L.R. (1938) Mad. 309=(1933) 1 M.L.J. 29=177 Ind. Cas. 904.

——**S. 12—Appeal—Question of valuation.**

If it is not clear from the plaint or the document itself that there has been an undervaluation, the reasonable course whether one looks to the C. P. Code, or the Court-fees Act is to register the plaint or the memorandum and take appropriate steps thereafter for enquiring into any matter that calls for enquiry. The power to reject a plaint arises only upon it being seen that the plaint is undervalued. The correct valuation of the property in dispute is not the condition precedent to admission of a plaint or memo. of appeal and it is not intended that before the plaint or memo. of appeal is registered, the plaintiff should be called upon to give evidence on the question of valuation merely in order to get his document on file. 122

Ind. Cas. 630=50 C.L.J. 164=33 C.W.N. 952 =A.I.R. 1930 Cal. 65.

——S. 12—Appeal decided.

The question of payment of additional fee ought to be raised when the appeal is heard. Where the Court of appeal which decides the matter becomes functus officio, it has no power to compel payment of additional Court-fee when the appeal is decided before the question of additional fee is raised; A. I.R. 1929 Oudh 321, Rel. on. 6 O.W.N. 757= A.I.R. 1929 Oudh 483.

——S. 12—Appeal—Order rejecting plaint.

Where an order rejecting a plaint necessarily, involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. 4 Pat.L.J. 57=49 Ind. Cas. 442.

——S. 12—Appeal.

Where a Munsiff refused to accept the valuation of a Commissioner and returned the plaint for representation, he only looked at the question from the point of view of his own jurisdiction. Decision on the question of value for purposes of Court-fees being only incidental to decision for purposes of jurisdiction, this section was not applicable. The appeal was rightly decided by the Dt. Judge. 151 P.W.R. 1918=47 Ind. Cas. 7.

——S. 12—Appeal—Decision as to class to which suit belongs—Appeal, competency of.

S. 12, Court-fees Act, applies merely to the valuation of the property for the purpose of calculating the Court-fee when there is no question as to the schedule of the Act with reference to which the valuation is to be made, and it does not apply to cases in which it is contended that the property has been wrongly valued and that the relief has been improperly estimated by putting it under a wrong article of the schedule in the Act. Therefore, an appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class.

Per Patkar, J.—At any rate, the Court can interfere in such cases under S. 115, C. P. Code, or S. 5 of Regulation 2 of 1827, if no appeal lies. A.I.R. 1931 Bom. 234=33 Bom.L.R. 263=136 Ind. Cas. 176.

——S. 12—Appeal—Class under which suit falls.

In determining whether a plaint bears sufficient Court-fee, regard must be had to the allegations of the plaintiff in the plaint, as to the nature of the relief sought in the substance, without any consideration of the evidence, in the case. S. 12 bars an appeal only in respect of the valuation of a suit in a particular class. It does not bar an appeal as to the class to which the suit should be referred for such assessment. 23 Bom. 486, Foll. 6 S. L.R. 72=16 Ind. Cas. 773.

——S. 12—Appeal—Insufficiently stamped appeal —Reduction of claim.

The appellant who has not properly stamped the appeal and is unable to do so may leave a part of the claim retaining only that much as is covered by his stamp. 131 P.L.R. 1911=180 P.W.R. 1911=11 P.R. 1912=10 Ind. Cas. 207.

——S. 12—Appeal—Limitation—Whole claim time barred—Failure to pay stamp duty on portion of claim—Effect.

A defendant appealing on the ground that the suit ought to have been dismissed in toto as time barred must appeal on the whole case and pay stamp duty on the whole claim. Otherwise the Court will not give him relief to the full extent. 14 P.W.R. 1918=44 Ind. Cas. 890.

——S. 12—Appeal—Payment of Court-fee on portion—Attack on whole decree.

There is nothing to prevent an appellant from attacking only a portion of the decree by paying Court-fee only, thereon, though the reason for the attack might cover the whole decree. 38 Mad. 18=16 Ind. Cas. 877.

——S. 12—Appeal—Objection to court-fee paid in lower Court.

Where on an objection to the sufficiency of Court-fee on a memorandum of second appeal, it appeared that the Trial Judge had, after framing an issue on the point, decided it in favour of the plaintiff and the defendant had accepted the decision and stamped his own appeal in the Lower Appellate Court accordingly, held, that the objection could not be entertained. 106 P.W.R. 1917 =40 Ind. Cas. 904.

——S. 12—Appeal—Relief granted which was not asked for by the plaintiffs—Court-fee.

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court-fee corresponding to the relief granted to the plaintiffs. The plaintiffs-respondents were also required to make good the deficiency in the court-fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety. Held, that the plaintiffs were not entitled to retain the full benefit of the first court's decree nor liable to pay the additional court-fee; and the appellant might on application to the proper authority obtain a refund of the excess Court-fee which he had been erroneously compelled to pay. 1908 A.W.N. 31=5 A.L.J. 18=30 A. 103.

——S. 12—Appeal—Objection by defendant appellant that plaint not properly stamped.

Where a plaint is not properly stamped and a decree is given in plaintiff's favour and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the Court of the first instance. 14 M.L.J. 144.

2. Appellate Court.

——S. 12—Appellate Court—Powers of.

An appellate Court has power when an appeal comes before it to correct a mistake in respect of court-fee paid below and to require to make good that deficiency in the court-fee payable by the appellant. 1945 Mar.L.R. (Civ.) 46.

——S. 12 (ii)—Appellate Court can correct mistake made by lower Court in respect of court-fees.

Where a Court accepts a plaint or memorandum

of appeal bearing a stamp of certain value, it must be deemed to have decided that that was the proper court-fee. S. 12 (ii), Court-fees Act, gives an appellate Court power when an appeal comes before it to correct a mistake made below in respect of court-fees. A.I.R. 1940 Mad. 383=51 M.L.W. 228=1940 M. W. N. 268=I. L. R. (1940) Mad. 646=(1940) 2 M.L.J. 425=193 Ind. Cas. 490.

——S. 12—Appellate Court — Powers of—Deficiency in court-fee in lower Court—Power of Appellate Court to order such deficiency to be paid when lower Court has decided the question of the category to which suit belongs.

An Appellate Court has power to require a party to make good the deficiency in the court-fee payable by him in the lower Court even in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of court-fees, but such decision is in the opinion of the Appellate Court erroneous. A.I.R. 1937 Mad. 81=44 L. W. 845=1936 M.W.N. 1392=(1937) 1 M.L.J. 1=I.L.R. (1937) Mad. 275=166 Ind. Cas. 615 (2) (F.B.).

——S. 12—Appellate Court can call upon party to pay deficiency in court-fees in lower Court.

When it is found in an Appellate Court that the court-fee on a plaint or memorandum of appeal, as the case may be, in the Court below, was insufficient, it is the duty of the Appellate Court to call upon the party whose fee was in defect to make good the deficiency under S. 12 (ii), Court-fees Act although no dispute as to the amount had arisen or been specially decided in the lower Court. A.I.R. 1935 Lah. 698=38 P.L.R. 349 =161 Ind. Cas. 173.

——S. 12—Appellate Court—Powers of.

Where it is found that the plaint in the lower Court is undervalued, the better practice is to go into the matter of undervaluation on acceptance and registration of memorandum of appeal. A.I.R. 1927 Cal. 775, Foll. 122 Ind. Cas. 630=50 C.L.J. 164=33 C.W.N. 952=A.I.R. 1930 Cal. 65.

——S. 12—Appellate Court can order additional Court-fees only on registration of appeal. 31 Cal. W.N. 1045=106 Ind. Cas. 335=A.I.R. 1927 Cal. 775.

——S. 12—Appellate Court—Powers of—Formal decision.

It is not necessary for the application of S. 12 (ii) that there should have been a formal decision on the question of sufficiency of the Court-fees in the Court below. 7 Cal. 348, Foll. 31 C.W.N. 1045=106 Ind. Cas. 335=A.I.R. 1927 Cal. 775.

——S. 12 and Sch. I, Art. 1—Appellate Court—Payment of additional Court-fee.

An Appellate Court cannot under S. 12 (2) order for payment of additional Court-fee stamps unless the first Court has decided the question of valuation. 10 Bur.L.T. 242=36 Ind. Cas. 957.

——S. 12—Appellate Court—Powers of.

If appellate Court should find that plaintiff is really making a claim to declaration properly so-called and that decree for possession is merely consequential relief, it may, under S. 12 adjust the matter of court-fee in accordance with S. 7 (iv) (c). A.I.R. 1938 Pat. 22=18 P.L.T. 977=4 B.R. 178=16 Pat. 766=172 Ind. Cas. 840 (F.B.).

——Ss. 12 and 10 (ii)—Appellate Court—Powers of—Appeal on insufficient stamp—Power of Court of second or further appeal.

The word "suit" in S. 10 (ii) includes appeal; if a Court of First Instance, whose duty it is to see that the fees paid are correct, proceeds to the trial of the suit, without expressly deciding that the plaint is correctly stamped, it must be assumed that the Court has **tacitly** decided that the amount of fees paid, is correct. Acting on that assumption it would be competent to the First Appellate Court to call upon the party to make good the deficiency within a reasonable time to be fixed and to dismiss the claim of the plaintiff, if he fails to do so. Similarly a Court of second or further appeal has the same power. 1 A.L.J. 392, Foll. 115 P.R. 1884, Overruled. 109 P.R. 1912=136 P.W.R. 1912=15 Ind. Cas. 463.

3. Applicability.

——S. 12—Applicability — Decision of Court as to category in which plaintiff's suit falls—Plaint returned for presentation to proper Court—Decision, if appealable.

Where a Court gives a decision as to the category in which the plaintiff's suit falls and as a result of that decision takes the view that the suit beyond its jurisdiction and returns the plaint for presentation to the proper Court, such a decision is not a decision to which the provisions of S. 12, Court-fees Act, apply and is appealable. A.I.R. 1949 Assam 64.

——S. 12—Applicability—S. 12 (ii) applies where deficient court-fee is paid whether by appellant or by any other party.

S. 12 (ii), Court-fees Act, applies to all the parties to the appeal. Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. It cannot be intended to apply to a case where the deficiency was by the appellant. A.I.R. 1940 Mad. 674=(1940) 1 M.L.J. 478 (2)=1940 M.W.N. 348=51 L.W. 434 (2)=193 Ind. Cas. 758.

——S. 12—Applicability—Section relates to valuation and not to decision of jurisdiction on question of principle—Appeal.

S. 12, Court-fees Act, only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee, that is to say, that section applies to a case where the contestants are agreed as to the particular section of the Court-fees Act which is applicable to it, but dispute the valuation of the property. It does not apply where there is a dispute as to the class in which the suit falls. If there is a doubt as to what section would apply to the suit as framed by the plaintiff and relief formulated, then it raises a question of principle, the jurisdiction to determine which is not impaired by S. 12, Court-fees Act. Consequently, the Court

has power to decide the question of jurisdiction in an appeal filed under O. 42, R. 1 (a), from an order returning the plaint for presentation to proper Court. A.I.R. 1938 Nag. 481=1938 N.L.J. 214=178 Ind. Cas. 97.

——S. 12—Applicability—Appeal when lies.

S. 12 applies only to a decision as to the valuation of a suit, which falls within a particular class and not to a decision as to the particular class in which a suit falls, that is to say, if there is no doubt as to the class, in which the suit falls, and the section of the Court-fees Act, which applies to it, the decision of the first court as to the valuation, which depends on the value of the property, in suit is final; but if there is a dispute as to the class in which the suit falls, that is to say, the section of the Court-fees Act which applies to it, an appeal will lie. 23 Bom. 486, Foll. 87 Ind. Cas. 911=A.I.R. 1925 Nag. 435.

——S. 12—Applicability — Decree passed — Deficit court-fees cannot be ordered.

Once a decree has been passed the Judge is functus officio and cannot order payment of deficit court-fees from the plaintiff. A.I.R. 1946 Sind 58=I.L.R. (1945) Kar. 313=223 Ind. Cas. 611.

——S. 12—Applicability—Decree signed and sealed but Court ordering plaintiff to pay deficit court-fee—Plaintiff getting benefit under decree—Revision—High Court can take action under S. 12 (ii) before passing final orders.

Where the plaintiff is ordered to pay the deficit court-fee after the judgment is signed and sealed, the Judge would be acting without jurisdiction, in that after giving judgment, his power to order the deficit court-fee to be paid is gone. But although the plaintiff may have a genuine grievance that he had not the opportunity of being heard and that the Court was functus officio, if he gets benefits from the decree, it is but reasonable that he should pay court-fee upon the benefits so received. Consequently, the High Court, in revision from such an order, can before passing final orders, take action under S. 12 (ii), Court-fees Act. A.I.R. 1939 Sind 279=I.L.R. (1939) Kar. 469=185 Ind. Cas. 364.

——S. 12—Applicability of—Decided cases.

The Act does not apply to decided cases but applies only to pending cases. 7 All. 528, Foll. 9 Bur.L.T. 43=32 Ind. Cas. 534.

4. Compromise between Court and parties.

——S. 12—Compromise between parties and Court, legality of.

Matters of court-fee cannot be decided by a compromise by the parties and the Court. A.I.R. 1933 Lah. 905=34 P.L.R. 868=14 Lah. 558=144 Ind. Cas. 636.

5. Decision as to Court-fee.

——S. 12 (2)—Decision as to court-fee—Interference in appeal.

Under S. 12 (2) of the Court-fees Act, an appellate Court can interfere with the decision of the trial Court on a question of court-fee only if it comes to the conclusion that the question was wrongly decided by the Court below to the detriment of revenue and not when it is contended that more court-fee than was payable under law was demanded. 51 P.L.R. 7=A.I.R. 1949 E.P. 336.

——S. 12—Decision as to Court-fee—Interference in appeal.

Where a question as to the proper valuation has been raised, it is to be decided by the Court under the provisions of S. 12, Court-fees Act, and where an enquiry has been made and a decision has been arrived at by the trial Court, the decision being based on evidence, the finding cannot be disturbed in appeal. A.I.R. 1935 All. 849=1935 A.W.R. 1128=158 Ind. Cas. 447.

——S. 12—Decision as to Court-fee—Reservation and trial of question as to court-fee as an issue in the suit—Not barred.

No doubt when the court-fee paid has been accepted without objection and the suit has been determined the Court may be deemed to have decided that the Court-fee paid was correct within the meaning of S. 12 of the Court-fees Act even though it has passed no specific order to that effect. But while a case is still pending the acceptance by a ministerial officer of the court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the court-fee to be paid. The only final decision is an order of the Court made after it has applied its mind to the question and it is open to the Court to take up and decide the question of the correct court-fee payable at any time before the case is determined provided that it has not already made a considered order. Accordingly though a suit is registered and numbered it is open to the Court to decide the question of court-fee as an issue in the suit itself. The mere fact that some arguments on the question of court-fee were heard before the registration of the suit will not be tantamount to a decision that the court-fee paid was correct so as to bar the trial of such question as an issue in the suit. 227 Ind. Cas. 156=59 L.W. 301 (2)=1946 M.W.N. 386=A.I.R. 1946 Mad. 483=(1946) 1 M.L.J. 459.

——S. 12 (i)—Decision as to court-fee—Decision without the mind of the Court being applied—Power of Court to reconsider.

Where the Court in deciding the question of the liability of a party to pay court-fee, did not apply its mind to the question of the sufficiency of the court-fee paid, the matter may be re-considered and decided by that Court. A.I.R. 1950 All. 237=1950 A.L.J. 706.

——S. 12—Decision as to court-fee—Court, if can reconsider order already passed.

There is nothing in S. 12 (ii), Court-fees Act which states that a Court may not reconsider an order which it has already passed under that subsection. Hence an order which calls upon the appellant to pay a deficit court-fee on the plaint is not without jurisdiction. A.I.R. 1941 Mad. 626=1941 M.W.N. 406=(1941) 1 M.L.J. 796=53 L.W. 740=198 Ind. Cas. 597.

——S. 12 (ii)—The decision on court-fee cannot be revised by the same Court. (1938) 2 M.L.J. 647=1938 M.W.N. 960=48 L.W. 461.

——S. 12—Decision as to court-fee—Power of Court to revise its decision—Power of Appellate Court to revise decision of trial Court.

Once on an objection taken by the office or by defendant the Court applies its mind and gives its considered decision on the question of court-fee, it is final and its power to revise the valuation is at an end.

The Court cannot exercise its powers under cl. (ii) of S. 12, Court-fees Act, unless the subject-matter of the suit is before it by way of appeal, reference or revision. A.I.R. 1937 Mad. 325=(1937) 1 M.L.J. 89=45 L.W. 206=1937 M.W.N. 243=169 Ind. Cas. 875.

——S. 12—Decision as to court-fee—Review.

Although under S. 12, the decision of a trial Court on the amount of fee chargeable on a plaint is final as between the parties to the suit subject to the provisions of the second part of that section, this does not prevent the trial Court from reviewing its own order, a power which is granted to it by S. 151, C. P. Code. Re-opening and taking up the question does not amount to material irregularity. A.I.R. 1936 Pesh. 213 =166 Ind. Cas. 178 (1).

——S. 12—Decision as to Court-fee—Previous notice not sent to defendant or Government—Decision, if can be re-opened by trial Court.

When the sufficiency of Court-fee paid by the plaintiff is objected to by the defendant or the office, and the trial Court after applying its mind to the question holds the Court-fee to be sufficient, then the trial Court's power to revise the valuation comes to an end. There is nothing in the Court-fees Act which requires that the question as to the sufficiency of the Court-fee should be decided in the presence of the defendant or after notice to the Government. Where there is a decision by the trial Court on the question of Court-fee, although without notice to the Government or to the defendant and the decision is intended to be final and not provisional, the principle of finality applies to the decision as much as to decision on other matters. The question in each case is, whether the order is one intended to be final or merely provisional.

Although in actual practice, a defendant is permitted to object that the proper Court-fee has not been paid, he has, strictly speaking, no legal right to raise such a plea, but his function must be deemed to be, subject to the Court's leave, merely to assist it in coming to a proper decision. A. I. R. 1935 Mad. 927=42 L.W. 354=69 M.L.J. 479=1935 M.W.N. 1114=158 Ind. Cas. 588.

——S. 12—Decision as to Court-fee—Re-opening of before succeeding Judge on the basis of a report of the Court-fee examiner—Legality—Proper procedure.

Where after the plaint was filed and before the written statement was put in, the question of the adequacy of Court-fee paid on the plaint was raised and decided by the Judge in favour of the plaintiff, and subsequently after the written statement was filed and issues framed the question as to the sufficiency of Court-fee was once again raised before the succeeding Judge on the basis of a report of the Court-fee examiner.

Held, that the succeeding Judge could not reopen the question of adequacy of Court-fee which had already been decided; and

any error committed by the judicial officer in deciding the question of Court-fee could only be corrected under S. 12 (2) of the Court-Fees Act. 61 Mad. L. W. 808=1948 M.W.N. 839=A.I.R. 1949 Mad. 395=(1948) 2 M.L.J. 553.

6. Decision of trial Court—Finality.

——S. 12—Decision of trial Court—Finality.

S. 12, Court-fees Act, makes the decision of the first Court as to value final as between the parties and enables a Court of appeal to correct any error as to this only when the first Court has decided to the detriment of public revenue. A.I.R. 1935 Cal. 338 =60 C.L.J. 201=39 C.W.N. 131=157 Ind. Cas. 356.

——S. 12—Decision of trial Court—Finality.

It is a principle of the law of court-fees that where a question as to taxation has to be decided, the decision of the first Court should be taken to be final, so far as the parties are concerned. A.I.R. 1931 All. 659=1931 A.L.J. 727=133 Ind. Cas. 465.

——S. 12—Decision of trial Court on question of Court-fee, whether final.

S. 12, Court-fees Act has no application whatever to a case in which the appellate Court has to ascertain the nature of the suit and to determine whether it falls in a particular category or not. A.I.R. 1931 Lah. 378=32 P.L.R. 244=130 Ind. Cas. 643.

——S. 12—Decision when liable to attack in appeal.

The section is passed for fiscal purposes and decision of the first Court cannot be contested by the parties, but dismissal of suit for failure to pay Court-fees according to the Court's valuation may be appealed against, in order to get the dismissal set aside and the suit reheard. 14 C.W.N. 343=5 Ind. Cas. 18.

7. Deficiency in Court-fee.

——S. 12—Deficiency in Court-fee—Collection.

Where plaintiff-respondent fails to make up the deficiency in the Court-fees paid by him in the trial Court, one of the effective ways of enforcing the payment of such Court-fees is to refuse to hear the counsel of the respondent in second appeal. 117 Ind. Cas. 107=1929 A.L.J. 1024=51 All. 886=A.I.R. 1929 All. 577.

——S. 12—Deficiency of Court-fee in the lower Court.

The Court of appeal, when admitting an appeal is entitled to demand under the provisions of S. 12 (2), proper Court-fee payable in the appellate Court as well as in the Court below by reason of the Judges in the Court below not having given a decision as to the proper amount of the Court-fee. 91 Ind. Cas. 729=1925 M.W.N. 826=A.I.R. 1926 Mad. 96=49 M.L.J. 608.

——S. 12—Deficiency of Court-fee—Respondent—Liability to pay deficient Court-fee in Court below.

Once an appeal has been dismissed for whatever cause, the High Court is *functus officio* and cannot call upon the respondent to pay any deficiency due by him in respect of Court-fees payable in the lower Court and it cannot also restrain the respondent from

executing the decree obtained by him. 7 All. 528, Foll. 4 Pat. L. J. 472=(1919) P.H.C.C. 276=51 Ind. Cas. 756 (F.B.).

——Ss. 12, 10 (2)—Deficiency of Court-fee—Appeal—Objection that plaint was insufficiently stamped—Respondents should be directed to pay proper Court-fee.

In a case falling under S. 12 (*ii*), Court-fees Act, the reference in S. 10 (2) to the "suit" must be read as a reference to the "appeal", and the Appellate Court is bound to stay the appeal until the additional fee is paid.

A plaint in the partition suit was insufficiently stamped and the suit was decreed. In an appeal by the defendants, an objection was raised that proper Court-fee be paid on the plaint:

Held, that the mandatory provisions of S. 12 (*ii*) compelled the Court to direct the respondents to pay the proper additional Court-fee and to stay the appeal until that is done. If the respondents did not pay the fee, and if the appellants wished to save their appeal, they would have to pay the Court-fee themselves in the name of the respondents, and then at the hearing it would be open to the Court of appeal to decide on whose shoulder this additional fee should fall. A.I.R. 1942 Bom. 151=44 Bom. L.R. 117=200 Ind. Cas. 323.

——S. 12—Deficiency when can be ordered to be made up by appellate Court.

Where the Court after dismissing an appeal proceeded to order the appellant to make up a deficiency discovered in the Court-fees on the appeal.

Held, that the Court had no power to do this and having dismissed the appeal the Court was *functus officio.* 82 Ind. Cas. 588=A.I.R. 1925 Lah. 131.

——S. 12—Deficient Court-fee—Collection by the appellate Court.

Even where an appellant is not appealing from that part of the decree of the lower appellate Court which disallowed his cross-objection on which he did not pay the proper Court-fees due, the appellate Court has inherent jurisdiction not to entertain his appeal before the deficit is made good as it is a default arising out of the same suit. The High Court has discretionary power to insist upon the appellant to pay the proper Court-fees throughout the litigation as a condition precedent to allowing him to come before it in appeal and ask it to set aside the decree of the lower appellate Court. 66 Ind. Cas. 769=1 Pat. 471=3 Pat.L.T. 327=1922 P.H.C.C. 162=A.I.R. 1922 Pat. 284.

——S. 12—Deficiency in Court-fee—Realisation by attachment and sale of the properties—Ultra vires.

After the dismissal of a suit, the Court ordered the deficit Court-fee to be paid by the plaintiff and on his default ordered the attachment of his properties. *Held,* that the Court had no jurisdiction to do so. 46 Cal. 520=52 Ind. Cas. 435.

8. Doubtful question of Court-fee—Reference.

——S. 12—Doubtful question of Court-fee—Reference to High Court—Jurisdiction.

A Subordinate Judge has no jurisdiction to refer a doubtful question of Court-fees to the High Court similar to the power under S. 60 of the Indian Stamp Act. 4 Bom.L.R. 951=27 B. 150. *See also* 1906 A.W.N. 180.

9. Duty of trial Court to fix Court-fee.

——S. 12 (ii)—Duty is of trial Court to fix Court-fee.

The duty of fixing the Court-fee is cast by law on the trial Court, and the trial Court's decision is ordinarily final. A.I.R. 1942 Mad. 445 (2)=55 L.W. 239=(1942) 1 M.L.J. 499=1942 M.W.N. 351=205 Ind. Cas. 43.

10. Effect of admission of document.

——S. 12—Effect of admission of document.

When once a document is admitted and set-off allowed on its basis by the trial Court, it is not for a party to say that the document should be struck off from the record. The Court is entitled to allow the party putting it in evidence on payment of the proper fee, to rely upon it. 28 Bom.L.R. 525=94 Ind. Cas. 646=A.I.R. 1926 Bom. 343.

11. Extension of time.

——S. 12—Extension of time.

Insufficiently stamped document — Opportunity should be given to pay the proper stamp—Proceedings following admission of insufficiently stamped document are not void. 106 Ind. Cas. 817=A.I.R. 1928 Lah. 221.

——S. 12—Extension of time—Specific provision of the Act.

Where an appeal from a redemption suit was filed with Rs. 10 court-fee,

Held, that proper-fee was the one prescribed by S. 7 (ix), Court-Fees Act, and that there was no ground for extending time to allow appellant to make the deficit. 3 L.L.J. 156=67 Ind. Cas. 130.

12. Fictitious Valuation.

——S. 12—Fictitious valuation—Inquiry by Commissioner—Valuation found less—Return of plaint.

Plaintiff sued in the Sub-Court for declaration and valued his claim at Rs. 1,100. On the objection of the defendant the Court appointed a Commissioner who fixed the value at Rs. 790. The Court returned the plaint to be presented to the proper Court. *Held,* that the question related essentially to the jurisdiction of the Court to entertain the suit and was not one relating to valuation for the purpose of determining the amount of court-fee. Therefore S. 12 was inapplicable and the appeal to the Lower Appellate Court by the plaintiff was competent. S. 12 is evidently framed for fiscal purposes. The section ought to be strictly construed. It cannot be applied to bar an appeal where the question raised is one of the class under which the suit falls or of the competency of the Court of first Instance to entertain the suit. 17 C.W.N. 503=16 C.L.J. 371=16 Ind. Cas. 575.

13. Finality of decision.

——S. 12—Finality of decision—Revision.

The finality given by S. 12 (1) of the Court-Fees Act to a decision as to the amount of court-fees leviable on a plaint does not deprive the High Court of its jurisdiction to interfere in revision under S. 115, C. P. Code, in proper cases; the discretionary power to interfere is not confined to cases where the wrong decision of a subordinate Court has been to the detriment of the revenue. The High Court has

power under S. 115, C. P. Code, to interfere in revision in proper cases where the trial Court has placed a suit under a wrong provision of the Court-Fees Act. 49 Bom.L.R. 72=A.I.R. 1947 Bom. 259 (F.B.).

——S. 12—Finality of decision—Extent—Court acting with material irregularity—Interference in Revision.

Where the Court, in coming to a conclusion on a question of valuation for the purpose of determining the amount of court-fee payable, has acted illegally or with material irregularity in the exercise of its jurisdiction, it is not only right but the duty of the High Court to exercise its powers under S. 115, C. P. Code and the High Court is not prevented from doing so by the provisions of S. 12, Court-Fees Act. The finality of the decision cannot no doubt be questioned by attacking the conclusions of the Court on the assessment of evidence, but that is no reason for the High Court to refuse to exercise its powers under S. 115, C. P. Code. A.I.R. 1949 Cal. 659.

——S. 12—Finality of decision.

Acceptance by ministerial officer of court-fee paid or registration of case without objection is not final decision of court-fee to be paid—Final decision is order of Court made after it has applied its mind to question. A.I.R. 1946 Mad. 483=227 Ind. Cas. 156=1946 M.W.N. 386=59 M.L.W. 301=(1946) 1 M.L.J. 459.

——S. 12 (i)—Finality of decision—Decision of Court on a question of court-fee payable on memorandum of appeal which is "final as between the parties to the suit" within the meaning of S. 12 (*i*), Court-Fees Act, must be a decision made between parties on record and after they had an opportunity of being heard and not a mere decision based on a report of a *Munsarim*. A.I.R. 1942 Oudh 385=1942 O.W.N. 338=1942 A.W.R. (C.C.) 226=200 Ind. Cas. 223.

——S. 12. Finality of decision—Decision as to court-fee is not final unless reached after hearing both sides.

The decision of the Court regarding the amount of court-fee payable on a plaint or memorandum of appeal is not final within the meaning of S. 12, Court-Fees Act unless it is reached after both sides have had a chance to be heard. A.I.R. 1941 Nag. 217=1941 N.L.J. 303=I.L.R. (1942) Nag. 432=196 Ind. Cas. 584.

——S. 12 (Bengal)—Finality of decision—No question as to class of suit.

S. 12, Court-Fees Act, has no application when the question for decision is as to the class under which a suit fell and not merely of valuation in that class. If there is a question of valuation, there being no question as to the class in which the suit fell, the valuation made by the Court of first instance is final. A.I.R. 1940 Cal. 451=I.L.R. (1940) 2 Cal. 166 =44 C.W.N. 745=193 Ind. Cas. 144.

——S. 12—Finality of decision—Revision.

An order of the lower Court assessing the court-fee payable upon a petition and allowing the petitioners certain time within which to pay it does not decide a "case" within S. 115 and is not revisable. A different set of considerations might arise if the court, on failure to make the payment dismissed the petition. A.I.R. 1926 Mad. 768, Rel. on. 104 Ind. Cas. 145=39 M.L.T. 220=A.I.R. 1927 Mad. 1021 L.J. 452.

——S. 12—Finality of decision—Category of suit.

Where the question is as to whether a suit is for a bare declaratory decree with no consequential relief or it is for a declaratory decree as well as for consequential relief, a decision by the lower Court on the question is not final under S. 12. 4 M.L.J. 193 (F.B.), Foll. 87 Ind. Cas. 660=21 M.L.W. 649= 1925 M.W.N. 276=A.I.R. 1925 Mad. 713=48 M. L.J. 688.

——S. 12—Finality of decision.

An order of trial Court assessing court-fee wrongly is not appealable. 26 P.L.R. 163=105 Ind. Cas. 610=A.I.R. 1927 Lah. 775.

——S. 12—Finality of decision—Revision.

The question whether an order directing additional court-fee to be paid is an interlocutory order which will be revised depends on the circumstances of each case. If it is an order merely assessing valuation of the property and the only question involved is as to the amount upon which the court-fee has to be paid, the decision of the Court of first instance would appear to be final under S. 12 of the Court-Fees Act. There will be no appeal or revision from that order. But the question may under certain circumstances be raised on appeal from the final decree made in the suit. Where, however, the question is, under what provision of the Court-Fees Act the relief sought for in the plaint comes or under which category the suit falls, the decision of the first Court is not final. Where it involves the jurisdiction of that Court to try the suit the decision is liable to be revised. 23 Bom. 486; 28 Cal. 334; 14 Mad. 169; 1 All. 360, Foll. 80 Ind. Cas. 667=5 P.L.T. 425=1924 P.H. C.C. 254=3 Pat. 930=A.I.R. 1924 Pat. 673.

——S. 12—Finality of decision—Revision.

Where a suit was dismissed by a Subordinate Judge and on appeal to the Dt. Judge he differed from the Sub-Judge as to the value of the properties and returned the appeal to be presented to the proper Court.

Held, that the Dt. Judge had jurisdiction to pass the order that he passed and that no revision lay. 90 Ind. Cas. 321=6 P.L.T. 448=1925 P.H.C.C. 167=A.I.R. 1925 Pat. 488.

——S. 12—Finality of decision—Review.

Before or after an order of demand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in S. 12 of the Court-Fees Act may for good and sufficient reasons review its own order of demand on application by the plaintiffs or revise that order of its own motion. (4 Pat. L.J. 57, Foll.) 80 Ind. Cas. 667=5 P.L.T. 425=1924 P.H.C.C. 254=3 Pat. 930=A.I.R. 1924 Pat. 673.

——S. 12—Finality of decision—When open to challenge on—Appeal.

Held, by the Full Bench (*Chevis and Broadway, JJ.*, dissented). The meaning of S. 12 is that the decision of the Court is final only as regards the actual appraisement of the suit and the determination of such question as relates directly and immediately thereto. The question whether such Court was right or wrong in holding the suit to be one of a particular class does not relate directly or immediately to such appraisement and it is open to challenge on appeal. If the Appellate Court holds that the suit has been rightly classified by the Court of first instance, the latter's valuation is final; otherwise it will be set aside. 16 P.R. 1919=11 P.W.R. 1919=49 Ind. Cas. 711 (F.B.).

——S. 12—Finality of decision of Taxing Officer—Appeal—Stamp insufficient.

The decision of the Taxing Officer in the matter of court-fees is final. The court-fee fixed by him must be paid. If the appellant has failed to pay sufficient court-fees in the Court below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default, no decree shall be executed in his favour till the deficiency has been made good. (1918) P.H.C.C. 264=4 P.L.W. 223=3 P.L.J. 443=44 Ind. Cas. 50.

——S. 12 (1) and (2)—Finality of decision.

A decision on the question of court-fee of the Court of First Instance is final between the parties under S. 12 (1) but can be re-opened by an Appellate Court under S. 12 (2) in the interests of Revenue. 25 Ind. Cas. 506 (Mad.).

——S. 12—Finality of decision—Taxing Officer's decision—Appeal from order refusing to file an award.

The order rejecting an application, to have an award filed in Court is a decree within the meaning of S. 12 of the Code but where an appeal is preferred from such an order the court-fee payable upon the memo. of appeal is a fixed-fee of Rs. 10. The decision of the taxing Judge of the Court upon the question of what Court-fee is payable upon a memorandum of appeal is final for all purposes and is not open to appeals for review or revision. 1903 A.W.N. 214.

——S. 12—Finality of decision—Appeal—When barred.

S. 12, Cl. (1) of the Court-Fees Act is no bar to an appeal when the question before the lower Court was to decide merely the class of the suit in order to ascertain under what schedule of the Act it must be taken to fall for the purpose of fixing the amount payable on the plaint or memorandum of appeal. 12 C.L.R. 148; 1 A. 360; 4 M. 204; 14 M. 169; 23 B. 486, app. of. 28 C. 334.

14. Fraud.

——S. 12—Fraud—Fraud on Government court-fee, whether to be tolerated by Court.

An irregularity amounting to fraud on Government Revenue by depriving State of its legitimate court-fee is not to be permitted by Courts. 3 O. L.J. 570=37 Ind. Cas. 133.

15. High Court—Duty of.

——S. 12—High Court—Duty of to see proper-fees are paid.

It is the duty of the High Court to see that the court-fees are paid to the High Court and in the Courts below from which, the case has come.

Quaere:—Whether the High Court has no power to allow a valuation of a claim in the Court below to be reduced in order to relieve party from liability to pay court-fees. 3 P.L.J. 101=43 Ind. Cas. 489.

——S. 12 (2)—High Court—Duty of in second appeal to order deficiency to be made good.

A decree for redemption was passed by the trial Court for Rs. 2,550 of which Rs. 80 was admitted by plaintiff. He should pay stamp duty on Rs. 2,550 less Rs. 80 admitted by him under S. 12 (2). The High Court was bound in second appeal to require the plaintiff to make good the deficiency. 235 P.L.R. 1913=146 P.W.R. 1913=19 Ind. Cas. 856.

16. High Court—Powers of.

——Ss. 12 and 13—High Court—Power of under S. 12—Refund under S. 13.

Appeal from decree allowing mesne profits—*Ad valorem* court-fee not required—Appellate Court setting aside decree and remanding case—Decree signed and sealed—Decree-holder's application under S. 10 para. (ii), Court-Fees Act—Successor-in-office of Appellate Court holding that he had no jurisdiction to revise order passed by his predecessor-in-office:

Held, that the order was correct and that in view of S. 12, the High Court could not exercise its power.

Held, also that it was doubtful, had the judgment-debtor paid proper court-fee, whether he would have been entitled to claim refund in view of S. 13 of the Court-Fees Act. 172 Ind. Cas. 212=18 P.L.T. 864 =4 B.R. 153.

17. Interlocutory orders.

——S. 12 (2)—Interlocutory decision in court-fee matter—Appeal.

Where in a suit for redemption an interlocutory decision as to court-fee is given, the appellate Court to which an appeal lies cannot interfere with the decision at that stage because the suit has not come up before that Court. 1946 A.M.L.J. 45.

18. Interpretation.

——S. 12—Interpretation.

The provisions of S. 12 should be strictly construed and additional-fee should be levied from a party litigant only in exact conformity with the precise words of the statute although provisions in fiscal statutes should not be so construed as to furnish a chance of escape and a means of evasion. 82 Ind. Cas. 292=39 C.L.J. 217=A.I.R. 1924 Cal. 953.

——S. 12 (i)—Interpretation—"Decided" and "decision" apply to any decision by Court, whether both parties have been heard or not.

The word "decided" and the word "decision" in S. 12 (i) are given without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the court-fee. It is pre-eminently a matter between the Government and the subject, a matter for the safeguarding of which the Court, of course, must be the final authority. Hence, an order calling for an additional payment on the memorandum of appeal, is contrary to the provisions of S. 12 (i) and without jurisdiction. A.I.R. 1941 Mad. 626=1941 M.W.N. 406=(1941) 1 M.L.J. 796=53 L.W. 740=198 Ind. Cas. 597.

——S. 12 (i)—Interpretation—'Decision'—Filing of plaint, etc.

When a Court receives a plaint, petition or any other pleadings and files it as properly stamped, its act amounts to decision that the proper court-fee has been paid. If according to the practice prevailing in the Courts the chief Ministerial Officer files a plaint, or a petition, or other pleading, as being properly stamped or that proper court-fee has been paid, his act is an act of the Court within the meaning of S. 12 (1). 7 Cal. 348, Appr. 91 Ind. Cas. 729=1925

M.W.N. 826=A.I.R. 1926 Mad. 96=49 M.L.J. 608.

——S. 12—Interpretation — 'Every question' meaning of.

The words 'every question' in Cl. (*i*) of S. 12, Court-fees Act are of a comprehensive nature and there is no reason for construing those words as restricted to questions relating to amount of Court-fee. A.I.R. 1937 Mad. 81=44 L.W. 845=1936 M.W.N. 1392=(1937) 1 M.L.J. 1=I.L.R. (1937) Mad. 275=166 Ind. Cas. 615 (2) (F.B.).

19. Objection about Court-fee—When to be taken.

——S. 12—Objection about Court-fee—When to be taken.

Plaintiff claimed possession of a house from a tenant holding over and paid Court-fee under S. 7 (xi) (*cc*). The defendants raised the question of title and in consequence of their plea, the question of title had to be gone into. The defendants appealed but did not pay Court-fee on the market value of the house. In second appeal defendants raised an objection that as Court-fee was paid under S. 7 (xi) (*cc*) plaintiff should not have been given a decree on the basis of title.

Held, that as the objection had only been raised for the first time in second appeal and as appellants (defendants) in their appeal in the lower appellate Court only paid Court-fees at the lower rate themselves, the question should not be reopened, no defect of jurisdiction being involved. 103 Ind. Cas. 337=A.I.R. 1927 Nag. 321.

20. Revision.

——S. 12 (ii)—Revision—Appellate Court accepting Court-fee paid on memorandum of appeal—Order is revisable.

An order of the appellate Court accepting Court-fees paid on the memorandum of appeal is revisable by the High Court if it considers that the question relating to the Court-fees has been wrongly decided to the detriment of the revenue. A.I.R. 1946 Nag. 160=1946 Nag. L. J. 110=222 Ind. Cas. 194.

——S. 12 (ii)—Revision—Order adverse to plaintiff—Revision lies.

The order of a Subordinate Court adverse to the plaintiff upon a Court-fee matter is open to revision. A.I.R. 1942 Pat. 60=20 Pat. 780=8 B.R. 471=23 P.L.T. 218=198 Ind. Cas. 866.

——S. 12 (ii)—Revision—Decision on question as to proper classification of suit—Revision, if lies.

Revision under S. 115, Civil P. C., lies against the decision on a question as to proper classification of a suit that is, whether an *ad valorem* fee or a fixed fee is payable on the plaint. A.I.R. 1941 Cal. 518=73 C.L.J. 240=196 Ind. Cas. 762.

——Ss. 12 (i), 7 (iv) (c), (ii) and S. 8-C (Beng.)—Revision—Only question of valuation and not classification is open to revision—Wrong application of standard laid down in S. 7 (ii), in determination of valuation under S. 8-C—Valuation, if open to revision under S. 115, Civil P. C.

Where the only question is one of valuation and not one relating to classification, an appeal being excluded under S. 12 (*i*), the remedy of revision is open, though the revisional power should be exercised only in a proper case, such as where it is shown that the order is manifestly wrong either because it is contrary to accepted principles of valuation or because of a wrong approach to the question.

Therefore, in a case falling under S. 7 (*iv*) (*c*) the application of a wrong standard by the Court in determining the correct valuation under S. 8-C, namely the standard laid down in S. 7 (*ii*) of the Act which is applicable to a different class of suits altogether will attract the revisional jurisdiction of the High Court under S. 115, Civil P. C. A.I.R. 1941 Cal. 509=197 Ind. Cas. 128.

——S. 12—Revision.

High Court will be justified in interfering in revision with an order relating to Court-fee where the question bears upon the valuation of the suit for purposes of jurisdiction. A.I.R. 1936 Mad. 411 =1936 M.W.N. 148=70 M.L.J. 398=43 L. W. 582=161 Ind. Cas. 679.

21. Scope.

——S. 12 (2)—Scope—Powers of Registrar as taxing officer—Orissa High Court Rules, Ch. 3, R. 13 (4)—Deficiency in Court-fee paid in lower Court—Power of Registrar to collect—Power to value subject-matter higher than Stamp Reporter.

Although, under S. 5 of the Court-Fees Act the taxing officer, as such, *i.e.*, the officer appointed under S. 5 has nothing to do with the deficiency in Court-fee paid in the Subordinate Court, the High Court has power to collect the deficit in the Court-fee paid in respect of a plaint or memorandum of appeal in the lower Court. S. 12 (2) specifically provides for the same. S. 12 (2) relates not only to the fees payable by an appellant but also to the fees payable by a respondent to an appeal. Nor is it necessary for the exercise of the powers under S. 12 (2) that there should have been an express decision by the lower Court regarding the Court-fee payable.

The powers of the Registrar as the taxing-officer of the High Court are normally those of an officer of the Court assisting the Court in discharging the functions under S. 12 (2). Under R. 13 (4) of the Orissa High Court Rules, Chap. 3, the Registrar is authorised to dispose of all matters relating to Court-fees. The power to dispose of a matter relating to Court-fee is a judicial power which can be delegated to the Registrar, who can either dispose of the matter himself, if he chooses, or refer it to the Court.

In exercising the powers delegated to him the Registrar, can fix the valuation at a figure higher than that reported by the Stamp Reporter. 16 Cut. L.T. 144.

——S. 12—Scope.

The real purpose for which sub-S. (1) of S. 12 was enacted was to ensure that the Court at as early a stage as possible in the suit should finally determine what was the amount of Court-fee payable before the subject-matter of the suit itself was to be embarked upon, and once the Court does so determine, the parties are not to be permitted to raise the question again before it. A.I.R. 1941 Mad. 626= 1941 M.W.N. 406=(1941) 1 M.L.J. 796=53 L. W. 740=198 Ind. Cas. 597.

——S. 12—Scope—Suit for declaration that revenue sale was illegal—Possession not delivered at time of suit—No consequential relief—Fixed Court-fee paid—Objection that ad valorem fee was payable—Dismissal of—Appeal does not lie.

In a suit for a declaration that a certain revenue

sale was illegal and *ultra vires* and not binding on plaintiffs, the defendants raised a defence that the fixed Court-fee of Rs. 20 paid on the basis that the suit is purely of a declaratory character was insufficient and that the plaintiffs could not maintain the suit without paying *ad valorem* Court-fees on the ground that subsequent to the suit possession was delivered. The trial Court held the amount of Court-fee to be sufficient. In appeal, this was reversed by the District Judge:

Held, that no appeal lies to the District Judge and his order should, therefore, be set aside. A.I.R. 1936 Cal. 784=63 C.L.J. 16=166 Ind. Cas. 960.

——S. 12—Scope.

A document not properly stamped is not a nullity. A.I.R. 1936 Cal. 277=167 Ind. Cas. 265.

——S. 12—Scope of.

This section has no application where the Court makes valuation for determining whether the suit is within the pecuniary limits. An order returning a plaint for representation on the basis of such valuation is appealable. 10 L.W. 178=26 M.L.T. 153=(1919) M.W.N. 599=52 Ind. Cas. 1001.

——S. 12—Scope of.

S. 12 has no application where the question for decision is as to the class under which a suit falls and not merely as to the valuation in that class. 6 Cal. 249; 12 C.L.R. 148; 28 Cal. 723; 16 C.L.J. 371; 28 Cal. 334, Foll. 16 C.L.J. 375=16 Ind. Cas. 963.

22. Valuation—Basis.

——S. 12—Valuation—Basis—Allegations in plaint.

If an objection is taken that a plaint is insufficiently stamped all that the Court has to do, is to see whether the Court-fee is sufficient assuming the allegations in the plaint to be true. The Court does not decide that those allegations are true. 30 Ind. Cas. 73 (Oudh).

——S. 12—Valuation—Basis of.

While valuing a suit, attention is to be confined to the plaint alone and should not be paid to other circumstances subsequently influencing the judgment of the Court as to the value of the relief. 79 Ind. Cas. 982=40 C.L.J. 150=A.I.R. 1924 Cal. 969.

23. Written statement claiming set off.

——S. 12—Written statement claiming set off—Two suits—Plaintiff in one sued as defendant in the other on the same transaction—Proper Court-fees paid in the two suits on the respective plaint claims—Set-off in the written statement in one suit—Ad valorem Court-fee—If can be required to be paid.

Two suits between the same parties for recovery of moneys paid on dealings between them was filed. In one suit, the petitioner-plaintiff claimed a certain amount after adjusting the amount claimed by the defendant-respondent in another suit, almost simultaneously filed by him as plaintiff against the petitioner here. The proper Court-fee had been paid by the petitioner for his plaint in his own suit. On the question whether the petitioner as defendant in the other suit should pay *ad valorem* Court-fee for the set-off raised by him in defence in his written statement,

Held, that in the circumstances the written statement in the other suit by the petitioner should not be deemed a set-off requiring *ad valorem* Court,fee, especially when sufficient Court-fees in the two suits had been paid by the respective plaintiffs on their plaints. 62 M.L.W. 199=1949 M.W.N. 146=A.I.R. 1949 Mad. 671=(1949) 1 M.L.J. 330.

24. Miscellaneous.

——S. 12—Miscellaneous—Suit for partition decreed—Appeal by defendant—Held, that in circumstances of case, appellant must pay same Court-fee as plaintiff paid on plaint in trial Court.

Three sisters, *A*, *B* and *C* had obtained title to a house under a gift deed from *S*. Disputes arose between *A* and *B* on the one hand and *C* on the other and *A*, *B* and one *G* to whom *A* and *B* had transferred half of their share in the house brought a suit to obtain possession of their share from *C*, *C* contended that the gift deed was void, that even if it was not void the plaintiffs could not obtain separate possession of their share as long as the donor *S* was alive, because it was so recited in the gift deed, and that the plaintiff's claim was barred by limitation. The trial Court held that the gift deed was valid, and that the clause in it, which barred the partition of the house during the lifetime of *S* was void, that the suit was not barred by limitation, and passed a decree for partition and ordered *C* to pay Rs. 50 as compensatory costs under S. 35-A of the C. P. Code, to the plaintiffs. Against this decree, *C* appealed and challenged the above findings and the order to pay costs and paid the court-fees as under: Rs. 15 for a declaration that the plaintiffs were not entitled to claim partition, Rs. 15 for a declaration that the sale-deed executed by *A* and *B* in favour of *G*, was void and Rs. 3-12-0 for a relief against the order to pay Rs. 50 costs. On an objection having been taken to the sufficiency of the court-fee, the appellant *C* applied for amendment of the plaint by striking out some of the grounds whereby she gave up the limitation point and also her opposition to the title of *A* and *B* under the gift deed and their right to joint possession but she desired to oppose the finding of the lower Court as to the plaintiffs' right to separate possession and partition during the lifetime of the donor, she also desired to contest the validity of the transfer by *A* and *B* to *G* and the order to pay Rs. 50 as compensatory costs. The appellant contended that if the amendment was allowed, the court-fee paid by her was sufficient. The appellate Court held that the memorandum of appeal was insufficiently stamped, *ad valorem* court-fee being necessary, and that the amendment, which the appellant desired to make, would not affect the court-fee payable:

Held, that in a case of this kind, the appellant must pay the court-fee which the plaintiff paid in the lower Court. The order of the lower Court was, therefore, correct. A.I.R. 1941 Nag. 217=I.L.R. (1942) Nag. 432=1941 N.L.J. 303=196 Ind. Cas. 584.

——S. 12—Miscellaneous—Lower Court by mistake recovering insufficient court-fees—In appeal, additional court-fee, if can be recovered.

Where the written statement claiming a set-off though not stamped is accepted by the trial Judge through mistake or inadvertence, and the trial Judge although subsequently directs defendant to pay court-fees when he passed a decree in his favour and the defendant does not pay the full court-fees, the High Court can, in second appeal, under S. 12 (ii), Court-Fees Act and S. 149, C. P. Code, direct the payment of the additional court-fees. A.I.R. 1936 Cal. 277=167 Ind. Cas. 265.

——Ss. 13-15.

Synopsis.

1. Applicability.
2. Application for refund.
3. Custody-fees.
4. Inherent powers.
5. Refund mandatory.
6. Refund.
7. Remand.
8. Withdrawal of appeal.

1. Applicability.

——S. 13—Applicability—Appeals from preliminary and final decrees.

When an appeal is pending from the preliminary decree it is not necessary to file another appeal from the final decree. The result of the appeal in the preliminary decree would govern the final decree as well, and if an appeal has actually been filed from the final decree, the court-fee may be refunded. 83 Ind. Cas. 829=11 O.L.J. 148=A.I.R. 1925 Oudh 39.

——S. 13—Applicability—Appeal against preliminary decree.

S. 13 of the Court-Fees Act does not apply to the case of an appeal against a preliminary decree. (1917) P.H.C.C. 377=4 P.L.W. 100=3 P. L. J. 116=43 Ind. Cas. 855.

——S. 13—Applicability—Appeal allowed on preliminary point.

The High Court reversed the decision of the first Court on a preliminary point with costs. The decree as drawn up directed that the respondents in the appeal do pay the costs of the appeal as also of the first Court, and the court-fee paid by appellant on the memo. of appeal was also included:

Held, that an order ought to have been made under S. 13 for refund of the fee paid on the memorandum of appeal, and that the amount ought not to have been entered in the decree so as to throw an unnecessary burden upon the unsuccessful respondent. Such an order should be made on application for amendment. 15 C.L.J. 658=15 Ind. Cas. 910.

——S. 13—Applicability—Payment of excess in pursuance of erroneous order of Court—Power to refund.

In an appeal from a suit for ejectment, the defendant was ordered by the appellate Court upon an erroneous view of the law to pay court-fees in excess of what was necessary. The plaintiff's second appeal to the High Court was dismissed. The High Court did not decide the question as to which party would be liable for the excess but in allowing costs to the defendant did not include in the decree excess court-fees paid by the defendants. The defendants thereafter applied before the lower appellate Court for refund of excess court-fees:

Held, that the Court has power to order refund of the excess court-fees as it was a matter in which the Government had profited by an erroneous order of the Court. A.I.R. 1932 Cal. 450=36 C.W.N. 190=137 Ind. Cas. 791.

——Ss. 13-15—Applicability—Plaint sufficiently but incorrectly stamped—Time allowed for affixing proper stamps—Order carried out—Application for return of stamps—Power of trial Court to return them.

The stamps on the plaint were sufficient, but they were not of the correct denominations, according to the rules, and therefore, the plaint was not registered but the plaintiff was given time to affix the proper stamps on the plaint. That was done and then the plaint was duly admitted and registered. Subsequently, the plaintiff applied to the Court for return of the original stamps to him for the purpose of a refund:

Held, that the trial Court had no power to return stamps which were once attached to the plaint and became the part of the judicial record and that the question of refund was one to be determined by the Revenue Authorities, the Collector alone having the power to grant a refund but that the trial Court should have granted a certificate to the plaintiff, stating the fact, and then the certificate could be presented to the Collector. A.I.R. 1934 Nag. 263 =31 N.L.R. 82=153 Ind. Cas. 26.

——S. 13—Applicability—Where the order of the Court rejecting a plaint was in terms a decree dismissing the suit and the plaintiff in appeal from the order paid the full court-fee.

Held, on reversal of the order of the lower Court that S. 13 of the Court-Fees Act applied to the case and that the appellant was entitled to a refund of the court-fee paid by him in appeal. (1905) 16 M.L.J. 30.

2. Application for Refund.

——Ss. 13, 19, Cl. (xx)—Application for refund of court-fee—Whether chargeable with court-fee.

An application for refund of court-fee under S. 13, Court-Fees Act, is covered by S. 19, Cl. (*xx*) thereof, and hence no fee is chargeable on such an application. A.I.R. 1932 All. 590=1932 A.L.J. 601=54 All. 790=142 Ind. Cas. 16.

3. Custody-fees.

——Ss. 13, 14—Custody-fees.

Custody fees might be paid in court-fee stamps as a matter of convenience, but they are not court-fees prescribed for any particular document under the Act. The money is legally payable in advance and hence no question of mistake or inadvertence as in Ss. 13 and 14, comes in. The payment is a contingent payment, and if the contingency does not happen, the purchaser is entitled to get the money. A.I.R. 1937 Cal. 86=41 C.W.N. 155=64 C.L.J. 492=I.L.R. (1937) 1 Cal. 624=168 Ind. Cas. 678.

——Ss. 12, 14—Custody-fees—Court's power to grant refund of.

There can be a refund of custody fees under the inherent powers of the Court, apart from the provisions of Ss. 13 and 14, Court-Fees Act; but that power is limited to cases where fees not warranted by the statute have been paid or realised by mistake or inadvertence. A.I.R. 1937 Cal. 86=41 C.W.N. 155=64 C.L.J. 492=I.L.R. (1937) 1 Cal. 624= 168 Ind. Cas. 678.

4. Inherent Powers.

——Ss. 13-15—Inherent powers. (*See also* C. P. CODE, S. 151).

A Court's power to allow the refund of court-fee

is not confined to Ss. 13, 14 and 15 of the Court-Fees Act and it has got some more, though strictly limited, powers. A Court can order refund of the court-fees under S. 151, C. P. Code, where there is an excess payment made by mistake or where on account of the mistake of the Court a party has been compelled to pay court-fees either wholly or in part. Outside these cases a Court has no power to order refund under S. 151. Where the petitioner wanted to file a second appeal and so filed a memorandum of appeal affixing the proper court-fee stamps, but then compromised with the other side and as the second appeal became unnecessary filed a petition under S. 151, C. P. Code, for a direction to refund the court-fee paid by him:

Held, that there was no provision of the Court-Fees Act on which petitioner could rely for a refund of the court-fee paid on a memorandum filed but with drawn as there was no mistake of Court in making the petitioner pay the court-fee, nor was there any excess court-fee paid by mistake:

Held further, that the remedy, if any, available to the petitioner was not to apply for a refund certificate but to apply to Government *ex gratia* and *misericordia domini regis* (by favour and by the mercy of Lord the King) for a refund less the one-anna in the rupee deduction, as for spoilt stamp papers, if they are pleased to grant it. 1950 M.W.N. 107=53 L.W. 180=A.I.R. 1950 Mad. 629= (1950) 1 M. L.J. 222.

——Ss. 13-15—Inherent powers.

Refund—Invoking inherent powers of Court in the absence of specific provision for that purpose. *See* (1949) 2 M.L.J. 12=1949 M.W.N. 338 (1).

——S. 13—Inherent powers—Chief Court refused to exercise its inherent power to refund court-fee paid.

The applicant filed a suit on the original side of the Chief Court and lost it. Instead of preferring an appeal, which he was entitled to do, before a Bench of the Chief Court, he obtained a certificate for special leave to the Privy Council. Their Lordships revoked the certificate, however, observing that the right of the applicant to file an appeal before a Bench of the Chief Court was not prejudiced. Accordingly an appeal was filed before the Bench on a court-fee of Rs. 16,730, with a prayer under Ss. 5 and 14, Limitation Act, for condoning the delay in filing the appeal. The Bench of Chief Court refused to condone the delay holding that the applicant was not actuated by good faith in prosecuting the proceedings before the Privy Council. Thereupon the applicant filed an application under S. 13, Court-Fees Act, read with S. 151, C. P. Code, for refund of the court-fee paid by him on appeal:

Held, that in view of the Bench order the applicant was clearly disentitled to relief as it would not be expedient in the interest of justice to pass an order of refund in his favour. A.I.R. 1946 Oudh 9=1945 O.W.N. 329.

——S. 13—Inherent powers—Plaint rejected for want of sufficient court-fee—Review application together with deficient court-fee—Application rejected—Stamps cancelled—Certificate to receive the amount paid should be granted under S. 151, C. P. Code—Court-Fees Act, Ss. 13, 14, 15 do not apply. A.I.R. 1942 Mad. 316=(1942) 1 M.L.J. 226=55 L.W. 88=1943 M.W.N. 109=202 Ind. Cas. 122.

——Ss. 13-15—Inherent powers.

Apart from Ss. 13, 14 and 15, Court-Fees Act, the Court has inherent power to refund court-fee. A.I.R. 1940 Mad. 208=1939 M.W.N. 1143=(1939) 2 M.L.J. 867.

——Ss. 13-15—Inherent powers.

The Court has inherent power to order a refund of court-fee even in cases which do not fall within Ss. 13, 14 and 15, Court-Fees Act. Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to a refund of court-fee paid by him on the memorandum of appeal in the lower Appellate Court. A.I.R. 1939 Lah. 257=41 P.L.R. 796.

——Ss. 13-15—Inherent powers.

The High Court can interfere under S. 151, C. P. Code, in a case not governed by Ss. 13, 14, 15, Court-Fees Act, and direct a refund in cases where excess court-fee has been paid and obvious injustice has been done. Suit for enhancement of rent under S. 7, Bengal Tenancy Act—Plaintiff paying court-fee on basis of enhanced rent both on the plaint and the memorandum of appeal, proper court-fees payable being the amount payable on the difference between the rate claimed and rate paid, under Sch. I, Art. 1, Court-Fees Act—High Court can direct refund of the excess amount paid. A.I.R. 1936 Cal. 347=39 C.W.N. 1074=163 Ind. Cas. 222.

——Ss. 13-15—Inherent powers.

Court has no power to order refund of court-fees under S. 151, C. P. Code, apart from powers under Court-Fees Act or other Acts. But in absence of specific provision, Court can act on principles of equity and good conscience. A.I.R. 1936 Rang. 208=14 Rang. 173=163 Ind. Cas. 340 (F.B.).

——Ss. 13-15—Inherent powers.

Where a litigant has paid fees which he was bound to pay under the law for his plaint or memorandum of appeal, the Court by ordering refund under the inherent power cannot indirectly exempt him from the obligation imposed upon him by the statute and thereby nullify the provisions of S. 6, Court-Fees Act. The Legislature however, has made certain exemptions and these are to be found in Ss. 13, 14 and 15, Court-Fees Act. A. I. R. 1935 Cal. 707=40 C.W.N. 309=62 C.L.J. 298=159 Ind. Cas. 443.

——Ss. 13-15—Inherent powers.

S. 13, Court-Fees Act, is not exhaustive and the High Court in suitable cases may exercise its inherent powers vested in it by S. 151, C. P. Code, and order refund of court-fees paid. Where an application for registration of an appeal was rejected on the ground that it was filed out of time but it appeared that delay was due to gross negligence of the legal adviser of the appellant and not his own:

Held, that it could not be said that there was any want of *bona fides* on the part of the appellant and that it was a fit case in which the inherent powers of the Court could be exercised. A.I.R. 1934 Cal. 615=38 C.W.N. 185=152 Ind. Cas. 215.

——Ss. 13-15—Inherent powers—Limits.

The Court can order a refund of court-fee wholly or in part only in three cases—(*i*) where the Court-fees Act applies, (*ii*) where there is an excess payment by a mistake, or (*iii*) where, on account of the mistake of a Court, a party has been compelled to pay court-fees.

Where a party preferred an appeal but when a revision petition, which had been filed by the opposite party was dismissed, he withdrew the appeal:

Held, that the Court has no power to refund the court-fee paid on the appeal. A.I.R. 1934 Mad. 566=40 M.L.W. 295=1934 M.W.N. 678=57 Mad. 1028=67 M.L.J. 321=152 Ind. Cas. 778 (1).

——Ss. 13-15—Inherent powers—Revision.

The Court has inherent power to grant a certificate for refund of court-fee in cases not covered by Ss. 13, 14 and 15, Court-Fees Act, and the discretion of the Court to grant such a certificate is not barred by the fact that the excess was paid by the mistake of the party and not in consequence of any direction by the Court.

In such cases, where the lower Court has wrongly refused a certificate, the High Court may interfere in revision and grant a certificate.

In cases of this nature, the certificate should merely state that the party has paid excess court-fee. The Court has no power to order refund or even to say that the party is entitled to a refund inasmuch as the revenue authorities are not bound to make a refund even if the party has obtained a certificate of the Court.

As a general rule where a party has paid excess Court-fee, the discretion of the Court should be exercised in the party's favour. A.I.R. 1934 Mad. 84=38 M.L.W. 983=66 M.L.J. 35=1934 M.W.N. 7=57 Mad. 542=148 Ind. Cas. 1108.

——Ss. 13, 14 and 15—Inherent powers. *See* C. P. CODE, S. 151, 51 Bom.L.R. 602=A.I.R. 1950 Bom. 4.

——S. 13—Inherent power.

Whether S. 13 applies or not, an appellate Court has jurisdiction to act under S. 151 for ordering refund of Court-fee levied by lower Court. 3 P.L.J. 452; 14 W.R. 47; and 40 Cal. 365, Foll. 107 Ind. Cas. 825 (Pat.).

——S. 13—Inherent powers—Appeal dismissed as not maintainable—No refund can be granted.

The High Court has, in proper cases, inherent power to make an order directing the Taxing Officer to issue the necessary certificates to enable an appellant to apply to the revenue authorities to obtain a refund of an excess court-fee paid on a memorandum of appeal. (3 P. L. J. 452, Foll.) But no Court-fee can be refunded when an appeal is dismissed on the ground that no appeal lay. 105 Ind. Cas. 740=6 Pat. 599=A.I.R. 1928 Pat. 35.

5. Refund mandatory.

——S. 13—Refund—Provision mandatory.

Reading S. 13 with O. 41, R. 23 of Civil P. C., 1908, the Judge has no discretion and is bound to refund the court-fee paid on the appeal memoranda. A.I.R. 1945 Mad. 351=(1945) 1 M.L.J. 205=58 Mad.L.W. 232=1945 M.W.N. 283 (1).

6. Refund.

——S. 13—Refund—Original certificate lost—Duplicate should be given.

The proper order to make when the Court is satisfied that the original certificate is lost is to issue a duplicate certificate and to state therein that it is issued on the representation that the original has not been cashed. Even though there are no statutory rules governing this matter, the Court can act in the exercise of its inherent jurisdiction to do justice. A.I.R. 1944 Mad. 56=(1943) 2 M. L. J. 377=56 L.W. 566=1943 M.W.N. 601=212 Ind. Cas. 640.

——S. 13—Refund.

In partition suit plaintiff abandoning claim to portion of property in his possession and seeking repartition of entire estate throwing into hotchpot that portion of it of which he had been is exclusive possession—He is not entitled to credit for the court fee payable in respect of that part of property of which he was already in possession. A.I.R. 1941 Sind 154=I.L.R. (1941) Kar. 102=197 Ind. Cas. 590.

——S. 13—Refund—Plaintiff paying deficit court-fees and failing to make up deficiency even within time allowed—Plaint rejected—Court-fees already paid, if can be refunded.

When a Court refunds an excess payment it is refunding really not an amount of court-fees but an amount mistakenly paid under the guise of court-fees.

A plaintiff when he institutes a suit should discover the amount of court-fee which he had to pay and if he fails to do this, he cannot complain if he suffers in any way.

Where, therefore, a plaintiff who pays deficient court-fees and upon his failure to pay up the deficiency even within the time allowed, the plaint is rejected, the court-fees already paid cannot be refunded. A.I.R. 1937 All. 505=1937 A.L.J. 481=1937 A.W.R. 389=170 Ind. Cas. 483.

——Ss. 13-15—Refund—District Court as Court of Appeal, if can direct refund of excess court-fees—Proper procedure.

The District Court as a Court of appeal cannot issue an order of refund of the court-fees. Recovery of the excess amount paid is a matter between the appellant and the Revenue Authorities. All that the court can do is to certify that in its opinion the amount paid by the appellant was in excess of the amount required by law. Armed with this certificate, the appellant may go before the Revenue Authorities and claim a refund from them. However, this certificate is merely the expression of opinion of the Court for which executive orders of the Government of Burma, require to be obtained where any person desires to make an application to the Revenue Authorities for refund of court-fee paid in excess. A.I. 1936 Rang. 352=164 Ind. Cas. 639.

——Ss. 13-15—Refund—Principle.

The principle underlying the refund of court-fees seems to be that Government should not profit by the mistake of a litigant or of a Court as to the amount of court-fees payable under the Court-Fees Act, and in cases of such mistake, the Court should order refund for ends of justice. A.I.R. 1935 Cal. 707=62 C.L.J. 298=40 C. W. N. 309=159 Ind. Cas. 443.

——S. 13—Refund.

Deficiency in court-fee—Proper order is to reject plaint—Order to withdraw suit and bring fresh suit cannot be made on insufficiently stamped plaint—If deficiency in court-fee is paid by plaintiff though unwillingly, he cannot be permitted to get back the same. A.I.R. 1934 All. 989=1934 A.L.J. 820=4 A.W.R. 920=152 Ind. Cas. 816.

——S. 13—Refund of excess court-fee paid.

Where on a land acquisition reference under S. 18, Land Acquisition Act, the District Judge held that one of the claimants, a widow, was entitled to a life-interest in the compensation money and order-

ed the money to be invested in the Imperial Bank, and interest to be paid to her and another claimant appealed claiming that the compensation was payable to him alone, paying court-fee *ad valorem* on the amount of the award:

Held, that he need pay court-fee of only Rs. 500 as for a mere declaration, and that he was entitled to a refund of the excess. A.I.R. 1932 Mad. 438 =62 M.L.J. 541=1932 M.W.N. 420=35 M.L.W. 618=55 Mad. 641=139 Ind. Cas. 131 (2).

——S. 13—Refund—Appeal dismissed as not maintainable—No refund can be granted.

The High Court has, in proper causes, inherent power to make an order directing the Taxing Officer to issue the necessary certificate to enable an appellant to apply to the revenue authorities to obtain a refund of an excess Court-fee paid on a memorandum of appeal. (3 P.L.J. 452, Foll.) But no Court-fee can be refusded when an appeal is dismissed on the ground that no appeal lay. 6 Pat. 599=105 Ind. Cas. 740=A.I.R. 1928 Pat. 35.

——S. 13—Refund—Appeal dismissed as insufficiently stamped.

There is no provision in the Court-Fees Act, or anywhere else, for refunding a Court-fee which has been deposited with the memorandum of appeal, or during the hearing of the appeal, when the appeal has been dismissed on the ground that a deficit in the Court-fee ordered to be paid has not been paid. 6 Pat. 602=105 Ind. Cas. 742=9 P.L.T. 337= A.I.R. 1928 Pat. 29.

——S. 13—Refund—Memo. of appeal stamped after limitation period—Appeal dismissed on ground of limitation—Refund of court-fee if can be claimed.

Where a counsel stamps the memorandum of a time barred appeal and is heard on the point of limitation and the appeal is dismissed he cannot set up the plea of the failure of the Court clerk to inform him of the practice about stamping in appeal memorandums as a ground for claiming refund of the Court-fee paid. 7 L.B.R. 90=22 Ind. Cas. 884.

——S. 13—Refund of excess court-fee.

The Court has power to make an order for refund of excess Court-fee if paid under a *bona fide* mistake. 107 Ind. Cas. 320=9 P.L.T. 240.

——Ss. 13-15—Refund—Excess court-fee paid—Power of Court.

A Court has jurisdiction to order the issue of a certificate to enable the plaintiff to apply to revenue authorities to obtain a refund of the excess Court-fee paid under a *bona fide* mistake. 40 Cal. 365 and 3 P.L.J. 452, Foll. 102 Ind. Cas. 193=A. I. R. 1927 Sind 192.

——S. 13—Refund of excess court-fees—Power of High Court.

In an appeal to the High Court refund of excess Court-fee paid could be granted only by the Collector of the District and not by the High Court. 3 U.P.L.R. (All.) 180=57 Ind. Cas. 26.

——S. 13—Refund of excess Court-fee paid by mistake in memo. of appeal.

The High Court can order a refund of the excess amount of Court-fee paid by mistake on a memorandum of appeal. 40 Cal. 365=20 Ind. Cas. 498.

7. Remand.

——S. 13—Remand—Refund of Court-fee on remand—If can be utilised for a future appeal.

Though a party is entitled to get a certificate for refund of court-fee when a case is remanded under O. 41, R. 23, it is not open to him without asking for such a certificate and a refund, to request the Court to allow him to use the court-fee stamp already affixed over again in respect of the appeal subsequently filed by him. A.I.R. 1950 Raj. 2.

——S. 13—Remand in—Second appeal—Plaintiff, if entitled to refund of Court-fee from lower appellate Court.

A suit was dismissed against defendants *A*, *B* and *C* and decreed against defendants *P*, *Q* and *R*. The plaintiffs appealed making *P*, *Q* and *R* also *pro forma* respondents and claiming that a decree should be passed in their favour against *A*, *B* and *C* also. This appeal was dismissed. On second appeal to the High Court, the plaintiffs again wanted a decree against *A*, *B* and *C* and made *P*, *Q* and *R pro forma* defendants. The High Court came to the conclusion that the case should be tried on the remaining issues against *A*, *B* and *C* by the trial Court and setting aside the decrees of the lower Courts sent back the case to the trial Court through the lower appellate Court for trial as against *A*, *B* and *C*. The plaintiffs claimed refund of court-fee:

Held, that *P*, *Q* and *R* were mere *pro forma* respondents, no claim being made against them and the whole appeal was accordingly allowed when the case was remanded and that the order of remand covered the whole of the subject-matter in dispute in the appeal and consequently, the plaintiffs were entitled to a refund under S. 13, Court-fees Act, and that as the whole case was referred to the Full Bench, the Full Bench alone could order the refund.

Held, also that as the remand order was made only in the High Court and not by the lower appellate Court the plaintiffs were not entitled to refund of court-fee paid in that Court. A.I.R. 1934 All. 106=1934 A.L.J. 41=56 All. 526=3 A. W. R. 117 =147 Ind. Cas. 686.

——S. 13—Remand—Refund of Court-fee.

When a case is remanded for rehearing and redecision in accordance with law, the court-fee paid in second appeal shall be refunded. 42 P. L. R. 275.

——S. 13—Remand—Refund of court-fee.

When a case is remanded on a preliminary point, court-fee paid on appeal is refundable. 42 P.L. R. 75.

——S. 13, Proviso—Remand not covering whole subject-matter of suit—Refund of whole court-fee paid, if proper.

Where the remand order has not covered the whole of the subject-matter of the suit according to the provisions in the proviso to S. 13, Court-fees Act an order directing refund of the whole of the court-fees paid on appeal is wrong. A.I.R. 1940 Nag. 349=I.L.R. (1940) Nag. 538=1940 N.L.J. 350= 191 Ind. Cas. 566.

——S. 13—Remand in Letters Patent Appeal—Certificate for refund of court-fee on memorandum of Letters Patent Appeal and in first and second appeals, if can be issued.

Where a suit is remanded in Letters Patent Appeal, refund can be claimed as of right under S. 13, Court-fees Act of the court-fee paid on the memo-

randum of appeal in the Letters Patent Appeal. As regards the claim for a certificate in respect of the court-fee paid on the memorandum of appeal in the second appeal as well as in the first appeal, the words of S. 13, Court-fees Act, do not appear to contemplate the grant of a certificate in respect of such court-fee. It does not contemplate the grant of certificates in respect of court-fee paid in the lower appellate Courts. A.I.R. 1938 Mad. 479=1938 M.W.N. 161=47 L.W. 300=181 Ind. Cas. 858.

——S. 13—Remand—Refund of court-fee.

Where in second appeal, the High Court passed an order: "We modify the decree of the Court below and remand the suit to the Court of first instance for trial in its entirety:"

Held, that the fee paid on the memorandum of appeal was refundable, inasmuch as the expression 'lower Court' in S. 13, Court-fees Act, includes the Court of first instance where the appellate Court is the High Court. A.I.R. 1932 All. 550 (2)=1932 A.L.J. 320=54 All. 523=140 Ind. Cas. 466.

——S. 13—Remand purporting to be under S. 151—Power to order refund.

Even though the appellate Court has purported to remand the suit under S. 151, Civil P.C., if as a matter of fact a remand can be deemed to have been made on any of the grounds mentioned in O. 41, R. 23, C. P. Code, the appellant is entitled to a refund certificate under S. 13, Court-fees Act. A.I.R. 1934 Mad. 643=40 M.L.W. 372=1934 M. W. N. 1070=151 Ind. Cas. 721 (2).

——S. 13—Remand under inherent powers.

Section 13 does not prohibit a Court ordering remand under its inherent powers from directing a refund of the court-fee paid on the memo. of appeal. A.I.R. 1933 Lah. 135=34 P.L.R. 270=141 Ind. Cas. 400.

——S. 13—Remand—Inherent power—Refund of court-fee.

Where a remand is made under the inherent powers of the Court as conferred by S. 151 the refund of the stamp duty is discretionary while in the case of a remand under O. 41, R. 23 the refund is mandatory under S. 13, Court-fees Act. 122 Ind. Cas. 485=A.I.R. 1930 Lah. 441.

——S. 13—Remand—Inherent power—Refund of court-fee.

Where an Appellate Court remands a case for retrial in a case not coming within O. 41, R. 23, C. P. Code no order for refund of court-fee can be passed. 36 Ind. Cas. 541; 26 C.L.J. 49, Rel. 42 Ind. Cas. 304 (Nag.).

——S. 13—Remand on grounds other than those covered by O. 41, R. 23, C. P. Code—Refund.

S. 13 requires an Appellate Court to grant a certificate for refund of court-fees where a suit is remanded under O. 41, R. 23, C. P. Code. O. 41, R. 23, C. P. Code applies only where the original Court has disposed of the suit on a preliminary point. (1917) P.H.C.C. 377=4 Pat.L.W. 100=3 Pat.L.J. 116=43 Ind. Cas. 855.

——Ss. 13, 15—Remand—Court of second appeal remanding case to lower Appellate Court—Appellant, if entitled to refund of court-fee paid.

When a Court of second appeal remands a case to the lower appellate Court under O. 41, R. 23, C. P. Code, the appellant is entitled, under S. 13, Court-Fees Act, to a refund of the court-fee paid on the memorandum of appeal. The word 'suit' in the Court-Fees Act, can be given a wide meaning so as to include proceedings in appeal. A.I.R. 1932 All. 641=1932 A.L.J. 748=54 All. 1081=140 Ind. Cas. 56.

——S. 13—Remand.

A certificate under S. 13, Court-Fees Act should be granted when a suit dismissed on the ground that a document relied on is inadmissible is remanded as the remand is under O. 41, R. 23. 103 Ind. Cas. 298=A.I.R. 1927 Lah. 592.

——S. 13—Remand—Refund of court-fee.

An order refunding court-fee, when remand is made, can only be passed under S. 13 of the Court-Fees Act in a case where the remand is under O. 41, R. 23. 100 Ind. Cas. 49=A.I.R. 1927 Lah. 196.

——S. 13—Remand—Refund of court-fee.

Refund cannot be refused in case of remand covered by the section. 92 Ind. Cas. 926=A.I.R. 1926 Nag. 265.

——S. 13—Remand—Refund of court-fee—Revision.

If an appeal is remanded the Court is bound to grant a certificate for the refund of Court-fees under S. 13 of the Act. Refusal to grant such a certificate is a material irregularity within the meaning of S. 115, C. P. Code. 42 Bom. 363=20 Bom. L.R. 348=45 Ind. Cas. 552.

——S. 13—Remand in appeal as against some respondents—Appellant if entitled to refund.

This section applies where a decree in favour of the respondents is set aside and the case is sent back "for a second decision". Where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, the proviso applies; but in either case, the decree appealed against must be set aside against all the respondents. Where the decree is set aside as against some respondents only and the case is only remanded in appeal for a second decision, the successful appellant cannot get a refund of court-fee. 14 A.L.J. 671=39 Ind. Cas. 28.

——S. 13—Remand—Refund of stamp duty.

Refund of stamp duty paid on the memorandum of appeal will be ordered only when the appeal is remanded under O. 41, R. 23. 12 N.L.R. 126=36 Ind. Cas. 241.

8. Withdrawal of Appeal.

——S. 13—Withdrawal of appeal—Settled outside Court—Refund of court-fee.

Where an appeal has been withdrawn as having been settled out of Court, the appellant cannot be allowed a refund of the court-fee paid on the memorandum of appeal. The case does not come within the purview of S. 13, Court-Fees Act. No Court has inherent power to do that which is expressly prohibited by statute. A.I.R. 1938 Mad. 67=46 L.W. 757=1937 M.W.N. 1157=(1937) 2 M.L.J. 788=174 Ind. Cas. 991.

——Ss. 13-15—Withdrawal of appeal—Refund of court-fee, if can be made.

Where an appeal was withdrawn and the Court was

satisfied that the appeal was wholly unnecessary and no proceedings except the admission of the appeal had taken place in regard to it:

Held, that a certificate for refund of court-fee should be issued in favour of the appellant. A.I.R. 1933 Oudh 170 (1)=10 O.W.N. 292=7 Luck. 588=146 Ind. Cas. 789 (2).

——S. 14—Applicability.

Plaint rejected for want of sufficient court-fee—Review application together with deficient court-fee—Application rejected—Stamps cancelled—Certificate to receive amount paid should be granted under S. 151, C. P. Code—S. 14, Court-Fees Act, does not apply. A.I.R. 1942 Mad. 316=(1942) 1 M.L.J. 226=55 M.L.W. 88=1942 M.W.N. 109=202 Ind. Cas. 122.

——S. 14—Inherent powers.

Apart from provisions of S. 14, there can be refund of custody fees under the inherent powers of Court. A.I.R. 1937 Cal. 86=41 C.W.N. 155=64 C.L.J. 492=I.L.R. (1937) 1 Cal. 624=168 Ind. Cas. 678.

——S. 14—Inherent powers.

Court has inherent power to grant a certificate for refund of court-fee in cases not covered by S. 14. A.I.R. 1934 Mad. 84=38 M.L.W. 983=66 M.L.J. 35=1934 M.W.N. 7=57 Mad. 542=148 Ind. Cas. 1108.

——S. 14—Refund.

Where there was no decree in existence and the application for review was presented to the stamp reporter after 89th day from judgment but within 89th day from decree and was returned:

Held, as refund could be ordered in this case application would be heard with half court-fee. 80 Ind. Cas. 794=39 C.L.J. 344=A.I.R. 1924 Cal. 994.

——S. 14—Right to certificate under—Delay in making application due to accident of Court being closed on last day of period for filing review application—No laches. *See* COURT-FEES ACT (7 OF 1870), ART. 5. (1950) 2 M.L.J. 474=A.I.R. 1951 Mad. 262.

——S. 15—Applicability.

Plaint rejected for want of sufficient court-fee—Review application with deficient court-fee—Appication rejected—Stamp cancelled—Certificate to receive amount paid should be granted under S. 151, C. P. Code—S. 15, Court-Fees Act, does not apply. A.I.R. 1942 Mad. 316=(1942) 1 M.L.J. 226=55 M.L.W. 88=1942 M.W.N. 109=202 Ind. Cas. 122.

——S. 15—Excess court-fee erroneously paid—High Court can under Ss. 107 and 151, C. P. Code, help party to get refund.

Although there is no specific provision in the Court-Fees Act which empowers the Court to order a refund, yet the Court may *ex debito justitiae* go into these questions, declare that any particular plaint or memorandum of appeal was overvalued and then leave the matter to the revenue authorities for the grant of a refund in accordance with the declaration given by the High Court.

The High Court can make a declaration and assist the party to recover the excess court-fee erroneously paid by him under its own order or under orders of Court subordinate to it. A.I.R. 1942 Mad. 464=55 M.L.W. 250=1942 M.W.N. 206=(1942) 1 M.L.J. 451=202 Ind. Cas. 420.

——S. 15—Inherent powers. *See* COURT-FEES ACT, SS. 13-15—INHERENT POWERS.

——Ss. 15, 14—Refund of court-fees apart from Ss. 14 and 15.

Apart from Ss. 14 and 15, Court-fees Act, the Court can order a refund of court-fees realised under an order which is subsequently held to be wrong. A.I.R. 1942 Cal. 539=46 C.W.N. 697=75 C.L.J. 393=I.L.R. (1942) 2 Cal. 253=201 Ind. Cas. 683.

——S. 15—Certificate for refund of court-fee—Conditions—Failure to appear at original hearing, effect of.

The requirements of S. 15, Court-fees Act, are (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. If the conditions are satisfied, the applicant for review is entitled to a certificate for refund of court-fee, and the fact that the adverse order first passed was due to the laches of the applicant in not appearing and presenting his case at the original hearing is immaterial. A.I.R. 1932 Pat. 86=10 Pat. 649=13 P.L.T. 284=135 Ind. Cas. 83.

——S. 15—Applicability—Review application.

A decree of the District Judge, by an accidental mistake, made those defendants also against whom no relief was claimed, liable for the decretal amount. On plaintiff's appeal to the High Court, the decretal amount was increased but the question, as to who were bound by the decree, was not referred to in the judgment. Thereafter the defendants whose names were wrongly included in the decree applied to the High Court for the amendment of the decree.

Held, that although S. 15, Court-Fees Act, was not applicable to this case, as it could not be said that on the rehearing the Court reversed or modified its former decision on the ground of mistake of law or fact, still the court-fee paid on the review application ought to be refunded for the ends of justice and to prevent the abuse of the process of the Court. 117 Ind. Cas. 585=7 Rang. 88=A.I.R. 1929 Rang. 158.

——S. 15—'Plaint.'

The words "the plaint" in column 3 mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an imaginary plaint which might be filed at the time of the application for review and asking for the same relief as in that application. Similarly, in the case of a memorandum of appeal a reference to Art. 1 would not support any other construction. 57 Cal. 679=129 Ind. Cas. 191=A.I.R. 1930 Cal. 631.

——S. 15—Refund—Reasonable time.

Granting of the refund of the improperly applied court-fee is always a matter of grace with the Government and in view of the fact that the Stamp Act and the rules thereunder prescribe that the application shall be made within a reasonable period, an application after two years of the decision of the case was rejected. 126 Ind. Cas. 294=11 P.L.T. 476=A.I.R. 1930 Pat. 495.

——S. 15—Review.

The court-fees on the petition for review is leviable on the value of the entire claim in suit, and not on the value of the relief sought for in the review proceedings. 57 Cal. 679=129 Ind. Cas. 191=A.I.R. 1930 Cal. 631.

——S. 15—Review—Refund on review—Court Acting under S. 151, C. P. Code.

Where a case came clearly under O. 47, R. 1, C. P. Code, and the conditions requisite for bringing the case within the purview of S. 15 of the Court-Fees Act were clearly present, refund was ordered though the Court purported to act under S. 151 instead of O. 47, R. 1. 28 C.W.N. 928=A.I.R. 1924 Cal. 1054=84 Ind. Cas. 278.

——S. 17.

Synopsis.

1. Applicability.
2. Aggregate value.
3. Alternative reliefs.
4. Common cause of action.
5. Consolidation of appeals.
6. Consolidation.
7. Costs—Claim as to.
8. Declaratory suit.
9. Distinct causes of action.
10. Distinct reliefs.
11. Distinct subjects.
12. Mortgage suit.
13. Pre-emption suit.
14. Redemption suit.
15. Single debt.
16. Specific performance and delivery.
17. "Subject".
18. Suit against several tenants.
19. Suit for administration.
20. Suit for rent by some co-sharer—Decree in favour of all—Appeal.

1. Applicability.

——S. 17—Applicability.

S. 17 of the Court-Fees Act applies to suits and appeals from suit and not to applications and appeals from orders passed on applications. A.I.R. 1933 Sind 343=27 S.L.R. 312=148 Ind. Cas. 150.

——S. 17 (2) (Bengal—Applicability—Cases arising under S. 7 (iv) (c).

S. 17 (2), Court-Fees Act, does not apply to cases arising under S. 7 (*iv*) (*c*) of the Act, where a single valuation has to be put for the relief for declaration and consequential relief. S. 17 (2) clearly shows that the relief contemplated by it must be in respect of which court-fees are independently payable under the Act. It cannot mean consequential relief which is not *per se* chargeable with court-fees. 54 C.W.N. 139=A.I.R. 1950 Cal. 85.

2. Aggregate value.

——S. 17 and Sch. I, Art. 1-A (C. P. and Berar)—Aggregate value—Suit for aggregate sum made up of different items relating to breach of different terms of contract—Court-fee.

Plaintiff sued the defendant for an aggregate amount made up of three items. The first item related to overpayments made by the plaintiff by mistake to the defendant on account of certain advances payable under the contract with him. The second and third items represented the loss sustained by the plaintiff on account of breach of different terms of the contract by the defendant:

Held, that the plaintiff claimed three separate reliefs each of which was founded on a different cause of action and that the three reliefs had to be valued separately under S. 17 (1), Court-Fees Act, but that the maximum court-fee payable on the plaint was that provided in Art. 1-A of Sch. I, Court-Fees Act. A.I.R. 1950 Nag. 189.

——S. 17, Sch. I, Art. 1 (U.P.)—Aggregate value.

Appeal from dismissal of claim under S. 9, U. P. Encumbered Estates Act (25 of 1934) based upon number of deeds—S. 17 does not apply—Court-fee payable is *ad valorem* on total amount of claim. A.I.R. 1940 Oudh 243=1940 O.W.N. 165=15 Luck. 395=1940 A.W.R. 84=186 Ind. Cas. 144.

——S. 17—Aggregate value.

A suit for a declaration that a sale in execution is illegal and inoperative and for an injunction restraining the auction-purchaser and puisne mortgagee from taking possession, is suit to obtain a declaratory decree or order where consequential relief is prayed under S. 7 (4) (*c*). The case is clearly outside the provision of S. 17 of the Act and the plaintiff has the right and duty to put down one single entire sum as representing the value of the total relief sought by him in the suit. 35 Cal. 202 (P.C.). Rel. on. 58 Cal. 281=34 C.W.N. 870 =A.I.R. 1930 Cal. 686.

——S. 17—Aggregate value—Suit for possession and mesne profits.

In a suit for possession of immovable property and and past mesne profits, court-fee is payable on the aggregate value of both the reliefs and not separately on value of each relief. 8 Cal. 593 (F.B.) and 16 All. 401, Rel. on. 54 Mad. 1=59 M.L.J. 469 =1930 M.W.N. 880=32 L.W. 433=A.I.R. 1930 Mad. 833.

——S. 17—Aggregate value.

In a suit for a balance due on a *khata* which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account and, therefore, in such a case the Court-fee payable is the Court-fee on the aggregate amount not on each item in the *khata*. 64 Ind. Cas. 486=46 Bom. 142=23 Bom.L.R. 995=A.I.R. 1922 Bom. 376 (F.B.).

——S. 17 (Beng.)—Aggregate value—Claim for possession, mesne profits and arrears of royalty—Suit for, falls under S. 17.

Provisions of O. 2, Rr. 2 and 4, C. P. Code, clearly indicate that a claim for mesne profits would not be barred under O. 2, R. 2, if such a claim was not included in a previous suit for possession and that claims for possession and mesne profits are not based on the same cause of action.

The cause of action in respect of the claim for arrears of royalty is separate and distinct from the the cause of action for *khas* possession and mesne profits. Hence a suit for *khas* possession, mesne profits and arrears of royalty being based on three separate and distinct causes of action is a multifarious suit and falls within the purview of S. 17,

Court-fees Act. A.I.R. 1942 Cal. 40=201 Ind. Cas. 563.

——S. 17 (U. P.)—Aggregate value—Suit claiming property and mesne profits—Separate Court-fee, if can be charged under S. 17 on claim for mesne profits.

Where the plaintiff also claims mesne profits along with a claim to certain property, separate court-fee cannot be charged under S. 17, Court-fees Act on the claim for mesne profits, as if a separate suit had been instituted for them. A.I.R. 1942 Oudh 412 =1942 O.W.N. 394=1942 A.W.R. C.C. 256 (2)= 202 Ind. Cas. 567.

——S. 17—Aggregate value.

A suit was one for recovery of possession of land together with a claim for *malikana* and for mesne profits and the plaintiff after valuing each of the three items paid Court-fees on the total amount. The Court below held that for the purpose of assessing the Court fees payable the three items should be taken separately.

Held, the court-fee payable is on the total amount of the claims added together and not on the separate valuation of each item. 4 P. L. J. 195=50 Ind. Cas. 470=1922 P.H.C.C. 79=A.I.R. 1922 Pat. 359.

3. Alternative reliefs.

——S. 17—Alternative reliefs—Suit for declaration that plaintiff was not effectively dismissed from office and decree for damages or alternatively, claim for arrears of pay—Court-fee payable.

Where, in a suit for a declaration that the plaintiff was not effectively dismissed from office the plaint claims a declaration and a decree for damages for Rs. 75,000, or alternatively, a claim for arrears of pay amounting to Rs. 2,500 is made the case is one in which alternative reliefs are claimed on the same cause of action, either for Rs. 75,000 by way of damages on the ground of wrongful dismissal or for Rs. 2,500 for arrears of pay, on the footing that there has been no effective dismissal. On this interpretation of the plaint, the court-fee payable would only be a fixed fee for the declaratory relief and *ad valorem* fee on the higher of the alternative reliefs, namely, the claim for Rs. 75,000. Court-fee could not be calculated as though the case fell under S. 17, Court-fees Act. A.I.R. 1942 F.C. 47=9 B.R. 94= (1942) 2 M.L.J. 784=I.L.R. (1942) Kar. (F.C.) 116 Sup.=56 M.L.W. 205=1943 M.W.N. 164=47 C.W.N. (F.C.) 23=(1942) F.C.R. 113=I.L.R. (1944) Lah. 533=203 Ind. Cas. 389 (F.C.).

——S. 17—Alternative reliefs.

Suit for possession on basis of sale deed and alternatively for recovery of consideration money—Suit valued at Rs. 955—Same value placed on alternative relief—Alternative reliefs, held did not constitute distinct subject-matters within S. 17—Single court-fee based on valuation of Rs. 955 held sufficient for both reliefs. A.I.R. 1942 Mad. 744=55 M.L.W. 612=(1942) 2 M.L.J. 418=1942 M.W.N. 802=205 Ind. Cas. 224.

——S. 17—Alternative reliefs.

When the suit is for possession on basis of title or by pre-emption based on the same transaction, the court-fee should be paid on the higher of the two reliefs and S. 17 does not apply. 40 P. L.R. 23.

——S. 17—Alternative reliefs—Suit by widow against persons claiming as legatees under her husband's will, for recovery of possession of his property on ground that he died intestate—Alternative prayer for maintenance.

The papment of court-fee for the higher claim for possession is sufficient to cover the alternative claim for maintenance as well, and no separate court-fee is payable for such alternative claim. A.I.R. 1939 Mad. 586=49 M.L.W. 393=(1939) 1 M.L.J. 456 =1939 M.W.N. 640=185 Ind. Cas. 30.

——S. 17—Alternative reliefs — Criterion—Higher Court-fee.

In the case of alternative reliefs if the court-fee payable in respect of any alternative reliefs should exceed the court-fee payable in respect of the other alternative reliefs then, the plaintiff must pay the higher court-fee. A.I.R. 1932 Mad. 158=34 M. L.W. 837=1932 M.W.N. 14=62 M.L.J. 150=55 Mad. 336=135 Ind. Cas. 747.

——S. 17—Alternative reliefs—Against whole decree for evading Court-fee—Proper.

It is an anomaly of the law of Court-fees that a person who appeals only against a part of the decree should have to pay more Court-fee than the one who appeals against the whole of it. But a litigant is entitled to appeal against the whole of a decree though he intends to attack only a part of it.

A suit for pre-emption was decreed. The market price of the property was fixed at Rs. 27,000. Vendees appealed alleging Rs. 43,000 to be the proper value. They sought not only enhancement of the market value but also dismissal of the plaintiff's suit on the ground of limitation and non-maintainability. The real object of the appeal was to have the value enhanced but to avoid payment of Court-fees on a larger amount the vendees resorted to the trick of adding grounds for dismissal of the suit.

Held, that the appeal was competent. 113 Ind. Cas. 538=9 Lah. 563=A.I.R. 1929 Lah. 190.

——S. 17—Alternative reliefs.

Where out of two reliefs which are identical in actual money value, one requires a higher Court-fee, the Court-fee is payable on the relief requiring the higher Court-fee. 78 Ind. Cas. 530=A.I.R. 1925 Pat. 193. *See also* 44 Ind. Cas. 143 (Pat.).

——S. 17—Alternative reliefs.

Where a plaint prays for one of two reliefs in the alternative based on one cause of action, the larger of the two reliefs determines the value of the claim and S. 17 of the Court-Fees Act does not apply. 96 Ind. Cas. 826=8 L.L.J. 449=27 P.L. R. 626=A.I.R. 1926 Lah. 467.

——S. 17—Alternative reliefs.

Where tne plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. Where plaintiff has paid Court-fee on smaller of two alternative relefs, that relief alone should be tried. 73 Ind. Cas. 709=A.I.R. 1923 Lah. 456.

——S. 17 (C.P.)—Alternative reliefs.

Suit for specific performance of agreement to sell and in the alternative for decree for mortgage debt in settlement of which sale was agreed on—

Court-fee on one relief held sufficient. 1942 N.L. J. 352.

——S. 17—Alternative reliefs.

A suit claiming money due on a pro-note principally from the legal representatives of the execution or in the alternative from another who is alleged to have actually taken the money representing himself to be an agent of the executant does not require separate court-fees for each relief. 120 Ind. Cas. 411=A.I.R. 1930 Nag. 55.

——S. 17—Alternative reliefs.

A suit for possession of the land against defendant 2 or in an alternative for the return of the consideration with interest from defendant 1, tenant who had surrendered to plaintiff, landlord requires separate Court-fee for each relief; since the claim for possession of the land is a claim in respect of the proprietary interest in the land, whereas the claim in respect of the refund of the money is a suit based on failure of consideration. It may be that where reliefs are claimed in the alternative with reference to the same cause of action. S. 17 would not govern the case. That may also be so where the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds. It is, however, different where the reliefs are distinct though both are evidenced by the same instrument. 30 Mad. 61, Appr. 29 All. 155, Foll. 78 Ind. Cas. 703=A.I.R. 1924 Nag. 169.

——S. 17—Alternative reliefs—Claim on an agreement to sell with an alternative claim for pre-emption.

The plaintiff came into Court claiming in the first place specific performance of an alleged agreement to sell to him certain immovable property, and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other. *Held*, that the suit was within the meaning of S. 17 of the Court-Fees Act, 1870, a suit embracing two distinct subject-matters and therefore chargeable with the Court-fee assessable upon each alternative relief separately. 1907 A. W. N. 4=4 A.L.J. 127=29 A. 155.

——S. 17—Alternative reliefs — Several causes of action.

S. 17 applies to alternative reliefs claimed with reference to more causes of action than one. The section is not necessarily confined to cases where cumulative reliefs are claimed. 47 Ind. Cas. 886 (Nag.).

4. Common cause of action.

——S. 17—Common cause of action—Joint suit against different persons.

The plaintiff brought a suit for recovery of possession of certain lands with mesne profits. He valued the lands and mesne profits at a certain sum. Upon that valuation he paid a Court-fee. The sheristadar reported that there was a deficiency in the Court-fees paid by the plaintiff upon the ground, valuing the lands and the mesne profits claimed against the different defendants separately.

Held, that Court-fee was sufficient and S. 17 did not apply as the plaintiff claimed *khas* possession of the land upon a single right, the *zerait* of the plaintiff. The fact that the defendants held different parcels of land separately and that the lands had been recorded in the record-of-rights did not change the character of the claim of the plaintiff. 13 Cal. 147; 29 Cal. 871, Foll. 110 Ind. Cas. 191=7 Pat. 402=9 P.L.T. 199=A.I.R. 1928 Pat. 274.

——S. 17—Common cause of action — One notice — Several subjects.

The word 'subject' in S. 17 means cause of action which means every fact which it would be necessary for the plaintiff to prove if traversed, in order to support, his claim to the judgment of Court. Where the plaintiff gave one notice to the defendant railway company in respect of 38 consignments of different dates, the notice being part of the cause of action, separate suits will not lie; consequently Court-fees on the consolidated amount is sufficient. 78 Ind. Cas. 415=1924 P.H.C.C. 175=A. I. R. 1924 Pat. 596.

5. Consolidation of appeals.

——S. 17—Consolidation of appeals—Inherent jurisdiction.

There is no objection to consolidating a number of appeals in the exercise of the inherent jurisdiction of the Court, if the matter for consideration in a number of appeals is the same and the parties are the same. But it is another matter when it is sought to invoke the aid of S. 17, Court-Fees Act, on the allegation that the memorandum of appeal in each of these cases should be consolidated into one memorandum of appeal and treated as if it was one memorandum for a single appeal. The appeals may be consolidated for the purpose of hearing them but Court-fees must be paid separately for each according to the provisions of the Court-Fees Act. 29 Cal. 140, Expl. 117 Ind. Cas. 692 =32 C.W.N. 776=A.I.R. 1929 Cal. 135.

6. Consolidation.

——S. 17, Art. 1, Sch. I—Consolidation—Court-fee payable.

In appeals from references under the Land Acquisition Act in respect of different plots of land held by different tenants having been consolidated under order of Court: *Held*, that the subject-matter of the references was not one and the same but distinct; that the aggregate of the Court fees payable in respect of each matter should be paid but that it was subject to the maximum limit of Rs. 3,000 under Art. I of Schedule I. 3 A. 108 foll. 29 C. 140.

7. Costs—Claim as to.

——S. 17—Costs—Claim in respect of costs of lawyer's notice—Whether a distinct subject.

A claim for costs incurred in sending a registered notice demanding the amount due to the plaintiff is not a claim in respect of a subject distinct from the claim for the amount due within the meaning of S. 17, Court-fees Act. A.I.R. 1936 Mad. 420= 70 M.L.J. 308=42 M.L.W. 362=1936 M.W.N. 243 (2)=59 Mad. 739=162 Ind. Cas. 175.

——S. 17—Costs—Court-fee, on.

Where in an appeal relief is sought with regard to costs independently of the result of the main contest between the parties, Court-fees must be paid *ad valorem* on the cost decreed. 3 P.L.J. 443=4 P.L.W. 223=(1918) P.H.C.C. 264=44 Ind. Cas. 50.

8. Declaratory suit.

——S. 17—Declaratory suit—Relief consisting of two parts—Court-fee payable.

Where the relief sought consists of two parts which are such that the first is the foundation for the second and the second part is a necessary consequence of the granting of the first part, then the two can be taken together as really constituting one relief which is quite enough for the purpose of decreeing the plaintiff's claim. On the other hand, if the two parts are such that the second part does not necessarily follow from the first or that the first goes further than what is necessary for the granting of the second part of the relief, then one sum of Rs. 10 would not be sufficient. Where, therefore, the plaintiff claims a declaration that property is *wakf-alal-aulad* and, therefore, not attachable and saleable in satisfaction of a debt due by one of the defendants to the others, one sum of Rs. 10 as court-fee is enough. Where, however, the plaintiff claims a declaration that the property in the suit is owned and possessed by the plaintiff and is not fit for attachment and sale in satisfaction of a decree in favour of the defendants against two *pro forma* defendants, two reliefs are claimed by the plaintiff so far as the ownership of the property and the non-liability of the property to attachment and sale are concerned, the dispute is between the plaintiff on the one hand and the attaching creditor on the other. The question whether the plaintiffs are actually in possession of the property raises a dispute between them on the one hand and possibly the judgment-debtor on the one hand for asking for a declaration as to possession, the plaintiffs are asking for more than is actually necessary for the granting of the second part of the relief, two distinct reliefs having been claimed by the plaintiffs and two sums of Rs. 10 should be paid. A.I.R. 1936 All. 874=1936 A. L.J. 1155=1936 A.W.R. 1287=167 Ind. Cas. 59.

9. Distinct causes of action.

——S. 17—Distinct causes of action.

Where three declarations were sought arising from distinct causes of action, *held*, Rs. 30 should be paid as Court-fees. 75 Ind. Cas. 597=A.I.R. 1923 All. 306.

——S. 17—Distinct causes of action—Suits against Government and an agent by owner of cars for recovery of amounts paid as licence fees twice over—Court-fee if to be paid twice.

The plaintiff firm owning a fleet of motor cars obtained licences on payment of licence fees to the Government through its agent defendant 2, but again had to pay the licence fees in respect of the same vehicles to Government the first defendant who threatened to prosecute them if it was not paid. So the plaintiff firm instituted suits against Government and against the agent for recovery of the amounts alleged to have been paid by the plaintiff twice over.

Held: That the suits could not be said to have embraced two or more distinct subjects within the meaning of S. 17 of the Court-Fees Act.

If two suits were to be filed, an anomalous result will follow in that there may be contradictory findings in the two suits. It is to avoid this anomalous result that O. 1, R. 1, C. P. Code, permits the joinder of the defendants against whom relief is claimed in the alternative in order that the question as to which of the defendants is liable and to what extent may be determined not only as between the plaintiff on the one hand and the defendants on the other, but as between defendants *inter se*.

Hence no additional court-fee need be paid. 63 M.L.W. 959=1950 M.W.N. 703=(1950) 2 M.L. J. 499=A.I.R. 1951 Mad. 288.

——S. 17—"Distinct causes of action"—Co-owner dispossessed of property—Suit by for possession—If one comprising distinct causes of action.

There is no rule of law by which a person who is dispossessed of property which is held jointly with another person, and in which he is entitled to a fractional share, must first ask to be put back in joint possession and then ask for partition. He may bring a suit for possession and ask for possession of his share only, and it cannot be said that the suit in such cases comprises two distinct causes of action, liable to separate Court-fees, merely because the Court has to effect a partition in order to grant him the relief. 1924 Pat. 558, diss. I.L.R. (1949) A. 79.

——S. 17—Distinct cause of action.

Where a plaintiff sued as endorsee of a promissory note and he subsequently obtained an assignment of the original obligation and applied to add that cause of action to the plaint, *Held*, the plaintiff was bound to pay court-fee once again in respect of the additional cause of action sought to be added. If a plaintiff wants the privilege of a fresh cause of action, he must pay a fresh court-fee. A.I.R. 1931 Mad. 533=1931 M.W.N. 390=131 Ind. Cas. 1.

10. Distinct reliefs.

——S. 17—Distinct reliefs arising out of the same cause of action.

Where distinct reliefs arising out of the same cause of action are claimed in a suit the court-fee payable would be on the consolidated amount of all the reliefs. I.L.R. (1949) A. 852=1949 A. W. R. 587=1948 A.L.W. 392=1948 O.W.N. 394=A.I.R. 1949 A. 117=1949 A.L.J. 377.

——S. 17 (U. P.)—Distinct reliefs — Suit against tenant for rent and ejectment—Separate Court-fee on the two reliefs—If and when payable—Test.

On a proper construction of S. 17 of the Court-Fees Act (as it stands at present in U. P.), no hard and fast rule can be laid down that in every case in which the tenant is sued for ejectment and rent the court-fee on the two reliefs should be paid separately. It all depends upon the nature of the transaction. The crucial test is whether the cause of action in respect of the two reliefs are the same or is different. I.L.R. (1948) All. 27=A.I.R. 1949 All. 348=1947 A.L.J. 681=1947 A.W.R. (H.C.) 426.

11. Distinct subjects.

——S. 17—Distinct subjects—Promissory note executed by defendant—Assignment to plaintiff—Contract of sale—Consideration to be adjusted in part towards promissory note—Sale not effected—Suit for specific performance—Alternative relief for recovery of amount due under note—Court-fee payable.

The defendant executed a promissory note in favour of a third person who subsequently assigned it

in favour of the plaintiff. Subsequently the defendant entered into an oral agreement of sale with plaintiff under which he agreed to sell certain property and it was agreed that the consideration should be adjusted towards part of the amount due under the promissory note. The defendant, however, did not execute a proper sale deed, though the plaintiff was ready and willing to perform his part of the contract. Inasmuch as the defendant finally denied the contract of sale the plaintiff instituted the suit against him and sought a decree granting specific performance of the contract of sale and directing the defendant to pay the balance of the amount due under the promissory note after adjusting the consideration for the sale, and in the alternative for a decree directing the defendant to pay the entire amount due under the promissory note with interest, if for any reason it was found that the contract of sale was unenforceable.

Held, that there were two separate and independent causes of action and two distinct reliefs which did not necessarily arise from the same subject-matter, namely, the relief for recovery of the amount due under the promissory note and the claim for specific performance in respect of the agreement to sell, and that the plaintiff was bound to pay court-fee on the two reliefs as on "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. 1948 M.W.N. 545=61 L.W. 653=A. I. R. 1949 Mad. 125=(1948) 2 M.L.J. 104.

——Ss. 17 and 7 (v)—Distinct subjects—Suit praying for possession of various items in the hands of number of defendants—Suit if embraces distinct subjects—Proper Court-fee.

Where the plaintiff sued for possession of several properties and the prayer in the plaint was that the plaintiff should be put in possession of the 'undermentioned' properties through process of Court and free from obstruction of the defendants, who came into possession under different titles from the first defendant who in violation of a trust had alienated them.

Held, that on the allegations in the plaint and taking the substance of the plaint also into consideration the suit did not embrace distinct subjects but only one subject as claimed in the prayer in the plaint and as such S. 17 of the Court-Fees Act was not applicable to it. 7 Pat. 402; 59 M. L.J. 469; 54 Mad. 1 (F.B.) and 63 M. L. J. 73, rel. 1949 M.W.N. 810=A.I.R. 1950 Mad. 155=(1949) 2 M.L.J. 565.

——S. 17—'Distinct subjects'—Suit to eject trespassers on several properties situate in different villages, by person claiming title under one settlement—Suit embraces several distinct subjects.

A person claiming title under one settlement deed to several properties situate in different villages, sued to eject persons in possession of the properties, alleging them to be trespassers and for mesne profits and compensation. There appeared to exist no legal inter-connexion between the defendants. They had nothing in common between them and were joined in one suit merely as a matter of convenience. The amount claimed as mesne profits and compensation against each person was different and it appeared that each committed a different although a similar act of trespass:

Held, that the relief sought against the several defendants was similar but not the same and the suit contained more distinct subjects than one within the meaning of S. 17, although the title was claimed under one settlement deed.

Quaere: Whether having one cause of action against several defendants is same thing as there being only one 'subject'. A.I.R. 1946 Mad. 162=(1945) 2 Mad.L.J. 571=58 Mad.L.W. 667=1946 Mad.W.N. 40=224 Ind. Cas. 26.

——S. 17—Distinct subjects—Suit for possession only—Several alienations challenged—Test for determining valuation—Binding nature of alienations to be considered.

The true test for determining whether a case comes under S. 7 (*iv*) (*c*) or under S. 7 (*v*) of the Court-fees Act is the answer to a question whether or not the plaintiff could obtain in the suit a decree for possession without first seeking a declaration that the alienation to the defendant was not binding on him.

The plaintiffs brought a suit for possession of immovable property part of which was alienated by their father by private sales and part was first mortgaged and then sold in execution of mortgage decrees. Plaintiffs were governed by Mitakshara law. Considering the special powers of a Hindu father to alienate coparcenary properties and applying the above test for determining the Court-fee payable by the plaintiffs, it was held that the alienations by private sales without justifying necessity can be treated by the plaintiffs as null and void and not binding on them, whereas the sales held in execution of mortgage decrees are binding on them till they are set aside. Therefore, with regard to the latter, plaintiffs must state the value of properties under S. 7 (*iv*) (*c*). With regard to the former, value shall be deemed to be twenty times the revenue, *i.e.*, under S. 7 (*v*). S. 17, Court-fees Act, would not apply in such case and the court-fee would be payable on the total value of the two kinds of properties, calculated as above. A.I.R. 1945 Pat. 421=24 Pat. 334=27 Pat.L.J. 67.

——S. 17—Distinct subjects—Several alienations challenged — Court-fee in respect of each alienation should be paid.

The reversioner asks for a number of declarations if he challenges several alienations by a Hindu widow and asks for declaration that the same do not bind the reversioners. In such a case, he must pay a court-fee of Rs. 15 in respect of each alienation. A.I.R. 1940 Pat. 158=20 P.L.T. 855=18 Pat. 756=6 B.R. 412=5 Cut.L.T. 84=186 Ind. Cas. 877.

——S. 17—Distinct subjects—Criterion—Plaint in appeal embracing two or more subjects—Court-fee.

To attract the application of S. 17, the suit must embrace two distinct subjects, *i.e.*, causes of action.

In estimating the court-fee payable on the memorandum of appeal what the Courts have to see is not whether the appeal embraces two or more subjects but whether the suit does. A.I.R. 1944 Pat. 384=23 Pat. 675=218 Ind. Cas. 143.

——S. 17—(U. P.) Distinct subjects—Certain items of property claimed under primogeniture sanad—Some pleas based on different causes of action—They cannot be said to be separate and distinct from main cause—No separate fee is chargeable on each of various items of property.

Where in a suit brought by the plaintiff to recover certain items of property, his main case is that he is entitled to all the property claimed, under the primogeniture *sanad*, there is in a sense one main cause of action in respect of all the property and from the mere fact that some pleas are based on different causes of action, it cannot be said that they are separate and distinct from the main cause. No separate fee is, therefore, chargeable under S. 17, Court-fees Act, on each of the various items of property claimed. A.I.R. 1942 Oudh 412=1942 O. W.N. 394=1942 A.W.R. C.C. 256 (2)=201 Ind. Cas. 567.

——S. 17—Distinct subjects—Minor executing mortgage—Mortgagee assigning his rights to another for consideration—Balance of mortgage-money not being paid, assignee filing suit against mortgagor and his surety and in alternative against vendor—S. 17, held did not apply—Vendor must refund money received by him under sale of mortgagee rights under S. 65, Contract Act.

The mortgagee of a mortgage executed by a minor assigned his rights to another for certain consideration. On failure to pay the balance, the assignee instituted a suit against the mortgagor and his surety and in the alternative, claimed a decree against the assignor if the amount was not recovered from the mortgagor and his surety. The mortgage being void, the suit against the original mortgagor was dismissed:

Held, that the cause of action against the assignor was a part and parcel of the cause of action against the original mortgagor. S. 17, Court-fees Act, was therefore, inapplicable.

Held, also, that the mortgage in favour of the assignor was a nullity, and therefore the consideration for the sale by him in favour of plaintiff had failed. The consideration having failed the vendor must refund the money received by him to the vendee for the sale of the mortgage rights under S. 65, Contract Act. A.I.R. 1938 Lah. 566=40 P.L.R. 528=181 Ind. Cas. 353.

——S. 17—Distinct subjects—Suit on deed of settlement — Two reliefs claimed—One to declare deed not binding and other decree for amount if deed was valid—Such reliefs, if distinct subjects.

The test which is sometimes laid down in order to ascertain whether two or more claims constitute different subjects within the meaning of S. 17, Court-fees Act, *viz.*, whether different suits might have been instituted in respect thereof, is not a decisive one.

Plaintiff brought a suit based on a deed of settlement. The reliefs claimed were to declare the deed not binding as having been brought about by fraud and an alternative relief that if the deed was found to be valid a decree should be given for the amount of the deed:

Held, that the two reliefs claimed did not constitute two distinct subjects within the meaning of S. 17, Court-fees Act. A.I.R. 1938 Mad. 241=1937 M.W.N. 1252=47 M.L.W. 64[illegible](1938) 1 M. L.J. 189=174 Ind. Cas. 988.

——S. 17—Distinct subjects.

Mortgage with possession—Subsequent bond creating charge on same property but not altering condition of first deed—Land to be redeemed by payment of both amounts—Possession passing to the mortgagee—Suit by reversioner challenging both transactions:

Held, that the suit did not fall under S. 17. A. I.R. 1933 Lah. 382=142 Ind. Cas. 641.

——S. 17—Distinct subjects—Mortgage by debtor for entire sum due to several creditors—Whether comprises distinct subjects.

Where a person became indebted to several persons in different sums and executed a single mortgage in favour of the several creditors for the entire sum due to all of them and the creditors instituted a suit to recover the sum due under the mortgage:

Held, that the claim did not embroce 'distinct subjects' within the meaning of S. 17, Court-fees Act, and the plaintiffs were not bound to pay court-fees separately on the amounts due to each of them. A. I.R. 1932 Mad. 737=63 M.L.J. 316=1932 M.W. N. 986=36 M.L.W. 424=139 Ind. Cas. 431.

——S. 17—Distinct subjects—Suit against ryots of a village for enhancement of rent.

A suit under S. 193, Madras Estates Land Act (1 of 1908), for enhancement of rent against *ryots* of a village does not embrace "distinct subjects" within meaning of S. 17, Court-fees Act. A.I.R. 1932 Mad. 667=63 M.L.J. 73=36 M.L.W. 191= 1932 M.W.N. 777=139 Ind. Cas. 102.

——S. 17—Distinct subjects—Several deposits—Single demand for total amount—Suit for aggregate amount—Court-fees.

Where the plaintiff sued for the recovery of an amount comprised of three distinct sums deposited on different occasions with the defendants:

Held, that the suit embraced three distinct subjects within S. 17, Court-fees Act, and court-fee had to be paid upon each deposit and not upon the aggregate amount.

Held, further, that the fact that the plaintiff had gathered all his claims into one and made a single demand was immaterial inasmuch as demand was not essential for giving a cause of action to the plaintiff. A.I.R. 1931 Mad. 712=34 M.L.W. 378=61 M.L.J. 680=134 Ind. Cas. 988.

——S. 17—Distinct subjects.

A plaintiff brought a declaratory suit in respect of propreties, partly in the Collector's possession which he valued at more than Rs. 5,000 and partly in his possession which he valued at less than Rs. 5,000 in the court of Subordinate Judge having special jurisdiction to try suits valued more than Rs. 5,000. The reliefs claimed were, declaration as to the former, and a declaration with consequential relief, valued at Rs. 5 for the latter. It was *held* (1) that the value exceeded Rs. 5,000 and (*ii*) the suit was within the Court's special jurisdiction (*iii*) and consequently the appeal lay to the High Court and not to the District Judge. The plaint clearly stated the plaintiff's claim was for two distinct subjects, the first exceeding in value Rs. 5,000 and the aggregate value of both the properties constituted the value of the suit. 14 Bom.L.R. 757=36 Bom. 628 =16 Ind. Cas. 1005.

[On appeal 43 Bom. 507=50 Ind. Cas. 280 P.C.).]

——S. 17—Distinct subjects.

The value for purposes of appeal is quite irrespective of the value for purposes of Court-fee under S. 17. 41 P.R. 1910=56 P.L.R. 1910=65 P.W.R. 1910=6 Ind. Cas. 715.

——S. 17—"Distinct subjects", meaning—Claims for rent, damages and possession.

Claim for possession and damages for use and occupation after the tenancy terminates, are not distinct subjects within S. 17 as they arise out of the tenancy having come to an end. A claim for rent, however, is a distinct subject, as it arises out of the contract of tenancy and can be enforced by a separate suit. 10 Bur.L.T. 60=8 L.B.R. 529=36 Ind. Cas. 883.

——S. 17—'Distinct subject'—Pre-emption—Suit for pre-emption of two villages out of larger number conveyed by the same sale-deed.

The words 'distinct subjects' in S. 17 of the Court-Fees Act must be taken to mean 'distinct causes of action.' The plaintiff sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid court-fees on their plaint calculated on five times the aggregate amount of the Government revenue payable by each of the two villages.

Held, that this was a proper mode of calculation. The two villages were not 'distinct subjects' within the meaning of S. 17 of the Court-Fees Act, 1870, and court fees were not, therefore, leviable in respect of each village separately, 1 A. 522; 2 A. 676 and 16 A. 401, Foll. 1904 A.W.N. 210=27 A. 186.

——S. 17—"Distinct subjects"—Suit for possession and mesne profits.

A claim for possession and a claim for mesne profits are not 'distinct subjects' within the meaning of S. 17 and the Court-fee in a suit embracing the two claims is payable only on the aggregate value of both the reliefs. 8 C. 593; 16 A. 401 and 4 Pat. L.J. 195, Foll. 32 Mad. L.W. 433. A.I.R. 1930 Mad. 833=54 Mad. 1=59 M.L.J. 469=1930 M.W.N. 880.

——S. 17—Distinct subjects—Partition and possession.

Where the plaintiffs were not in possession of any portion of the properties sought to be partitioned, and the suit of the plaintiffs was one for joint possession and for partition.

Held, the suit embraces two distinct causes of action and therefore two subjects within the meaning of S. 17 and the plaintiffs must pay the fixed fee for partition in addition to the *ad valorem* fee as in a suit for possession. A party seeking partition must ask for joint possession if he is out of possession as a condition precedent to a decree for partition. The causes of action are entirely different and the one is not included in the other. 81 Ind. Cas. 1052=3 Pat. 618=5 Pat.L.T. 618=A.I.R. 1924 Pat. 558.

——S. 17—Distinct subjects.

The word 'subject' in S. 17 means cause of action, and it has no reference to the division of subjects adopted in S. 7 of the Act. Where a suit comprises several claims arising out of the same cause of action, the Court-fee should be charged on aggregate of the values of all the claims and not on the value of each claim separately. 4 P.L.J. 195=50 Ind. Cas. 470.

——S. 17—Distinctive subjects—Suit for recovery of sums due under different promissory notes—Applicability of S. 17.

Where two sums of money are respectively claimed in a suit on the basis of two promissory notes, court-fee is payable under S. 17, Court-Fees Act, and under that section, court-fees are payable not on the aggregate sum but on the several sums which go to make up that aggregate, as if separate plaints have been filed.

Under S. 17, the test is what is the amount that would be payable had separate plaints been filed for each of the several distinct claims, all of which the suit embraces. A.I.R. 1933 Mad. 178=37 M.L.W. 74=65 M.L.J. 252=1933 M.W.N. 215=141 Ind. Cas. 533 (1).

——S. 17—Distinct subjects—Several promissory note by defendant to plaintiff.

Where a suit is brought on several promissory notes executed in plaintiff's favour by the defendant, such suit embraces distinct subjects within the meaning of S. 17 whether the several notes were executed for different advances or for one balance, arrived at in a settlement of accounts. The words "distinct subjects" in S. 17 mean distinct causes of action. It is not necessary that a suit must fall under more than one of the categories of suits mentioned in S. 7 before it can be said to embrace distinct causes of action. 5 L.B.R. 94=4 Ind. Cas. 289.

——S. 17—Distinct subjects—Mortgage—S. 17 of the Court-Fees Act not confined to cases where the reliefs claimed are cumulative.

Where a plaintiff prayed for redemption of a mortgage, the principal amount secured whereby was Rs. 3,000 and, in the alternative, for recovery from defendants of various sums aggregating more than Rs. 2,000 on the footing of a mortgage to be executed by the plaintiff to the defendants, in accordance with certain provisions contained in an earlier mortgage:—*Held*, that the suit embraced two *distinct* subjects and was chargeable with the aggregate amount of the Court-fees to which the plaints embracing separately each of the reliefs prayed for would be liable; and that, consequently, the appeal from the Subordinate Judge lay to the High Court and not to the District Court. 1 M.L.T. 426=16 M.L.J. 462=30 M. 61.

12. Mortgage suit.

——S. 17—Mortgage suit—Suit on two bonds—Plaintiff and trial Court treating entire mortgage-debt as one consolidated sum—Bonds held not distinct subjects within S. 17.

Held, also that the trial Court as well as the plaintiff having treated the entire mortgage debt due on the two bonds as one consolidated sum of Rs. 1,07,300 it was not open to the Appellate Court to go behind the decree of the trial Court and determine the amount due on each mortgage when the trial Court itself did not determine these amounts separately. A.I.R. 1943 Lah. 275=45 P.L.R. 382 =I.L.R. (1944) Lah. 24=211 Ind. Cas. 53 (F.B.).

——S. 17—Mortgage suit—Suit embracing two or more mortgages—Court-fee should be paid on each mortgage and not on aggregate amount of claim.

Section 67-A, T. P. Act, does not control S. 17, Court-fees Act. A.I.R. 1941 Rang. 95=1940 Rang. L.R. 767=193 Ind. Cas. 711.

——S. 17—Mortgage suit—Suit on several mortgage bonds hypothecating different properties—Court-fee is payable separately in respect of each bond. 63 Cal. 720=40 C.W.N. 409.

——S. 17—Mortgage suit—Two mortgages executed for five promissory notes—Whether embraces two or five distinct subjects—Effect of S. 67-A, T. P. Act.

Where a suit was brought to enforce two mortgages which were executed for amounts due under five promissory notes:

Held, that in the words of S. 17, Court-fees Act, the suit embraced only two distinct subjects and the Court-fee payable on the plaint should be computed on this basis.

Held, further that the principle of consolidation applied by S. 67-A, T. P. Act, has no bearing on the interpretation of S. 17 of the Court-fees Act and the suit in a case like this cannot be deemed to relate to one subject only. A.I.R. 1935 Mad. 262 (1)=1935 M.W.N. 198=41 M.L.W. 327=68 M.L.J. 316=156 Ind. Cas. 435.

——S. 17—Mortgage suit—Two mortgages.

A person holding two mortgages from the same mortgagor hypothecating the same properties and even when the due date in both is the same can bring suits separately on the two bonds. In other words, there is nothing to prevent a mortgagee from suing on the first mortgage without joining the second mortgage and *vice versa*. And therefore the mortgages are separate subjects and not one under S. 17 of the Court-fees Act. 33 C.L.J. 232, Foll. 4 P.L.T. 546=74 Ind. Cas. 820=2 Pat. 874=1923 P.H.C. C. 293=A.I.R. 1924 Pat. 77.

——S. 17—Mortgage suit — Two mortgages hypothecating same property—Court-fee.

Plaintiff sued on two mortgage-bonds, in which the same properties were hypothecated, *held*, he had to pay *ad valorem* Court-fee on the amount due under each of the two bonds separately and not on the total claim. The word "subject" in S. 17 of Court-fees Act, means causes of action and the plaintiff has two causes of action on the two bonds although the mortgagee could sue on the first mortgage and sell the property subject to the second or sue on the second mortgage for the sale of the property subject to the first. 1 Pat.L.T. 444=57 Ind. Cas. 685.

13. Pre-emption suit.

——S. 17—Pre-emption suit—Appeal for reversal of decree or more money.

Plaintiff sued for pre-emption in respect of the sale of house property sold for Rs. 10,000. He alleged that the actual consideration was only Rs. 5,100. The lower Court found that the market value of the house was Rs. 6,800 and granted plaintiff a decree on payment thereof; the vendee appealed to the High Court and valued his appeal at Rs. 6,800. He asked for restoration of the property or for an additional sum of Rs. 3,200.

Held, that there being no distinct subjects within the meaning of S. 17 the appeal was correctly valued at the higher of the two alternative reliefs. 85 Ind. Cas. 556=5 Lah. 114=A.I.R. 1924 Lah. 494.

14. Redemption suit.

——S. 17—Redemption suit—Distinct reliefs.

In a suit for redemption the Court is bound to go into the accounts and ascertain the surplus property, if any, and no separate Court-fee is necessary therefor. A. I. R. 1941 Mad. 115=(1940) 2 M.L.J. 867=1940 M.W.N. 1153.

——S. 17—Redemption suit—Mense profits.

Relief for redemption and mesne profits based on right to redeem and arising out of same cause of action—Suit, held, falls under S. 7 (ix) and not under S. 17. A.I.R. 1941 Mad. 115=(1940) 2 M.L.J. 867=1940 M.W.N. 1153.

——S. 17—Redemption suit—Suit for redemption and also for surplus profits—Suit is not multifarious. A.I.R. 1937 Nag. 295=I.L.R. (1937) Nag. 49 (F.B.).

——S. 17—Redemption suit decree—Appeal by mortgagee—Claim for interest for additional mortgage—Held, court-fees should be paid for relief of interest. A.I.R. 1935 Lah. 605=37 P.L.R. 89=159 Ind. Cas. 340.

——S. 17—Redemption suit—Surplus profits.

Where the plaintiff seeks to redeem the usufructuary mortgage the Court-fee is payable on the principal amount exclusive of any surplus profits realised by the mortgagee and claimed in the suit. S. 17 of the Court-fees Act relates only to suits which embrace two or more distinct subjects and does not apply to such a case. 68 Ind. Cas. 226=A.I.R. 1922 Nag. 259.

15. Single debt.

——S. 17—Single debt—Suit against debtor and guarantors—Court-fee.

Where a creditor sues the principal debtor and several persons who have guaranteed that amount, for the full amounts to which they have guaranteed it, by separate pro-notes or mortgages, the plaint is chargeable under S. 17 with the aggregate amount of fees due on amounts claimed from each and all guarantors, separately. 8 Bur.L.T. 217=8 L. B. R. 219=30 Ind. Cas. 705.

16. Specific performance and delivery.

——S. 17—Specific performance and delivery of possession.

The suit for specific performance and delivery of possession is not a combination of two suits or two or more distinct subjects, to attract the application of S. 17 of the Court-Fees Act. 38 All. 292, Foll. 11 Ind. Cas. 228 and 60 Ind. Cas. 512, Diss. 77 Ind. Cas. 542=47 Mad. 150=18 M.L.W. 333=1923 M.W.N. 726=A.I.R. 1924 Mad. 360=45 M. L. J. 431.

17. "Subject".

——S. 17—"Subject", whether same as cause of action.

The word 'subject' used in S. 17 means 'cause of

of action' and is not to be interpreted with reference to the different subject mentioned in S. 7. A.I.R. 1945 Pat. 421=24 Pat. 334=27 Pat. L.T. 67.

——S. 17—"Subject" explained—Whether same thing as "cause of action."

The word "subject" in S. 17, Court-fees Act is not the same as 'cause of action'. On the one hand, it is difficult to see how distinct causes of action can ever be one subject within the meaning of S. 17, while on the other hand it is possible for a suit based on one cause of action to embrace more than one subject within the meaning of the section. Separate claims to relief are ordinarily to be considered as separate and distinct subjects even though they are based on one cause of action. A.I.R. 1943 Pat. 355=10 B.R. 163=209 Ind. Cas. 530.

——S. 17—"Subject"—Distinct causes of action, if can form one subject within S. 17 — Case where different groups of facts have to be established—Separate amounts of court-fee—Necessity of.

The word "subject" in S. 17, Court-fees Act, covers a multitude of matters which cannot be confined within a precise formula. Distinct causes of action cannot be one 'subject' within the meaning of S. 17, but the converse does not necessarily hold good, for it may well be that a suit based on one cause of action alone may nevertheless embrace more than one subject within the meaning of S. 17, Court-fees Act.

A suit was instituted by 73 persons who averred that they held each a separate *jama* and prayed for a declaration that each plaintiff had a *raiyati joti* interest in one out of 73 plots of land and that a certain compromise decree was illegal and *ultra vires* and hence inoperative against them:

Held, that in the suit there were in effect prayers for 73 declarations affecting 73 separate titles, and that therefore the proceedings embraced 73 distinct subjects within the meaning of S. 17, Court-fees Act. A.I.R. 1935 Cal. 573=63 Cal. 163=39 C. W. N. 1146=158 Ind. Cas. 780.

——S. 17—"Subject".

The word "subject" in S. 17 means cause of action. It also means "matters". 4 P.L.J. 195. Foll. 110 Ind. Cas. 191=7 Pat. 402=9 P.L.T. 199=A.I.R. 1928 Pat. 274.

18. Suit against several tenants.

——S. 17—Suit against several tenants—Correction of Record-of-Rights—Court fee.

In a suit by a landlord against several sets of tenants in respect of 25 holdings for a declaration that their several lands were held under the *bataí* system, and were wrongly recorded as paying cash rent, the Court-fee of Rs. 10 should have been paid in respect of each of the 25 sets of tenants. 4 Pat. L. J. 297, foll. 4 Pat. L.J. 299=51 Ind. Cas. 767.

19. Suit for administration.

——S. 17—Suit for administration—Valuation of claim at Rs. 200—Prayer for declaration of a will as void and for handing over properties to executors —*Held*, suit was one for accounts and S. 7 (iv) (f) applied—*Held* further that S. 17 did not apply as the suit did not embrace two or more distinct subjects, the other reliefs claimed by plaintiff being all incidental to the chief item of relief which was the administration of estate. A.I.R. 1936 Bom. 353=38 Bom.L.R. 754=165 Ind. Cas. 954.

20. Suit for rent by some co-sharer—Decree in favour of all—Appeal.

——S. 17—Suit for rent by some co-sharer landlords—Other co-sharer made *pro forma* defendant but subsequently added as plaintiff—Suit decreed in favour of all—Appeal by defendants—Appellants, held must may court-fee equal to total of court-fees paid by all plaintiffs. A.I.R. 1943 Pat. 356=22 Pat. 275=10 B.R. 164=209 Ind. Cas. 534.

——S. 19 (iii)—Written statement of puisne mortgagee impleaded in prior mortgagee's suit—Court-fee, if payable. *See* C. P. CODE, O. 34, R. 4 (5). I.L.R. (1948) 1 Cal. 321. 51 C.W.N. 798.

——S. 19 (iii)—Written statement filed opposing application by Official Liquidator under the Companies Act to set aside transfers as fraudulent—Need not be stamped with Court-fee.

S. 19 (iii), Court-fees Act should not be interpreted to exclude the written statement in a miscellaneous case. A.I.R. 1934 All. 332=4 A.W.R. 1196=56 All. 747=1934 A.L.J. 881=148 Ind. Cas. 642.

——S. 19 (iii)—Mortgage suit—Subsequent mortgagee added wanting determination of his rights—Valuation of suit for purposes of jurisdiction — Amount claimed on prior and subsequent mortgages exceeding pecuniary jurisdiction of Court—Court's jurisdiction, if lost—Court-fes, if payable on claim on subsequent mortgage.

When in a mortgage suit, a subsequent mortgagee is added who wants his rights to be investigated and decided the suit is to be valued for purposes of jurisdiction, *ad valorem* on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.

The claim under the subsequent mortgage is neither a set-off nor a counter-claim on which court-fees should be paid. Where the puisne mortgagees ask for this relief in their written statement, it does not require to be stamped at all. It is no doubt advantageous to puisne mortgagees to obtain a decree on their mortgages without paying any court-fees and it would be especially so where the later mortgages happen to be for very large sums. The Legislature, no doubt, could have provided for payment of court-fees by the puisne mortgagees when they claimed a determination, or recourse perhaps might have been had to S. 9 of the Suits Valuation Act. But in the absence of any such provision or rule, no court-fees are payable on the claim under the subsequent mortgages. A.I.R. 1941 Nag. 138=1941 N. L. J. 105=I.L.R. (1941) Nag. 194=194 Ind. Cas. 390.

——S. 19 (iii)—Partition suit—Defendant's written statement.

A defendant in a partition suit asking for separation of his share in his written statement is not required to pay any court-fee. A.I.R. 1932 Mad. 722=1932 M.W.N. 949=36 M.L.W. 604=63 M. L. J. 845=55 Mad. 975=139 Ind. Cas. 457.

——S. 19 (iii)—Written statement claiming set off.

Per *Banerjee, J.*:—A written statement in which a set-off is claimed is not chargeable with court-fee as on a plaint. 8 A. 396; 13 B. 672; 15 M. 29 dissented from. 8 C.W.N. 174.

——Ss. 19 (viii), 19-D and 19-K.

It is clear from the provisions of Ss. 19-D, 19 (viii) and 19-K, Court-fees Act that *ad valorem* duty is not payable on probate of a will or letters of administration relating to property held by a deceased person wholly or partially in trust but that the exemption does not extend to property held in trust beneficially or with general power to confer a beneficial interest. A.I.R. 1942 Lah. 173=44 P. L. R. 330=I.L.R. (1942) Lah. 717=202 Ind. Cas. 114 (F.B.).

——S. 19 (viii)—Probate duty.

No duty is payable in respect of a grant of probate or Letters of Administration where the value of the estate after the reductions specified in Sch. III, annexures *A* and *B*, is less than Rs. 1,000. 40 All. 279=46 Ind. Cas. 865.

——S. 19 (viii), Sch. 1, Art. 11—Probate or letters of estate, whose net value is less than Rs. 1,000—Court-fee.

Where the net value of an estate in respect of which probate or letters are granted, is less than Rs. 1,000, no fees are chargeable. 21 Ind. Cas. 502; 24 Ind. Cas. 793. Foll. 7 Bur.L.T. 275=7 L.B.R. 359=24 Ind. Cas. 823.

——Ss. 19 (viii), 19-I and 19-K—Probate and Letters of Administration—Fee to be paid—Exemption—Gross value above and net value below one thousand.

S. 19 (viii) and No. 11 of Sch. I of the Court-Fees Act exempt from liability to fees, Probate or Letters of Administration where the amount or value of the property in respect of which the grant is made does not exceed, one thousand rupees. This exemption, however applies only in cases where the gross value of the property does not exceed Rs. 1,000. The fee mentioned in No. 11 of Sch. I is to be paid on the said valuation mentioned in Sch. III and is to be paid on the net value of the property. Where the gross value is above and the net value below one thousand rupees, a fee of 2 per cent is payable on the net value. 17 C.W.N. 21 =15 Ind. Cas. 621.

——S. 19 (xvii)—Revision by prisoner presented through counsel—Court-fees, if necessary.

Where a revision application is presented by a prisoner, even if it is presented through counsel, it is exempt from the payment of the court-fees under the provisions of S. 19 (xvii), Court-fees Act. A.I.R. 1942 Pesh. 50=43 Cr.L.J. 837=202 Ind. Cas. 379.

——S. 19 (xvii)—Application to sue as pauper, rejected—Revision—Point that applicant is entitled to exemption under S. 19 (xvii) cannot be raised.

A point that the applicant is entitled to the benefit of S. 19, Cl. (xvii) cannot be raised in an application made for the revision of an order refusing to allow the applicant to appeal as a pauper and not for the revision of an order passed on an application praying that the provisions of S. 19, Cl. (xvii), Court-fees Act, be applied to the memorandum of appeal filed by the applicant. A.I.R. 1942 All. 45 =1941 A.L.J. 733=1941 A.W.R. 357=I.L.R. (1941) All. 793=198 Ind. Cas. 275.

——S. 19 (xvii)—Applicant must be shown to have been in duress at time of filing memorandum.

An applicant seeking the benefit of S. 19, Cl. (*xvii*) in respect of payment of Court-fee on the memo. of appeal must show that he was in same duress at the time of filing the memorandum and not on some prior date. A.I.R. 1942 All. 45=1941 A.L.J. 733=1941 A.W.R. 357=I.L.R. (1941) All. 793=198 Ind. Cas. 275.

——S. 19 (xvii)—Plea of exemption cannot be raised for first time in revision.

The plea as to the exemption from payment of Court-fee under S. 19, Cl. (*xvii*), Court-fees Act, cannot be raised for the first time in revision as it involves a question of fact. A.I.R. 1942 All. 45= 1941 A.L.J. 733=1941 A.W.R. 357=I.L.R. (1941) All. 793=198 Ind. Cas. 275.

——S. 19 (xvii)—Nature of petition.

The petition mentioned in Cl. (*xvii*) of S. 19 must be a petition in respect of or connected with, or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. A.I.R. 1942 All. 45=1941 A.L.J. 733= 1941 A.W.R. 357=I.L.R. (1941) All. 793=198 Ind. Cas. 275.

——S. 19 (xvii)—Prisoner not claiming relief on behalf of himself, but asking for setting aside acquittal orders against others—Application, whether comes under S. 19 (xvii).

S. 19, (*xvii*) Court-fees Act, contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. Where the application does not concern the liberty safety or rights of the prisoner himself but is on the contrary an application affecting the rights and freedom of other persons not in custody and whom the applicant prays to be convicted, the application does not fall within S. 19 (*xvii*) and as such is not exempt from stamp duty. A.I.R. 1936 All. 318= 1936 A.L.J. 453=58 All. 871=1936 A.W.R. 215= 37 Cr.L.J. 566=162 Ind. Cas. 298.

——S. 19 (xvii)—Application by counsel of accused—Adjournment application.

An application filed by an advocate or counsel on behalf of the prisoner and purporting to be from the prisoner himself, is a petition "by a prisoner" within the meaning of S. 19 (*xvii*), and the fact that it was an adjournment application made by the counsel for his personal convenience is immaterial. A.I.R. 1922 U.B. 14; 14 N.L.R. 77 and A.I.R. 1924 Rang. 160, Rel. on. 52 All. 542=126 Ind. Cas. 827=11 L.R.A. Cr. 45=1930 A.L.J. 682=A.I.R. 1930 All. 261.

——S. 19 (xvii)—Appeal or revision.

A petition of appeal or revision signed and filed by an advocate or pleader on behalf of a prisoner under an authority signed by the prisoner, need not bear a Court-fee stamp. 76 Ind. Cas. 869=1 Rang. 510=25 Cr.L.J. 277=A.I.R. 1924 Rang. 160.

——S. 19 (xvii)—Bail applications.

An application made by the advocate of a prisoner in duress or under restrint is an application made by the prisoner himself. It has been the practice to

accept applications by Advocates of behalf of persons in custody within the meaning of S. 19, Cl. (*xvii*) without a Court-fee. 65 Ind. Cas. 553=23 Cr.L.J. 121=4 U.B.R. 72=A.I.R. 1922 U.B. 14.

——S. 19 (xvii)—Prisoner—Petition of appeal through pleader.

A petition of appeal presented by a pleader on behalf of the prisoner is exempted from Court-fees. 14 N.L.R. 77=19 Cr.L.J. 494=45 Ind. Cas. 158.

——S. 19 (xx)—Application for refund.

Application for refund of Court-fee under S. 13 is covered by S. 19 (*xx*) and hence no fee is chargeable on such application. A.I.R. 1932 All. 590=1932 A.L.J. 601=54 All. 790=142 Ind. Cas. 16.

——S. 19 (xx)—Application for refund of deposit.

An application for refund of money deposited for the costs of preparing a paper book, etc., is not an application for payment of money due by Government to the applicant within the meaning of S. 19, Cl. (*xx*). On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. I of the Court Fees Act. 77 Ind. Cas. 619=27 C.W.N. 646=A.I.R. 1923 Cal. 599.

——Ss. 19-A, 19-B, 19-C, and 19-I—Probate, application for—Court-fee payable.

On an application for probate, the Court-fee chargeable is to be assessed on the value of the estate at the time of application. Subsequent changes in value do not alter the amount of Court-fee payable. 5 Bur.L.T. 39=14 Ind. Cas. 804.

——S. 19-C—Fresh fee.

When the appointment is made *de bonis non* there is no new succession, and no new devolution of the estate, which would justify a finding that fresh Court-fee must be paid. 4 L.B.R. 255, affirmed. 88 Ind. Cas. 759=4 Bur.L.J. 97=3 Rang 90=A.I.R. 1925 Rang. 217.

——S. 19-C—Probate—Full Court-fee—Death of beneficiary—Application for probate—Court-fee.

An applicant for probate of his wife's will is bound to pay the full Court-fees due even though the bulk of the property dealt with in the will was included in the wife's father's will of which probate had been granted on full payment of Court-fees. 5 Pat.L.J. 36=(1920) P.H.C.C. 81=54 Ind. Cas. 703.

——Ss. 19-C and 19-I—Succession—Probate duty—Full fees chargeable—Second grant—No further fee.

Where a full fee chargeable under the Court-Fees Act on the probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. The law is in accordance with English Law in this respect; the full fee chargeable must be determined with reference to point of time when the second grant is sought. When an executor to whom the probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration, there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. 3 Cal. 733, Foll. An order refusing to issue probate till a sum of money not legitimately leviable is paid as succession duty, refuses in effect the application for probate and is, therefore, appealable under S. 86 of Prob. and Admn. Act. 43 Cal. 625=20 C.W.N. 472=22 C.L.J. 370=30 Ind. Cas. 394.

——S. 19-D—Shares of joint stock company in name of father as manager of joint Hindu family—Widow for herself and her sons can apply for letters of administration limited to such shares and need not pay court-fee.

When a Hindu manager of a joint Hindu family or the father dies possessed of the joint family properties and also of certain other properties of which (although members of the coparcenary have beneficial interest in them) the legal title vests in him, it is competent to take out letters of administration limited to that part of the property, the legal title of which vested in the manager or the father. When, therefore, the widow of the deceased for herself and her minor sons applies for letters of administration with respect to all the shares of the joint stock companies standing in the deceased's name, the legal title to which (as distinct from the beneficial interest in them which belongs to the whole body of coparceners) vested in him, she is asking for letters of administration in respect of the assets of the deceased. The beneficial interest in the other joint family property having already passed by survivorship is no longer an asset of the deceased to which representation is required to be taken out. There is, therefore nothing irregular in asking for letters of administration with respect to the shares in the joint stock companies without mentioning in the application all other property belonging to the joint Hindu family and the application would be exempt from the payment of any Court-fee. A.I.R. 1946 Bom. 163=47 Bom.L.R. 862=224 Ind. Cas. 150.

——S. 19-D—Applicability.

The applicability of S. 19-D, Court-fees Act, is not conditional on the circumstance that there had been a previous grant of probate or letters of administration. A.I.R. 1942 Lah. 173=44 P.L.R. 330 =I.L.R. (1942) Lah. 717=202 Ind. Cas. 114 (F.B.).

——Ss. 19-D, 19 (viii) and 19-K—Effect of—Shares in bank purchased with joint family funds standing in name of one member—Such member dying—No court-fee is payable on letters of administration in respect of such shares.

Per *Full Bench*.—It is clear from the provisions of Ss. 19-D, 19 (*viii*), and 19-K, Court-fees Act, that *ad valorem* duty is not payable on probate of a will or letters of administration relating to property held by a deceased person wholly or partially in trust, but that the exemption does not extend to property held in trust beneficially or with general power to confer a beneficial interest. The shares in a bank purchased with the joint Hindu family funds but standing in the name of one of its members (deceased) is property held in trust by that member for the joint family and no Court-fee is, therefore, payable on letters of administration limited to such shares. A.I.R. 1942 Lah. 173 =44 P.L.R. 330=I.L.R. (1942) Lah. 717=202 Ind. Cas. 114 (F.B.).

——S. 19-D—Exemption under.

Where a testator bequeathed his property to his wife and nephew's sons jointly and provided that his wife should manage the property during her lifetime,

and after her the nephews were to get possession, and on her death the nephews applied for limited letters of administration and claimed exemption of Court-fee under S. 19-D read with Annexure B and Sch. III of the Court-Fees Act.

Held, that the widow was an executor with life interest in the property, and was a co-tenant with the claimants, and was not a trustee in respect of their share and therefore the applicants were not entitled to exemption. 108 Ind. Cas. 709=52 Bom. 188=30 Bom.L.R. 54=A.I.R. 1928 Bom. 55.

——S. 19-D—Exemption under.

Where on the death of the father in a joint Hindu family governed by the Mitakshara, the son applies for limited letters of administration to the family property, standing in the name of the father, the grant of the letters is exempt from payment of Court-fees. 29 Bom. 161, Foll.; 39 Bom. 245, Overruled. 77 Ind. Cas. 749=48 Bom. 75=25 Bom.L.R. 1240 =A.I.R. 1924 Bom. 228 (F.B.).

——S. 19-D—Property belonging to joint Hindu family—Probate—Exemption.

A will purporting to dispose of properties held jointly between the testator and his minor son as members of a joint family under Hindu Law is not exempt from probate duty under S. 19-D and annexure *B* of Sch. III on an application for probate. The whole of the property was liable to pay probate duty inasmuch as the parties claiming under the will could not go behind its terms or claim any exemption whatsoever upon allegations incomsistent with the will or its provisions. 39 Bom. 245=17 Bom. L. R. 169=28 Ind. Cas. 473. [Overruled in 48 Bom. 75=A.I.R. 1924 Bom. 228=25 Bom. L.R. 1240 (F.B.).]

——S. 19-D—Provident Fund—Private Company.

A sum of money in a private provident fund cannot be deemed to vest in the nominee or the widow or the children of the depositor. No doubt there is a fiduciary relationship between the depositor and the private company which has created the provident fund, but such a company cannot be deemed to be trustee for the dependent or the nominee of the depositor. Such a nominee or dependent can only take by succession to the estate of the deceased, and such a deposit is, therefore, not exempt from paying the Court-fee when application is made for Letters of Administration to the estate of the deceased subscriber or depositor. 116 Ind. Cas. 467=6 Rang. 558=A.I.R. 1928 Rang. 312.

——S. 19-D—Residue devised to son—Property passing by survivorship.

In obtaining probate on a will, the legatees must pay full duty leviable on the property comprised in the will. No exemption is allowed to persons capable of inheriting in their natural rights. A Hindu left the residue of his property to his son. The executors applying for probate claimed exemption from Court-fees on the residue on the ground that the son was entitled to the property by survivorship. *Held*, that they were not entitled to the exemption. 23 Cal. 980, Not Foll. 39 Bom. 245, Foll. 5 Pat.L.J. 510= 58 Ind. Cas. 1007.

——S. 19-D—Hindu family—Application by son for Letters of Administration.

A Hindu father cannot be said to hold his own share of the joint family property "in trust not beneficially" though he may be said to hold his son's share in that way. If, therefore, the son desires letters of administration to the joint family property on the father's death, he must pay the *ad valorem* duty on so much of the property as was not property held "in trust not beneficially or with general power to confer a beneficial interest," *i.e.*, on the father's share in the property. 6 M.L.T. 280=4 Ind. Cas. 1064=19 M.L.J. 591=33 M. 93.

——S. 19-D—Exemption from probate duty—Joint family property.

The manager of a joint Hindu family died leaving behined him certain shores valued at Rs. 11,280 in joint stock companies, of which he was registered holder. After his death his sons applied on the 9th February 1903, for letters of administration limited only to one share valued at Rs. 275; the letters of administration were accordingly granted. On the 16th Mar. 1903, they again applied for letters of administration in respect of the remaining shares left by the deceased, claiming exemption from duty over the said letters of administration. *Held*, that the the property, in respect of which the letters of administration were asked for being property held in trust by the deceased for the joint family, the letters of administration should be exempted from court-fees. The exemption of trust estates from the payment of *ad valorem* court-fees is not conditional on the circumstance that there has been a previous grant of probate or letters of administration on which a court-fee has been paid. 27 B. 140; 4 Bom.L.R. 974, dissented from. 6 Bom.L.R. 652=29 B. 161.

——S. 19-D, Sch. 1, Art. 11—"Trustee"—How far a Hindu Manager a trustee only.

S. 19-D of the Court-Fees Act VII of 1870 contemplates a case where there is a probate or letters of administration for some property of the deceased. Where court-fee is paid and letters of administration obtained with respect to property for which no letters were necessary, S. 19-D does not apply and the court-fees cannot be refunded if there is no probate or letters for any portion of the deceased's property. *Quaere*.—Whether a Hindu father or manager of a joint Hindu family is a trustee within the meaning of S. 19 D. 23 C. 980 not followed. 27 B. 140=4 Bom.L.R. 974.

——S. 19-E—Penalty—Suit for recovery, if maintainable.

A suit lies in the Civil Court by the Secretary of State for recovery of a penalty lawfully imposed under S. 19-E. S. 19-E contemplates an application on the part of a person who has taken out probate and produces the same as duly stamped. Where the estimated value of the estate is less than what the value has afterwards been proved to be, then only a Revenue Court can impose penalty. Where there is no determination of value by the Probate Court, S. 19-E has no application. 43 Cal. 230= 20 C.W.N. 504=22 C.L.J. 375=31 Ind. Cas. 460.

——S. 19-H—Exemption of duty, claim for—Duty of Registrar to refer to Chief Justice—Practice.

Where a claim for exemption is made, the Registrar should refer the matter to the Chief Justice. It is not a matter of valuation but of exemption. A.I.R. 1935 Cal. 509=62 Cal. 114=157 Ind. Cas. 975.

——Ss. 19-H and 4—The certificate of Registrar under S. 4, Court-fees Act, though conclusive for certain purposes, does not preclude the Collector from

applying under S. 19-H of the Act under which certificate is conclusive in a Court on the point as to whether correct duty has been paid, except when an application is made under S. 19-H. And under S. 19-H, Collector can challenge the validity of claim of this kind. A.I.R. 1935 Cal. 509=62 Cal. 114=157 Ind. Cas. 975.

——S. 19-H—Application for probate—Duty—Proper date for valuing testator's estate—Date of death or date of application—Return and re-presentation of application—Effect of.

The date to be taken for the valuation of the estate for the purpose of assessment of probate duty is the date on which the application for grant of probate is made, and not the date of the testator's death.

Where an application for probate is returned with the direction to deposit probate duty and the duty is deposited and the application is re-filed on a subsequent date, the date to be taken the valuation is the latter date. A.I.R. 1933 Lah. 936 (2)=14 Lah. 526=148 Ind. Cas. 279.

——S. 19-H—Application for probate—Valuation—Judgment-debts — Applicant's right to give fair valuation.

An applicant for probate is entitled to state what he considers to be the fair value of a judgment-debt, and to apply for probate on that basis. If the revenue authority is not satisfied with the estimate, he can deal with the matter under S. 19-H, Court-fees Act. A.I.R. 1931 Bom. 419 (2)=33 Bom. L.R. 864=55 Bom. 844=134 Ind. Cas. 729.

——S. 19-H—Costs—Enquiry under.

There is no provision for the realisation of any costs which may be incurred in connection with an inquiry under S. 19-H, only the excess fee is to be realised as an arrear of land revenue under the statute. The costs cannot be so recovered as there is no provision for it. The Collector, who is no party to the probate proceeding, can in no case recover the costs from the executor or administrator, as an ordinary suitor, in the absence of any provision to that effect in the statute. 72 Ind. Cas. 472=50 Cal. 239=A.I.R. 1923 Cal. 406.

——S. 19-H—Duty of Collector to show enquiry was needed.

In moving the court for an enquiry into the true value of the assets of a deceased person under S. 19-H, Court-Fees Act, it is not enough for the Collector simply to make an application for enquiry. He should place before the court materials showing that an enquiry was needed, *i.e.*, he should make a case for enquiry upon definite facts. 6 C. W. N. 898.

——S. 19-H—Property outside province—Court can charge fees.

The sum charged upon a grant of Probate or Administration is not a tax or duty levied upon the property upon which the Probate or Administration operates. But it is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection and therefore it is right to levy Court-fee at the enhanced rate on the value of all the assets, whether in the Province where Probate is granted or outside. 75 Ind. Cas. 466=27 C.W.N. 812=50 Cal. 597=A.I.R. 1924 Cal. 115.

——S. 19-H—Revision—Refusal to consider allegation.

Revision lies against the order of a District Judge refusing to enter into the matter, when the applicant for probate alleges that certain properties have been erroneously included in the schedule and that they are trust properties and not part of the estate of the deceased and should therefore be excluded from the valuation. It is the duty of the District Judge in such a case to go into the matter and his failure to do so is a refusal to exercise a jurisdiction vested in him by law and under S. 115 of the C. P. Code, his order is revisable. 78 Ind. Cas. 901=A.I.R. 1925 Cal. 357.

——S. 19-H (4)—Application for enquiry to High Court by Collector—If may be made in its Ordinary Original Civil jurisdiction.

An application for enquiry under S. 19-H (4), Court-Fees Act, by the Collector to the High Court must be made in its Testamentary and Intestate Jurisdiction, and not in its Ordinary Original Civil Jurisdiction. I.L.R. (1946) 1 Cal. 77=49 C.W.N. 695.

——S. 19-H (4)—Enquiry as to the value of the estate of the deceased—Who is to conduct—Costs.

The Act does not specify in what manner or by whom the expense of an enquiry should be met. It would be the duty of the court, if possible, and if the circumstances permit, to hold the enquiry itself and so save further expense to the parties. 6 C. W. N. 898.

——S. 19-H (4)—Shares in joint names of husband and wife—Gift by husband to wife—Wife surviving husband — Application for probate by wife—Court-fee on value of shares, if to be paid—Period prescribed in proviso to sub-S. (4) of S. 19-H—When begins to run.

Where it is proved that the shares held in the joint names of a husband and wife were gifted in their entirety by the husband to his wife, on the wife surviving the husband, the shares are the absolute property and not the property of her deceased husband. In such a case, the wife is not liable to pay court-fee on the value of those shares while applying for probate of her husband's will.

Per *Smith, J.*—The period of six months prescribed in the proviso to sub-S. (4) of S. 19-H, Court-fees Act, must be taken to run from the time of the presentation of the revised inventory. A.I.R. 1934 Oudh 72=11 O.W.N. 78=9 Luck. 370=148 Ind. Cas. 247.

——S. 19-H (4)—Letters of Administration — Court-fee—Proceedings to amend valuation—Date of exhibition of inventory.

The six months within which the Collector may move under S. 19-H. (4) to obtain an amended valuation of the estate in respect of which Letters of Administration have been granted, runs from the date of the lodging of an inventory as required by S. 98 of the Probate and Administration Act and no inventory satisfies the statutory requirement which does not contain a "full and true estimate of all the

property in possession." The period of six months does not begin to run from a period when a certain document which might be classed or denominated an inventory satisfied a particular District Judge. 41 Cal. 556=18 C.W.N. 153=19 C.L.J. 136=26 M. L. J. 56=15 M.L.T. 87=(1914) M.W.N. 13=12 A.L.J. 69=16 Bom.L.R. 95=40 I.A. 236=21 Ind. Cas. 975 (P.C.).

——S. 19-H (4)—Probate—Grant—Delay of Collector.

The grant of probate to petitioner cannot be delayed on account of the Collector's omission in making the motion under S. 19-H (4) of the Court-fees Act. 40 Ind. Cas. 576 (Cal.).

——S. 19-H (7)—Decision on valuation.

By virtue of S. 19-H (7) of the Court-fees Act, no appeal lies against the order of District Judge fixing the valuation of an estate in respect of which probate has been applied for, in response to the application in that behalf by a Collector to whose satisfaction the applicant for probate refuses to amend the valuation of the estate. In such a case the finding of the District Judge as to the value of the property is final and no appeal lies therefrom. 78 Ind. Cas. 901=A.I.R. 1925 Cal. 357.

——S. 19-I.

Synopsis.

(1) Applicability.
(2) Bad debts.
(3) Compromise after filing application.
(4) Construction.
(5) Fees payable according to law at time of grant.
(6) Letters for part property.
(7) Provident fund.
(8) Scope.
(9) Succession.
(10) Time for payment.

1. Applicability.

——S. 19-I—Applicability.

The question whether a certain property is or is not a trust property comes under S. 19-I, and an order in respect of that property by a Financial Commissioner under S. 19-G, without proceeding under S. 19-H is *ultra vires*. 33 Mad. 93 (F.B.), Foll. 111 Ind. Cas. 692=A.I.R. 1928 Lah. 947.

——S. 19-I—Applicality.

Where the son of a deceased undivided father applied for Letters of Administration, the requisite stamp duty on the share of the deceased should be paid, since the property was not held "in trust nor beneficially or with general power to confer a beneficial interest" referred to in Annexure *B*. to Sch. III of the Court-fees Act nor is it "other property not subject to duty" referred to in the said Annexure. 33 Mad. 93=19 M.L.J. 591=6 M.L.T. 286=4 Ind. Cas. 1064.

2. Bad debts.

——S. 19-1—Bad debts—Time-barred debts—If can be included for exemption from duty.

In Annexure *B* in Sch. III to the Court-Fees Act, which an executor applying for probate has to file in Court under S. 19-I of the Court-Fees Act, under the head "amount of debts due and owing from the deceased, payable by law out of the estate, an executor is entitled to include debts which are time-barred". There is nothing in law which prevents or prohibits an executor from paying time-barred debts, and he is therefore entitled to include those debts and claim exemption from payment of probate duty in respect of such debts. 51 Bom.L.R. 847=A.I.R. 1950 Bom. 74.

3. Compromise after filing application.

——S. 19-I—Compromise after filing application.

When one of the executors applying for the grant of probate of the will, in his application, states the amount of the assets which he expects to realize, the mere fact that he is prepared to allow certain other persons to retain and administer the amount recovered by them before the grant of probate to the petitioner does not entitle him to evade the duty in respect of the latter amount. The duty must be paid on the entire sum. A.I.R. 1931 Lah. 310=32 P. L. R. 393=12 Lah. 584=135 Ind. Cas. 60.

4. Construction.

——S. 19-I—Construction—"At the time of the latter's death"—If governs 'valuation".

It is wrong to say that the words "at the time of the latter's death" in S. 19-I of the Court-Fees Act govern "valuation". Those words refer to the assets and liabilities of the deceased in British India. It is only those assets and liabilities which exist at the time of the death which have to be valued, but the valuation must be on the market rates current on the date of the application, namely, the petition for probate. 1949 A.W.R. 431=1949 A.L.J. 364.

——S. 19-I—Construction—"Valuation of the property".

The expression 'valuation of the property' in S. 19-I, Court-fees Act means valuation of the property of the deceased. A.I.R. 1934 Oudh 72=11 O.W.N. 78=9 Luck. 370=148 Ind. Cas. 247.

5. Fees payable according to law at time of grant.

——S. 19-I—Fees are payable according to the law existing at time of grant of probate—R. 4 (a), Cl. 11, Patna High Court Rules, is to be followed.

Court-fees payable upon an application for probate are payable, not upon the application but as a condition precedent to the grant of probate and, therefore, the amount of fees payable must be determined, not by the law existing at the time of application but upon the state of law at the time of grant. But under R. 4 (*a*), Chap. 11 of the Patna High Court Rules, an application cannot come up for hearing without the Registrar's certificate that the duty has been paid and the Registrar cannot give a certificate unless extra duty under Bihar Court-fees (War Surcharge Amending) Act, 1943, is also paid. The Registrar cannot anticipate what the state of law may be at the uncertain date when the probate comes to be granted. Hence the amount of fees payable by the applicant must be determined by the law existing at the time of application and should the Amending Act be repealed at the time the question arises of the grant of probate, it will be open to the applicant to apply for refund. A.I.R. 1945 Pat. 361=24 Pat. 171.

——S. 19-I—Fees payable—Computation—Date.

Per *Crump, J.*—The fees to be paid before the grant of probate is to be calculated according to the Act in force on the date of grant of probate and not the date of application for probate. 39 C. L. J. 209, Dissented from. 106 Ind. Cas. 66=29 Bom.L. R. 1511=A.I.R. 1927 Bom. 643.

——S. 19-I—Fees payable—Law applicable—Application prior to amendment of Act but order subsequent.

A Court cannot furnish the applicant with letters of administration unless he has paid the fees which are due under the Act which is in force when the document is drawn up or is to be furnished to him.

Consequently, where an application for letters of administration has been filed prior to the amendment of the Court-fees Act but the order for the issue of letters is passed subsequent to the amendment, the Court-fees are to be paid under the amended Act and not under the old Act. A.I.R. 1944 All. 119=1944 A.L.J. 133=1944 O.W.N. 58 (1)=1944 A.W.R. 97 (1)=I.L.R. (1944) All. 229=213 Ind. Cas. 162.

6. Letters for part property.

——S. 19-I—Letters for part property.

On a petition for Letters of Administration for part of property Court-fee on the value of the whole property cannot be levied. 90 Ind. Cas. 620 =7 L.L.J. 288=26 P.L.R. 608=A.I.R. 1925 Lah. 493.

7. Provident Fund.

——S. 19-I—Provident fund—Amount over Rs. 5,000—Claimant neither nominee nor dependant—Application for succession certificate — Court-fee payable.

A claimant for the provident fund of a deceased person, other than a nominee or a dependent, where the sum claimed is more than Rs. 5,000, can obtain the amount only on production of probate, letters of administration or a succession certificate, and on application for a succession certificate in such case, the claimant has to pay court-fee on the amount claimed. A.I.R. 1933 Sind 101=26 Sind L. R. 429=142 Ind. Cas. 359.

——S. 19-I—Provident Fund.

Even in the absence of an administrator, Provident Fund money does not form an asset of the estate of the deceased and passes to the nominee direct; hence it is exempt from probate or administration duty. 82 Ind. Cas. 128=A.I.R. 1925 Nag. 108.

8. Scope.

——S. 19-I—Scope—Under will, testator appointing 20 persons as sole executors—All the properties vest in them and they alone are legal representatives for all purposes—Fact that widow and daughters are in possession of substantial portion does not attract S. 255, Succession Act, and no exception can be made in favour of executor—No probate can be granted to them in respect of a portion of the estate only and they are liable to pay court-fee on the entire value of the estate of the testator. A.I.R. 1943 Oudh 151=1942 O. W. N. 480=1942 A.W.R. 310 (3)=204 Ind. Cas. 219.

——S. 19-I—Scope.

A right of membership in a certain association is not property. It is a personal right which does not pass on the death of a person to his heirs, and hence no duty is payable in respect of membership card of an association. A.I.R. 1942 Bom. 33=43 Bom. L. R. 943=198 Ind. Cas. 291.

——S. 19-I—Scope—Mandatory language of S. 19-I is subject to O. 33, R. 8, C. P. Code.

The mandatory language of S. 19-I, Court-fees Act, regarding payment of fees for the grant of probate and letters of administration is subject to the provisions of O. 33, R. 8, Civil P.C., which unequivocally deals with exemptions from payment of all court-fees in any proceedings connected with a pauper suit. A.I.R. 1938 Mad. 486=47 M.L.W. 731= 1938 M.W.N. 640=180 Ind. Cas. 308.

——S. 19-I—Scope.

S. 276, Succession Act, must be read along with S. 19-I, Court-fees Act. Where to an application for grant of probate is not attached the schedule or annexure required by S. 19-I, the application is defective and it is not competent for the Court to allow this defect to be made good. A.I.R. 1936 Sind 150=30 Sind L.R. 201=165 Ind. Cas. 202.

——S. 19-I—Scope — Application not in proper form—Previous proceedings, if rendered a nullity —Opportunity to make good defects, if can be given.

Under S. 19-I, Court-fees Act, no order entitling the petitioner to the grant of probate or letters of administration shall be made until the petitioner has filed in Court a valuation of the property in the prescribed form and the proper Court-fee has been paid. But it does not follow that because he has not made a petition in proper form, the previous proceedings must be deemed a nullity. The Judge may not pass an order granting probate or letters of administration until the application has been made in proper form and fulfils the requirements of the law. But it does not follow therefrom that the Judge cannot give the petitioner an opportunity to make good any defects in his petition and cannot then proceed to make a grant upon the petition, the defects of which have been removed. A.I.R. 1936 Sind 150=30 Sind L.R. 201=165 Ind. Cas. 202.

9. Succession.

——Ss. 19-I and 19-C—Succession — Probate — Fees chargeable—Second grant—No further fee.

Where the full fee chargeable under the Act on a probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. The law is in accordance with English Law in this respect. When an executor to whom the probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. 6 B.L.R. App. 137; 3 Cal. 733,

Foll. 43 Cal. 625=20 C.W.N. 472=22 C.L.J. 370 =30 Ind. Cas. 394.

——S. 19-I—Succession by survivorship—Applicability.

An application for letters of administration by Hindu co-parceners claiming to succeed by survivorship to the estate of the deceased cannot be granted if there is no compliance with S. 19-I of the Court Fees Act. 94 Ind. Cas. 986=29 C.W.N. 372=A.I.R. 19295 Cal. 627.

10. Time for payment.

——S. 19-I—Time for payment.

Where there is a deficiency in the Court-fee paid for probate, a Court would be right in ordering that the deficiency should be made up before the day of final hearing. I.L.R. (1948) All. 598=1948 A.L.J. 67=A.I.R. 1948 A. 268=1948 A.L.W. 186.

——S. 19-I—Time for payment—Payment of fee, if condition precedent to making of application.

S. 19-I, Court-fees Act, only says that the Court shall not grant probate until the fees are paid. It does not say that the Court shall not try an application for probate or letters of administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application. A.I.R. 1943 Cal. 19=I.L.R. (1942) 2 Cal. 194=204 Ind. Cas. 457.

——S. 19-I—Time of payment.

An executor cannot be compelled to pay probate duty until the Collector has finished his work with regard to valuation of the property. A.I.R. 1929 Cal. 733.

——S. 19-I—Time for payment.

A Court will hear the application for Probate or Letters of Administration where the applicant has not paid but has undertaken to pay whatever fees would be found due. 14 O.C. 14=8 Ind. Cas. 695.

——S. 19-J—Scope.

Where S. 19-J is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue authority who is at liberty to refuse to stamp probate till the penalty has been paid. Therefore the question of recovery by summary process or by suit, of the penalty imposed under S. 19 cannot arise. 43 Cal. 230=20 C.W.N. 504=22 C.L.J. 375=31 Ind. Cas. 460.

——Ss. 19-K, 19-D and 19 (viii)—It is clear from the provisions of Ss. 19-D, 19 (*viii*) and 19-K, Court-fees Act, that *ad valorem* duty is not payable on probate of a will or letters of administration relating to property held by deceased person wholly or partially in trust. A.I.R. 1942 Lah. 173=I.L.R. (1942) Lah. 717=44 P.L.R. 330=202 Ind. Cas. 114 (F.B.).

——S. 20—Madras Civil Rules of Practice and Circular Orders, Rr. 197, 200—Process—Order by Court for sale of property in its custody pending suit by person specially appointed under R. 197—It is process—Sale is chargeable with poundage.

An order issued by the Court for the sale of property in its custody during the pendency of the suit either by the process establishment or by an officer specially appointed under R. 197 of the Madras Civil Rules of Practice is a process and the sale is chargeable with poundage. Direction of the Court to sell the property in pursuance of its order must be held to be a proceeding in execution.

The remuneration paid to a person appointed to conduct the sale is exclusive of the poundage which, under R. 200, is one of the expenses of the sale. A.I.R. 1945 Mad. 238=(1945) 1 M.L.J. 320=I.L.R. (1945) Mad. 816.

——S. 20—General Letter No. 43 (Civil) of December 19, 1935, declaring refund of poundage fees as ultra vires, whether touches custody fees—Calcutta High Court Rules and Orders, para. 790, note (3), whether framed under S. 20.

There is no rule framed by the Calcutta High Court under S. 20, Court-fees Act, relating to the refund of poundage fees, but there is a provision for refund of poundage fees under Art. (7) of the Rules if the execution sale is afterwards set aside. Poundage fees are paid invariably after the sale and constitute a sort of percentage or commission upon the gross amount realised by the sale. There would be no question of their being spent or not spent, and it may be said that S. 20, Court-fees Act, did not authorize the High Court to legislate through the rules, as to under what circumstances the auction-purchaser could demand back these fees. The case of custody fees, however, stands on a different footing; they are taken in anticipation, and if the anticipated circumstances do not happen, there is clear duty to refund on the plainest and most elementary principles of law. The General Letter No. 43 (Civil) of 1935, dated December 19, 1935, issued by the High Court, declaring refund of poundage fees does not touch custody fees as there is no rule fixed by the High Court relating to such fees under S. 20. The provision in para. 790, note (3), of the Rules and orders issued by Calcutta High Court, is not framed under S. 20, Court-fees Act. It comes under the heading of "payment of money" in Chap. XXX, and simply lays down the procedure for quick realization of these deposite if lying unspent. This paragraph does not create the right to get refund, but presupposes it to be already existing. But apart from any rules, and it may be assumed that there is no provision directly bearing on the point, it must be held that the Court has inherent jurisdiction to grant refund in such cases. A.I.R. 1937 Cal. 86=41 C.W.N. 155=64 C.L.J. 492=I.L.R (1937) 1 Cal. 624=168 Ind. Cas. 678.

——S. 20—Custody fees—Whether come under S. 20.

Custody fees come undoubtedly within the purview of S. 20, Court-fees Act, as they are charges levied upon the decree-holders to meet the costs of a person or persons sent out to insure safe custody of the movables attached in execution proceedings. A.I.R. 1937 Cal. 86=41 C.W.N. 155=64 C.L.J. 492=I.L.R. (1937) 1 Cal. 624=168 Ind. Cas. 678.

——S. 20—Calcutta High Court Rules — Bengal Tenancy Act (8 of 1885), Ss. 115, 189 — Rules, Chap. 8, R. 65—Process-fees for notice to respondents in appeal before Special Judge, scale of.

Process-fees for notices on respondents in appeals before the Special Judge under the Ben. Ten. Act

must be paid according to the scale laid down in the rules framed by the High Court under S. 20 of the Court-fees Act and not according to the scale provided for in R. 65, Chap. VIII, of the rules framed by the Government under the Ben. Ten. Act. A.I.R. 1931 Cal. 572=35 C.W.N. 253=58 Cal. 995=132 Ind. Cas. 683.

——S. 20—Common respondents—Consolidation.

Court has no inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents. A.I.R. 1930 Mad. 376, Rel. on. 123 Ind. Cas. 606=31 M.L.W. 294=53 Mad. 262= A.I.R. 1930 Mad. 381=58 M.L.J. 521 (F.B.).

——S. 27—Court-fee stamp of proper denomination not available — Right of litigant to present plaint with court-fee stamps of lesser denomination.

There is nothing illegal in permitting a plaintiff to file a plaint with stamps of a denomination smaller than the one required under the rules if the requisite stamps are not available. A.I.R. 1937 Mad. 266= 71 M.L.J. 804=44 M.L.W. 830=168 Ind. Cas. 340.

——S. 27—C. P. Government Rules—Court-fees exceeding Rs. 25 — Impressed stamp of highest value, necessity of.

Under the Rules published by the C. P. Government Court-fees exceeding Rs. 25 must be denoted by a single impressed stamp or an impressed stamp of the next lower value available, the deficiency being made up by stamps of lower value. Where Court-fees are not denoted in the manner thus prescribed, the document will be treated as unstamped. A.I.R. 1931 Nag. 94=26 Nag.L.R. 263=130 Ind. Cas. 112.

——S. 27—Plaint filed on stamps of lower denomination—Stamps of proper denomination subsequently filed—Application for refund of value of stamps originally filed—Power of Court to grant refund—Procedure.

Where a plaint is presented with Court-fees stamps of smaller denominations, and, on being required by the Court to file fresh Court-fee stamps of proper value, the plaintiff obeys the order of the Court and applies for the refund of the value of the Court-fee stamps which had been originally filed with the plaint, the Court has no power either to detach the stamps originally filed and return them to the plaintiff or to order a refund of their value, but could only grant a certificate to the plaintiff stating the facts leaving the question whether a refund ought to be allowed in the circumstances to the determination of the revenue authorities. A.I.R. 1931 Pat. 113=11 P.L.T. 708=131 Ind. Cas. 532.

——Ss. 27 and 28—Use of court-fee stamps of lower denomination—Proper stamps subsequently supplied—Application for refund—Power to refund —Procedure—Grant of certificate stating facts.

A suit valued at Rs. 898 was instituted in Munsif's Court. The plaint bore Court-fee stamps to the value of Rs. 87-8-0 made up of five stamps consisting of an impressed stamp of value of Rs. 40 and adhesive stamps of lower denominations. The Munsif found that the proper value was Rs. 1,100 which was beyond his pecuniary jurisdiction and he, therefore, returned the plaint for presentation in the proper Court. The plaint was then presented to the Subordinate Judge bearing additional Court-fee of the value of Rs. 17-8-0 to make a total of Rs. 105, the amount payable on the valuation of Rs. 1,100. The plaintiff then amended the valuation, raising it to Rs. 2,300 on which the proper Court-fee would be Rs. 195. The Subordinate Judge finding that the original Court-fee of Rs. 105 was made up of a number of stamps of small denominations, which was not in accordance with the rules, directed that the plantiffs should file a new Court-fee stamp of the value of Rs. 195. The plaintiffs after obeying this order, petitioned for refund of the value of the Court-fee stamps which were originally on the plaint, or in the alternative for the return of the stamps:

Held, (*i*) that the Sub-Judge had jurisdiction to decide the question whether the plaint had been properly stamped under S. 28, Court-fees Act, and the rules framed by the Government although the Munsif had raised no objection, and acted correctly in requiring the plaintiffs to file Court-fees which complied with the rules framed by the Local Government under S. 27 (*b*) of the Court-fees Act;

(*ii*) that though the Subordinate Judge had no power to order a refund of Court-fee he had power to grant a certificate stating the facts, leaving the question of whether a refund should be granted to the discretion of the revenue authorities. A.I.R. 1931 Pat. 39=11 P.L.T. 711=131 Ind. Cas. 530.

——S. 27—"For use in High Court" — Use of stamps.

The words "for use in the High Court only" impressed on the back of Court-fee stamps do not limit their use to High Court only. The words may have some significance for administrative purposes, but they are not capable of invalidating the stamps themselves if filed in lower Courts. 97 Ind. Cas. 822=8 P.L.T. 33=A.I.R. 1926 Pat. 408.

——S. 27—Jurisdiction of Court.

A plaint was presented in the Small Cause Court with two stamps one of Rs. 20 and the other of Rs. 10. The Court returned the plaint and directed the plaintiff to file a single impressed stamp of Rs. 30, in accordance with the rules made by the Local Government and the High Court to the effect, that a stamp of the highest available denomination should be used. The plaintiff represented the plaint with the proper stamp and applied to the Court for refund of the value of the stamps originally filed.

Held, the lower Court was justified in rejecting the first plaint as the certificate from one stamp-vendor that the proper stamp was not available with him was not sufficient and the plaintiff should have tried to get the same from other stamp vendors in the same locality.

Held also, that the application for refund should be addressed to the Revenue authorities and the Court should only have granted a certificate to the plaintiff stating the facts in the form issued in 40 C. 365. 11 Pat.L.T. 708=131 Ind. Cas. 532= A.I.R. 1931 Pat. 113.

——S. 27—Manner of denoting.

Where the fees were not denoted in the manner prescribed by the Rules published by notification under S. 27 of the Court-Fees Act the application can be treated by Court as being unstamped. [Time extended to comply with requirements of rule.] 26

N.L.R. 263=130 Ind. Cas. 112=A.I.R. 1931 Nag. 94.

——S. 27—Rules—Insufficient stamp.

If a plaint not properly stamped is presented to a Court not having jurisdiction and is subsequently returned for presentation to the proper Court, the latter Court is not bound to treat the plaint as properly stamped even though it may never have been properly stamped, merely because no objection to it was taken when first presented, and can require the plaintiffs to file Court-fees which complied with the rules framed by the Local Government under S. 27 (b) of the Court-fees Act. 11 P.L.T. 711=131 Ind. Cas. 530=A.I.R. 1931 Pat. 39.

——S. 28.

Synopsis.

1. Applicability.
2. Scope.
3. Appeal insufficiently stamped.
4. Appellate Court's order to make good deficiency—Appeal.
5. Deficit fee paid—Effect.
6. Deficient Court-fee.
   (a) If can be ordered to be paid after decision of case.
   (b) Power of Court to recover by attachment.
   (c) Proper order.
   (d) Time for payment.
7. Effect of insufficiency of stamp.
8. Miscellaneous.

1. Applicability.

——S. 28—Applicability.

Held, that when it has been discovered at any time that through mistake or inadvertence a plaint has been filed on an insufficient court-fee stamp, the court upon discovering the mistake can at any time and without any regard to limitation have the proper court-fee made up, and when it is so made up, the plaint is as valid as if it had been properly stamped when presented. The principle of the decision in 12 A. 129 so far as it is applicable to plaints, rejected. 1907 A.W.N. 253=4 A.L.J. 636=29 A. 749 (F.B.).

——S. 28—Applicability—Suit filed on last day of limitation on an insufficient court-fee—Limitation.

Where by a mistake of the plaintiff, and not of the court or of any officer of the court, a plaint was filed upon an insufficient court-fee and this was not discovered until after the period of limitation for the suit had expired, it was held that the suit was barred. 12 A. 57; 23 A. 428; 23 A. 129 and A.W.N. 1904, 133 foll.; 24 M. 331 diss. from. 3 A.L.J. 838=1906 A.W.N. 21=28 A. 310.

——S. 28—Applicability — Valuation of suit — Limitation—Rules of Court of 4th April, 1894, R. 12—Duties of Munsarim.

When reporting as to the sufficiency of the stamp on a plaint it is not necessary for the Munsarim to do more than ascertain whether the plaint is sufficiently stamped according to the plaintiff's valuation of the subject-matter of the suit: his duty does not extend to an examination of the correctness of the plaintiff's valuation. Hence where a plaint was correctly stamped according to the plaintiff's valuation, and so reported by the Munsarim, but it was afterwards discovered, when the period of limitation for the suit had expired, that the plaintiff's valuation was wrong and the plaint was in fact insufficiently stamped, it was held that the suit was barred by limitation. 23 A. 423, foll. (1904) 27 A. 411=1905 A.W.N. 12=2 A.L.J. 55.

——S. 28—Applicability — Suit under-valued — Power to grant time for payment of deficiency in court-fee—Limitation.

A suit comprising a claim for recovery of immoveable property on title and in the alternative a claim for pre-emption was filed, so far as the latter claim was concerned, on the last day of limitation. Owing to a miscalculation of the Government revenue payable on the property claimed, the plaint was understamped and the mistake was not discovered until long after the period of limitation had expired. *Held*, that it not being the duty of the court in which the plaint was presented, or of the office of that Court to check the plaintiff's calculation, S. 28 of the Court-Fees Act did not apply, and as S. 54, C.P.C., did not allow the period of limitation being extended, the suit was properly dismissed, the plaintiff being found to have no case on his alleged title. 23 A. 423, foll. 1904 A.W.N. 133=1 A.L.J. 321=26 A. 553.

——S. 28—Applicability—Power to extend time for payment of deficiency in court-fee—Limitation.

A suit for pre-emption of Zemindari property was filed one day before the expiry of the prescribed period of limitation. The plaint stated the profits of the property to be Rs. 8-4-0 and should, therefore, have borne court-fee stamps to the amount of the proper Court-fee on Rs. 123-12-0; but the valuation given in the plaint was only Rs. 108-12-0 and the plaint was stamped accordingly. The plaint was reported by the officer of the Court to be properly stamped on the valuation, but when the case came on for hearing the defendant objected that the relief had been undervalued. On this objection the court found that Rs. 8-4-0 was the correct amount of profits, disallowing the plaintiff's application to be allowed to reduce the amount of profits stated in the plaint to Rs. 6-14-0 and rejected the plaint under S. 54 of the Code of Civil Procedure. *Held*, that this was not a case falling within S. 28 of the Court-Fees Act, 1870, but one to which S. 54 of the Code of Civil Procedure applied. The court had no power to extend the time for making up the deficiency in the court-fee beyond the expiry of the prescribed period of limitation and the plaint was rightly rejected. (1901) A.W.N. 118=23 A. 423.

——S. 28—Applicability — Appeal insufficiently stamped and received through mistake or inadvertance.

S. 28 of the Court-Fees Act is not inapplicable to a memorandum of appeal, which being in fact insufficiently stamped, has, through mistake or inadvertence of the court or its officer, been received as if properly stamped. 12 A. 129, explained. 1901 A.W.N. 21=1 A.L.J. 5=26 A. 291.

2. Scope.

——Ss. 28 and 5—Scope.

Decision of Taxing Officer under S. 5, Court-fees Act is final and cannot be questioned under S. 28. A.I.R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

——Ss. 28 and 5—Scope.

S. 28, Court-fees Act, refers to the case where the question is not raised by a reference by the Taxing Officer under S. 5 and applies to the case where the deficiency in Court-fee is noticed otherwise and the jurisdiction then will lie in a Judge of the High Court before whom the deficiency is noticed. A.I.R. 1934 All. 807=1934 A.L.J. 643=4 A.W.R. 263 =150 Ind. Cas. 1090.

——Ss. 28 and 4—Scope.

Having regard to Ss. 4 and 28 of the Court-Fees Act there is no legal appeal filed if the order appealed against is not properly stamped. 71 Ind. Cas. 736 =A.I.R. 1924 Lah. 401.

——S. 28—Scope.

An insufficiently stamped memorandum of appeal is not valid. 67 Ind. Cas. 901=3 L.L.J. 237=A.I.R. 1921 Lah. 43.

——S. 28—Scope—Suit for cancellation — Plaint and memorandum of appeal insufficiently stamped.

Where in a suit for cancellation the plaint and memorandum of appeal to the lower appellate court were, through a mistake of law as to the court-fee payable stamped with a ten rupee stamp:

Held, that the case came within S. 28 of the Coourt-Fees Act; and hence the plaint could not be rejected by the High Court. As regards the memorandum of appeal to the lower appellate court, S. 582-A, C. P. C., applied. 24 M. 331=25 Mad. 380=11 M L.J. 119.

——S. 28—Scope—"Validity" — Interpretation.

The Court-fees Act does not aim at supplementing the provisions of the Limitation Act, the word "validity" in S. 28 of the Act is confined to the purpose of the Court-fees Act only. 32 Mad. 305=6 M.L.T. 129=4 Ind. Cas. 503.

——S. 28—Appeal admitted—Question of court-fee arising subsequently — Respondent, if can be heard.

Though the question of court-fee is primarily one between the appellants and the Crown, yet where the stamp reporter inadvertently reported that the court-fee paid was sufficient and the appeal was admitted and the question of the insufficiency of the court-fee arose after the admission of the appeal and after the appearance of the respondents when the mistake was discovered, it cannot properly be said that the question does not affect the respondents at all and that they cannot be heard. A.I.R. 1943 Pat. 102=21 Pat. 720=9 B.R. 282=206 Ind. Cas. 241.

3. Appeal insufficiently stamped.

——S. 28—Appeal insufficiently stamped received by Court—It must be dealt with under S. 149, C. P. C., read with S. 28, Court-fees Act—Whether it is 'rejected' or 'returned', it does not preclude appellant from presenting fresh memorandum on sufficient court-fee. A.I.R. 1941 Nag. 220=I. L. R. (1941) Nag. 467=1941 N.L.J. 258=196 Ind. Cas. 60.

4. Appellate Court's order to make good deficiency—Appeal.

——S. 28—Appellate Court ordering appellant to make up deficiency in court-fees—Order dismissing appeal on failure to do so—If appealable.

Where the Appellate Court orders the plaintiff-appellant to make up the deficiency in court-fee within certain period and on failure to do so passes an order dismissing the appeal on account of the appellant's failure to pay the court-fee as previously ordered, the order of this nature has the effect of a decree and is clearly appealable as such. 189 Ind. Cas. 681 (Bhopal).

5. Deficit fee paid—Effect.

——S. 28—Deficit fee paid—Effect—Appeal ought to be heard.

A memorandum of appeal which, as a matter of fact, was insufficiently stamped was reported by the proper officer of the court to be sufficiently stamped and was filed. At the hearing, however, the court found that the stamp was insufficient and fixed a time within which an additional court-fee stamp should be filed. The additional court-fee was paid within the prescribed period, but at a subsequent date the court, notwithstanding its previous order, declined to hear the appellant upon that portion of his case respecting which there had been a deficiency in the court-fee. *Held*, that the court was not justified in so declining to hear the appellant, thus practically allowing an appeal against its own order. The case was further one falling within the provisions of S. 28 of the Court-Fees Act (1870) and S. 582-A of the Code of Civil Procedure. 1902 A.W.N. 153.

——S. 28—Deficit fee paid—Effect.

When deficit court-fee on memorandum of appeal has been paid as directed, the appeal is deemed to have been properly stamped in the first instance. 1942 N.L.J. 91.

——S. 28—Deficit fee paid—Effect.

In a suit for the cancellation of a sale deed for Rs. 2,500, a stamp duty of Rs. 10 only was paid in the lower courts. In the High Court the plaintiff-appellant, who had failed in both the lower courts, paid a stamp duty of Rs. 150. The High Court ordered under S. 21 of the Court-Fees Act, to pay the deficient Court-fee payable in the lower courts within twenty one days. The order was complied with. It was contended that the memorandum of appeal could be retrospectively validated by S. 582-A of the Code of Civil Procedure but the plaint could not be so validated and that it could be so validated. 11 M.L.J. 119=25 M. 380.

6. Deficient court-fee—(a) If can be ordered to be paid after decision of case.

——S. 28—Deficient court fee—If can be ordered to be paid after decision of case.

An appeal which was filed was insufficiently stamped but the Court did not discover this till the time of the writing of the judgment. The Court dismissed the appeal and directed the appellant to pay the deficiency within a certain period and that on failure, it should be realized from him in due course:

Held, that it was not proper for the Court to pass such an order. A.I.R. 1938 All. 546=1938 A.L. J. 860=1938 A.W.R. 535=177 Ind. Cas. 849.

——S. 28—Deficient court fee—If can be ordered to be paid after decision of case.

After a suit has been decided, the Court has no jurisdiction to require the plaintiff to make good an alleged deficiency in Court-fee. A.I.R. 1933 Lah. 208=34 P.L.R. 84=141 Ind. Cas. [illegible].

——S. 28—Deficient court fee—If can be ordered to be paid after decision of case.

There is no power in the Court under the Court-fees Act or otherwise to levy deficit Court-fee on a memorandum of objections after the appeal has been disposed of. A.I.R. 1933 Mad. 321=1933 M.W.N. 330=37 M.L.W. 300=142 Ind. Cas. 25.

——S. 28—Deficient court-fees — Made good within time allowed—Document dates back to date of original presentation.

Where within the time allowed the proper Court-fee and printing fee are paid up, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally presented. A.I.R. 1936 Lah. 564=166 Ind. Cas. 575.

(b) Power of Court to recover by attachment.

——S. 28—Deficient court-fee—Power of Court to recover by attachment of property.

There is no provision in the Court-fees Act, which justifies a process of attachment for recovery of court-fees after the Court finally parts with the seisin of a case. A.I.R. 1932 All. 316=1932 A.L.J. 165=140 Ind. Cas. 191.

(c) Proper order.

——S. 28—Deficiency of court-fee—Proper order.

It is no doubt open to a Judge to require payment of a particular amount as deficit Court-fee within a particular date and, if such payment is not made, to reject the plaint, thus giving the prospective plaintiff the right to appeal from the order rejecting the plaint. An order returning the plaint for "necessary amendments" and compelling the party to accept the view of the Judge as to the Court-fee payable, thus depriving the plaintiff of his right of appeal, is not fair. A.I.R. 1938 Mad. 645=1938 M.W.N. 453=47 M.L.W. 523=176 Ind. Cas. 928.

——S. 28—Deficiency in court-fee—Proper order.

There will be no proper suit before the Court until the deficiency in Court-fee is paid. The only order that can be passed is one rejecting the plaint. No order permitting the plaintiff to withdraw the suit and to bring a fresh suit can be made on the basis of an insufficiently stamped plaint, which was liable to be rejected. If the deficiency in Court-fee is paid by the plaintiff, though unwillingly, he cannot be permitted to get back the same. A.I.R. 1934 All. 989=1934 A.L.J. 820=4 A.W.R. 920=152 Ind. Cas. 816.

(d) Time for payment.

——S. 28—Deficient court-fee — Time for payment of deficiency—Starting point.

The time provided for paying deficiency in Court-fee in any decree must be computed from the date of the decree unless the time is extended by the Court of appeal. A.I.R. 1938 All. 497=1938 A.W.R. 495=1938 A.L.J. 673=177 Ind. Cas. 824.

——S. 28—Deficient Court-fee—Time for—Court-fee paid as on declaratory relief—Court finding *ad valorem* Court-fee should be paid—Question raised complex one, requiring decision of High Court—Plaintiff should be given opportunity to make up deficiency after decision of High Court. A.I.R. 1938 All. 481=1938 A.L.J. 578=I.L.R. (1938) All. 470=1938 A.W.R. 426=177 Ind. Cas. 85.

——S. 28—Deficient court-fee—Time for payment—Plaintiff misled by wrong procedure of Court and filing appeal on deficient court-fee—Appellate Court should extend time for making good deficiency—Forum of appeal in pre-emption suit—How determined.

Where in a suit for pre-emption, once a Court has found that the market value of the property is different to that alleged in the plaint, the plaintiff should be at once called upon to make up the proper Court-fee as determined, before the trial of the suit takes place at all, it is obviously improper for the Court to hold up the decision on the question of Court-fee until the end of the suit and incorporate the order passed in the decree.

In a pre-emption suit once a Court has determined the market value, the forum of appeal depends on that finding especially in a case where the plaintiff does not challenge the finding on the market value in the grounds of appeal at all.

Where the paintiff was misled by the wrong procedure adopted by the trial Court and hence he filed his appeal with the same Court-fee as he had stamped his plaint:

Held, that the Appellate Court should exercise its discretion in his favour and extend time to allow him to make up the deficiency. A.I.R. 1938 Lah. 311=40 P.L.R. 88=177 Ind. Cas. 686.

——S. 28—Deficiency of court-fee—Time for paying—Objections on award filed without court-fee stamp—Opportunity to make good court-fee not given—Material irregularity.

Where on objections against an award being filed without Court-fee stamp, the Court proceeded at once to dispose of the matter, without taking any notice of the objections, and without giving the objector any opportunity whatsoever to make good the Court-fee stamp:

Held, that the Court at least should have given him a *locus penitentia* by enabling him to pay the Court-fee. The action of the Court was undoubtedly precipitate. The Court had acted with material irregularity in the exercise of its jurisdiction in ignoring the provisions of S. 28, Court-fees Act and S. 149, Civil P. Coode. 169 Ind. Cas. 672=38 P.L.R. 1163.

——S. 28—Deficiency of court-fee—Time for paying.

The Court has no jurisdction to return a plaint presented with an insufficient stamp. It is incumbent upon the Court to receive it, fix a time within which the deficiency should be made up and if it is not complied with within the time allowed, to reject it. A.I.R. 1937 Mad. 266=71 M.L.J. 804=44 M.L.W. 830=168 Ind. Cas. 340.

——S. 28—Deficiency of court-fee—Time for paying.

Where appeals filed without proper Court-fee have been accepted without objection by the office and the question of the fee payable is not free from doubt and there has been no deliberate attempt to evade payment of proper fee, time can be allowed for payment of proper fees. A.I.R. 1935 Lah. 448=17 Lah. 122=159 Ind. Cas. 274.

——S. 28—Deficiency of court-fee—Time for paying—Power to extend to make.

The Court can extend time to put in the insufficient

Court-fee on a plaint after the expiry of the time originally granted. 14 C.W.N. 882=12 C.L.J. 62=6 Ind. Cas. 424.

7. Effect of insufficiency stamp.

——S. 28—Effect of insufficiency of stamp.

A sued *B* on bahi accounts for Rs. 4,969-0-6 principal and Rs. 1,631-10-0 interest. Trial Court decreed the suit for Rs. 3,385-11-6 only. Plaintiff appealed asking for full amount claimed but paid Court-fees covering a demand of Rs. 3,215, only.

Held, the whole appeal will not be dismissed but appellant will not get a decree in appeal for more than the amount for which fee was paid. 96 Ind. Cas. 135=A.I.R. 1926 Lah. 558.

——S. 28—Effect of insufficiency of stamp.

The decree of the Appellate Court will not be prepared or signed until the deficiency of Court-fee paid in the lower Court is made up. 41 P.L.R. 491.

——S. 28—Effect of insufficiency of stamp—Duty of Court to give time to make good deficiency.

In case of appeal when the amount of the Court-fee payable is open to doubt, or the amount of the fee cannot be asertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good. A.I.R. 1939 Pat. 83=5 B.R. 59=19 P.L.T. 885=17 Pat. 687=178 Ind. Cas. 150.

8. Miscellaneous.

——S. 28—Miscellaneous.

High Court has power under S. 28 to determine whether the Court-fee paid on the memorandum of appeal is sufficient or not. A.I.R. 1932 Pat. 228=13 P.L.T. 304=11 Pat. 532=137 Ind. Cas. 855.

——S. 28—Miscellaneous.

Quaere.—Whether a Division Bench has power under S. 28, Court-fees Act to enquire into the question whether a memorandum of appeal which is is before them has been sufficiently stamped or not. A.I.R. 1933 Pat. 81=13 P.L.T. 810=12 Pat. 188=142 Ind. Cas. 617.

——S. 28—Miscellaneous.

Quaere.—Whether the Registrar as Taxing Officer, has power to demand payment of additional Court-fee when the Stamp Reporter had reported the Court-fee to be sufficient. A.I.R. 1932 Pat. 228=13 P.L.T. 304=11 Pat. 532=137 Ind. Cas. 855.

——S. 28—Miscellaneous—Order to pay additional court-fee — Plaintiff's right to relinquish excess claim and re-present plaint on same court-fee.

A plaintiff can relinquish a portion of his claim to bring it within a certain Court-fee.

Where the Court ordered payment of additional Court-fee and returned the plaint and the plaintiff relinquished the excess portion of the claim and represented the amended plaint with same Court-fee.

Held, that the plaintiff had the right to do so and the suit could not be dismissed on the ground that the plaintiff had not complied with the order of the Court. A.I.R. 1931 Mad. 716=1931 M.W.N. 677 34 M.L.W. 252=134 Ind. Cas. 816.

——S. 28—Miscellaneous — Stamping documents inadvertently received—Appeal—Grounds of appeal challenging the whole decree—Court-fee paid only on valuation of the appellants of relief sought.

A decree for sale on several mortgages was obtained by the plaintiffs against a number of defendants. Some of the defendants appealed. So far as their interest in the mortgaged property was concerned, appellants vaued their appeal at Rs. 11,648, the total amount of the decreee being Rs. 28,313, and they paid a Court-fee in accordance with this valuation. Two of the grounds of appeal, however challenged the decree in its entirety. *Held*, that the memorandum of appeal should have been stamped to the full value of the decree, also that the insufficiency of the Court-fee could not be said to be due to a mistake within the meaning of S. 28 of the Court Fees Act, 1870. 1907 A.W.N. 63=4 A.L.J. 130.

——S. 30—Stamps, when can be said to be used—Endorsement by stamp vendor — Erasement of —Whether offence under S 263, part 2, I. P. Code.

S. 30, Court-fees Act, requires, that the Officer of the Court or the head of the office on receiving any document requiring to be stamped under the Act, shall forthwith effect a cancellation of the stamp by punching out the figurehead so as to leave the amount designated on the stamp untouched and the part removed by punching shall be burnt or otherwise destroyed. The endorsements put upon a stamp by the stamp vendor are the name of the vendor, the name of the vendee and the date of sale. These endorsements are not put upon the stamp for the purpose of showing that it has been used, and therefore, erasement of it and its possession do not come within the purview of the second part of S. 263, I.P. Code.

Per *Jack, J*.—The fact that the stamps were not punched does not, of course, necessarily show that an offence could not be committed in respect of them, as there have been a number of cases in which stamps which have been used have been left unpunched and, subsequently, removed probably for nefarious purposes. Of course, if the procedure laid down in the Stamp Act, is properly carried out, every stamp ought to be punched, but experience has shown that punching is often omitted. 164 Ind. Cas. 12=37 Cr. L. J. 923=39 C.W.N. 542.

——Ss. 30, 28—Cancellation of stamp—Stamp purchased by one person—Use by another—Rules of 1883, R. 7—Practice of Calcutta High Court, Original Side.

A plaint bearing stamps of the value of Rs. 17 was stamped with an impressed stamp of Rs. 15 and an adhesive stamp of Rs. 2. The impressed stamp bore the name of the attorney for the plaintiff and the adhesive stamp that of another, and it further appeared that the stamps had been purchased on different dates. On the attorney seeking to get the stamps punched, the punching officer refused to punch them. The Registrar wrote to the attorney to state the special circumstances in writing to enable him to make the necessary orders for punching. The attorney without complying with this request claimed it as a matter of indulgence to him and applied to the court to have the plaint admitted and the stamps punched. *Held*, that the punching officer noticing

the irregularity was fully justified in refusing to punch the stamps. That mere intimation from the Registrar did not confer the indulgence which the Registrar could extend under the rules, and that the solicitor should have placed the circumstances on paper to entitle him to the same. 6 C.W.N. 785.

——Ss. 30 and 28—Plaint return of, under O. 7, R. 10, C. P. Code — Credit to be given for old Stamp.

Where a plaint is returned by one Court for presentation to another Court, the latter Court should give credit for the old stamp on the plaint. 8 Bom. 313, Foll. 35 Mad. 567=21 M.L.J. 533=10 M. L. T. 29=10 Ind. Cas. 201.

——S. 31. [Repealed by S. 163, Criminal Procedure Code Amendment Act (XVII of 1923) and S. 546-A of the Criminal Procedure Code has been substituted in its place.]

——S. 31—Wrong order—Remedy.

The only Court which can rectify an improper order as to Court-fee under S. 31 of the Court-fees Act is the appellate or in a case where no appeal lies, the Revisional Court. 81 Ind. Cas. 56=25 Cr.L.J. 568=A.I.R. 1923 All. 86.

——S. 31—Cognizable cases.

In a cognizable case it is inequitable to order the accused to pay the costs of the complainant. 81 Ind. Cas. 187=2 Bur.L.J. 37=25 Cr.L.J. 699=A.I.R. 1923 Rang. 245.

——S. 31—Cognizable offence.

Under S. 31 payment has only to be ordered when the offence is non-cognizable. 81 Ind. Cas. 56=25 Cr.L.J. 568=A.I.R. 1923 All. 86.

——S. 31—Criminal Procedure Code, S. 545—Re-payment to complainant of fees paid in criminal Court.

A criminal court can levy from the accused the court-fees paid by the complainant. S. 31 of the Court-fees Act is not modified by S. 545 of the Cr. P. C. 24 M. 305.

——S. 31—Effect—"Fines"—Scope of.

The making of an order under S. 31 does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgments into conformity with the law. S. 31 of the Court-fees Act provides that all fees ordered to be repaid under the section shall be recoverable "as if they were fines" but does not thereby make them part of the sentence. 82 Ind. Cas. 141=47 Mad. 914=20 M.L.W. 293=35 M.L.T. 39=1924 M. W. N. 489=25 Cr.L.J. 1213=A.I.R. 1925 Mad. 136= 47 M.L.J. 355.

——S. 31—Effect—Appellate Court's power to set aside order about court-fee.

An appellate court is not competent to set aside the order of the first court directing the accused who was convicted of a non-cognizable offence to pay to the complainant, the fees paid on the latter's petition of complaint, as the same does not form part of the sentence. 31 M. 547=11 Cr.L.J. 194=5 M.L.T. 223=4 Ind. Cas. 1130.

——S. 31—Power of Court.

Re-payment of Court-fee on a petition or complaint can only be ordered in addition to any penalty imposed upon the person complained against and no penalty can be imposed until the person complained against has disobeyed the order for the re-payment of sum advanced to him. 33 Bom. 22=6 Bom.L.R. 225=1 Ind. Cas. 378.

——S. 34 (3)—Duty of prosecution-in-charge under S. 34 (3)—Stamps sold should be identified.

To establish a charge under S. 34 (3), Court-fees Act, it is necessary for the prosecution to identify the stamps alleged to have been so sold. A.I.R. 1938 Cal. 195=39 Cr.L.J. 417=42 C.W.N. 246=174 Ind. Cas. 513.

——S. 34—Using stamp for another client altering endorsement of stamp vendor—Offence.

The case of a *mukhtear* who purchases a court-fee stamp for a client and transfers it to another client is not covered by S. 34, Court-fees Act.

A stamp was purchased for a client and the stamp-vendor wrote his name across it. It was not used for that client and the Vakil's *munshi* instead of obtaining a refund for the unused stamp, altered the name so as to show the name of another client and not of the first and made use of it for the first time on behalf of the second client:

Held, that the *munshi* was not guilty of an offence under S. 468, I.P.C., as the evidence did not show that he acted dishonestly. A.I.R. 1931 Lah. 337=32 P.L.R. 432=32 Cr.L.J. 1051=133 Ind. Cas. 645.

——S. 34, Cl. (3)—Sale of stamps — Court-fee stamp, sale of—Exchange—Transfer of stamp on promise of return of another of equal value.

A mukhtiar by merely transferring a court-fee purchased on behalf of one client to another on promise that the latter will transfer another stamp of equal value is not guilty of an offence under S. 34 of Act VII of 1870, the transaction not amounting to a sale at all. 7 C.W.N. 704=30 C. 921.

——S. 35—Madras G. O. No. 5791 of 1943—Application of.

The notification in G.O. No. 5,791, dated 17th May 1943 issued under S. 35 reducing court-fee payable on suits for possession or joint possession between trustees, etc., applies only to suits in which the status of the defendant as trustee either at the time of suit or previously is undisputed. A.I.R. 1945 Mad. 102=1944 M.W.N. 702 (1)=(1944) 2 M. L. J. 383=57 L. W. 615=I.L.R. (1945) Mad. 584=219 Ind. Cas. 503.

——S. 35—Appeals from orders under S. 47, C. P. Code—Restitution proceedings.

In an appeal under S. 47, of the C. P. Code, *A* was declared (reversing the lower Court's order) entitled to a certain share in the sale proceeds realised by the decree-holder, which were lying in Court. Subsequently the lower Court allowed also the claim of *A* for interest and damages from the date on which the decree-holder removed from the Court, the entire sale proceeds realised by him.

Held, that the order came under S. 47, that therefore the B. and O. Government Notification No. 2,576 LA-25 of 1921 directing under S. 35 of the Court-fees Act that the fee chargeable on appeals from orders under C. P. Code, S. 47, shall be limited to the amounts chargeable under Sch. II, Art. 11 of the Court-fees Act applied and therefore that an appeal from the Court's order in the present instance need not be stamped *ad valorem* but that a stamp of Rs. 4 was enough. 92 Ind. Cas. 474=4 Pat. 294 =7 P.L.R. 415=A.I.R. 1925 Pat. 577.

——Schedules—Scope—If confer right to impose court-fee.

The schedules to the Court-fees Act only determine the method of assessment and do not confer right to impose and collect court-fee. A.I.R. 1941 Nag. 129 =1941 N.L.J. 42=194 Ind. Cas. 731.

——Schedules—Scope—Impose liability and is not merely auxiliary to S. 7.

Art. 1 of Sch. I, Court-fees Act, is not merely auxiliary to S. 7 because, the Schedules to the Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6 as the case may be. A.I.R. 1939 Rang. 375=1939 Rang. L.R. 474=185 Ind. Cas. 623.

——Sch. 1, Art. 1. See also SCHEDULE 2. ART. 17 (iii) AND (vi).

Synopsis.

1. **Appeal—Valuation.**
(a) **Appeal against rejection of plaint under O. 7, R. 11.**
(b) **Appeal against rejection on non-payment of deficit Court-fee.**
(c) **Appeal—(Miscellaneous).**
2. **Applicability.**
3. **Award—Appeal against decree on.**
4. **Charge.**
5. **Conditional decree.**
6. **Costs.**
7. **Counter-claim.**
8. **Cross-objections.**
9. **Garnishee order.**
10. **Instalment decree.**
11. **Interest—Future interest.**
12. **Interest pendente lite.**
13. **Land Acquisition Act—Reference under.**
14. **Letters of administration on probate of will.**
15. **Mesne profits.**
16. **Mortgage suit.**
17. **Partition suit.**
18. **Partnership.**
19. **Personal liability.**
20. **Pre-emption—Appeal.**
21. **Reducing claim for court-fee.**
22. **Refund of purchase money.**
23. **Rent suit.**
24. **Restitution.**
25. **Separate appeals.**
26. **Set-off.**
27. **Suit for money due on adjustment of accounts.**
28. **U. P. Agriculturists Relief Act—Appeals and suits.**
29. **U. P. Encumbered Estates Act — Appeal and suits.**

1. Appeal—Valuation.

——Sch. 1, Art. 1—Appeal—Valuation—Suit for possession of land alleged to have been encroached upon by defendant and for demolition of building built upon it—Land valued at Rs. 6,000 and damages at Rs. 900—Suit decreed—Appeal by defendant.

Held, that the value to the defendant-appellant of getting rid of the decree could not be less than Rs. 6,000, and consequently the court-fee on appeal must be assessed according to the plaintiff's valuation of the subject-matter of the suit. A.I.R. 1941 All. 295=1941 A.L.J. 381=195 Ind. Cas. 448.

——Sch. 1, Art. 1—Appeal—Valuation.

Where an appellant wants to avoid a liability or seeks to enhance the value of his decree, he should pay *ad valorem* fee under Sch. I, Art. 1 on the amount for which he seeks to avoid liability or that by which he seeks to enhance the value of decree. A.I.R. 1933 Pat. 234=14 P.L.T. 180=12 Pat. 694=144 Ind. Cas. 684.

——Sch. 1, Art. 1—Appeal—Valuation.

The principle of valuing an appeal must be the same as the principle used in valuing the plaint in the original suit for the purpose of court-fees. A.I.R. 1930 Rang. 164=126 Ind. Cas. 645.

——Sch. 1, Art. 1—Appeal—Valuation.

When the subject-matter of the suit is also the subject-matter of the appeal the amount or the value of the appeal is the value of the property sought to be recovered. 25 P.R. 1916=16 P.W.R. 1916=32 Ind. Cas. 121.

——Sch. 1, Art. 1—Appeal—Valuation — Second appeal.

The Court-fee payable on a memorandum of further appeal in a redemption suit by the mortgagee against the amount fixed by the Appellate Court as the redemption amount is to be calculated on the difference between the amount claimed by the mortgagee in appeal and the amount fixed by the Appellate Court. 29 Mad. 367=27 All. 447, Foll. 5 P.R. 1911 =48 P.L.R. 1911=59 P.W.R. 1911=9 Ind. Cas. 676.

——Sch. 1, Art. 1—Appeal.

The value of an appeal is not in all cases the value of the suit as originally fixed but the value of the relief granted by the decree which a party wishes to get rid of, that value being determined according to S. 7 (*v*). 85 Ind. Cas. 405=48 Mad. 652=21 M. L.W. 15=A.I.R. 1925 Mad. 323=47 M.L.J. 919.

——Sch. 1, Art. 1—Appeal.

An appeal differs from a mere application for ascertainment of mesne profits, and a memorandum of appeal of this kind is liable to *ad valorem* Court-fee. A.I.R. 1933 Pat. 81=13 P.L.T. 810=12 Pat. 188 =142 Ind. Cas. 617.

(a) Appeal against rejection of plaint under O. 7, R. 11.

——Sch. 1, Art. 1—Appeal against rejection of plaint under O. 7, R. 11—Appeal—Court-fee.

A memorandum of appeal from an order rejecting a plaint under O. 7, R. 11, C. P. Code, need not bear *ad valorem* Court-fee on the same amount as the plaint; it need be stamped only on the basis of the difference between the Court-fee paid in the lower Court and the Court-fee demanded there. I.L.R. (1948) Nag. 565=A.I.R. 1949 Nag. 1.

(b) Appeal against rejection on non-payment of deficit court-fee.

——Sch. 1, Art. 1—Appeal against rejection on non-payment of deficit court-fee.

Court-fees of Rs. 100 paid on memorandum of appeal—Appellate Court hoding that fee payable was Rs. 412-7-0 and on failure to pay deficit dismissing appeal—Second appeal valued at Rs. 312-7-0 and Court-fees paid on that amount—Judge holding that proper fee payable was Rs. 412-7-0 and on failure of appellant to pay deficit dismissing appeal—*Held,* in Letters Patent appeal that case was governed by Art. 1—Court-fee paid on second appeal, held proper. A.I.R. 1938 Mad. 498=47 M.L.W. 356=1938 M.W.N. 264=(1938) 1 M.L.J. 662=I.L.R. (1938) Mad. 981=181 Ind. Cas. 433.

——Sch. 1, Art. 1—Appeal—Appeal against rejection of plaint for non-payment of deficit court-fee.

Proper Court-fee on memorandum of appeal is the amount of deficit, as that difference is alone the matter disputed. 1939 N.L.J. 32.

(c) Appeal (Miscellaneous).

——Sch. 1, Art. 1—Appeal—Refusal to grant time for additional Court-fee—Sch. 2, Art. 17.

Where the subject-matter in dispute is the correctness of the lower appellate Court's decision demanding additional Court-fee and refusing to grant time to comply with it and the resultant rejection of the memorandum of appeal as insufficiently stamped, the relief is not capable of being properly valued and the case cannot be brought under Art. 1 of Sch. I and must therefore fall under the residuary Art. 17 of the 2nd Schedule. 98 Ind. Cas. 663=A.I.R. 1927 Nag. 100.

——Sch. 1, Art. 1—Appeal—Court-fee is payable only on subject-matter of appeal.

The plaintiff sued for partition, claiming one-third of a house which, he alleged, constituted the joint family property. The trial Court came to the conclusion that the joint family property consisted, not only of the house which the plaintiff sought to partition, but also of another house, which was in the possession of the plaintiff, and it, therefore, made an order that unless the plaintiff amended the plaint expressing his desire to put the house in his possession as joint family property, no orders to effect partition of the suit house in his favour could be passed. The plaintiff appealed against that order, and the question was whether the memorandum ought to be stamped with the *ad valorem* value of the suit house and also the other house in possession of the plaintiff:

Held, that no fee should be charged in respect of the other house which had never formed any part of the subject-matter of the litigation, and was merely to be brought in if the plaintiff chose to bring it in, which he had not done. A.I.R. 1943 Bom. 441=45 Bom.L.R. 880=211 Ind. Cas. 637.

——Sch. 1, Art. 1—Appeal against preliminary decree and final decree.

When defendant first appealed, the amount of mesne profits had not been ascertained but had only been ordered to be ascertained and the fee was paid on the amount at which the plaintiff estimated the mesne profits.

Held, no additional Court-fee on the memorandum of appeal need be paid from the decree awarding actual mesne profits. (16 C.L.J. 564, Foll.) 79 Ind. Cas. 908=3 Pat. 815=1924 P.H.C.C. 206=A.I.R. 1924 Pat. 694.

——Sch. 1, Art. 1—Appeal from order under S. 331, C. P. Code.

A memorandum of appeal from an order under S. 331, C. P. Code, directing surrender of possession should be stamped with an *ad valorem* fee. 29 M. 172.

2. Applicability.

——Sch. 1, Art. 1—Applicability.

Sch. I, Art. 1, is the residuary article and applies only when there is no other provision in the Act, governing the case under consideration. A.I.R. 1941 Lah. 123=43 P.L.R. 147=I.L.R. (1941) Lah. 234=194 Ind. Cas. 230 (F.B.).

——Sch. 1, Art. 1—Applicability.

Under Sch. I, Art. 1 *ad valorem* Court-fee has to be paid on amount or value of subject-matter in dispute—Value of subject-matter must necessarily mean market value. A.I.R. 1944 Pat. 17=22 Pat. 783=24 P.L.T. 446=11 B.R. 111=216 Innd. Cas. 132 (F.B.).

——Sch. 1, Art. 1—Applicability.

Per *Teja Singh, J.* (*Obiter*).—Documents presented in a High Court are not excluded from the operation of Art 1 of Sch. I. A.I.R. 1946 Lah. 280=I.L.R. (1947) Lah. 47=48 P.L.R. 250=226 Ind. Cas. 5.

——(Madras) Sch. 1, Art. 1; Sch. 2, Art. 17-B and S. 7 (x) (a)—Applicability—Contract for exchange—Suit for specific performance—Appeal.

A suit for specific performance of a contract for exchange of immoveable property is not one for specific performance of a contract of sale within S. 7 (*x*) (*a*) nor can it be said that the subject-matter of such a suit is incapable of valuation within Sch. II, Art. 17-B. The memo. of appeal in such suit therefore is governed by the residuary Art. 1 of Sch. I. A.I.R. 1944 Mad. 252=(1944) 1 M.L.J. 187=57 M.L.W. 130=219 Ind. Cas. 329=1944 M.W.N. 133.

——Sch. 1, Art. 1; Sch. 2, Art. 17 (iii)—Applicability—Suit for declaration that decree is void and illegal—Court-fee.

Where the plaintiff files a suit for a declaration that a decree is void and illegal, the declaration involves the setting aside of the decree and relieving the plaintiff from the obligation arising thereunder and therefore involves a consequential relief. He is hence liable to pay *ad valorem* Court-fee on the valuation of the suit under Art. 1, Sch. I, Court-fees Act and not a declaratory fee as given in Sch. II, Art. 17 (*iii*). 191 Ind. Cas. 413=1940 O.W.N. 1121=1940 A.W.R. 454=16 Luck. 526.

——Sch. 1, Art. 1—Applicability.

Plaint asking for declaration that certain sale deeds were void against plaintiff:

Held, Per *Bennet, J.*—That the plaint required *ad valorem* Court-fee under Sch. I, Art. 1. A.I.R. 1935 All. 817=58 All. 146=1935 A.W.R. 896=1935 A.L.J. 869=156 Ind. Cas. 494 (F.B.).

——Sch. 1, Art. 1; Sch. 2, Art. 17 (3)—Applicability—Suit for declaration that a document executed by plaintiff is void—Prayer for cancellation of deed implied—Court-fee payable.

Where a suit was filed by the plaintiff for a declaration that a sale deed which had been executed by her in favour of the defendants was void and ineffectual as against her and on a proper construction of the plaint, it appeared that the plaintiff must be taken to have sued cancellation of the sale deed:

Held, that the suit fell within S. 39, Specific Relief Act and Sch. II, 17 (*iii*) of the Court-fees Act was not applicable to this case and an *ad valorem* Court-fee was payable under Sch. I, Art. 1 as though there had been a definite prayer for cancellation.

Per *Niamatullah, J.*—It is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of S. 39, Specific Relief Act. For all purposes of Court-fee, it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation. A.I.R. 1935 All. 207=1935 A.L.J. 133=4 A.W.R. 1142=57 All. 638=153 Ind. Cas. 599.

——Sch. 1, Art. 1—Applicability—Suit by plaintiff for declaration that compromise by father in partition suit and decree thereon are not binding on plaintiff—Court-fee.

The plaintiff sued for a declaration that a certain compromise entered into by his father in a family partition suit and a decree passed on the basis of such compromise were not binding on him:

Held, that the plaintiff was bound to pay *ad valorem* Court-fees for the relief which, in substance, was one for cancellation of the compromise, under the residuary article, Sch. I, Art. 1, Court-fees Act, and that the compromise having merged in the decree of the Court, the cancellation of the decree was not a distinct subject, but amounted to one consolidated relief. No further Court-fee was, therefore, payable in respect of this part of the relief. A.I.R. 1934 All. 1071=1934 A.L.J. 955=4 A.W.R. 1138=153 Ind. Cas. 517.

——Sch. 1, Art. 1—Applicability.

Suit for recovery of certain money from company and debenture-holders of company—Prayer for declaration that amount is recoverable in priority to debentures—Suit decreed—Debenture-holders appealing to modify decision by trial Court by refusing the declaration as to priority—Court-fee held payable *ad valorem* under Sch. I, Art. 1 on decretal amount or on value of debentures whichever was less. A.I.R. 1933 All. 45=54 All. 553=1932 A.L.J. 385=136 Ind. Cas. 837.

——Sch. 1, Art. 1; S. 7 (iv) (c); Sch. 2, Art. 17 (iii)—Applicability—Suit for cancellation of mortgage-deed and decree thereon—Whether declaratory relief — 'Consequential relief', meaning of.

Where *A* executed a mortgage deed in *B's* favour and *B* obtained a preliminary decree and subsequently a final decree in a suit on the mortgage, and the nephew and the son of *A* under the guardianship of their grandmother who had been impleaded therein, instituted a fresh suit praying that the mortgage deed executed by *A* might be cancelled and that the compromise and the decree obtained on the mortgage might be cancelled:

Held, (*i*) that the first relief fell neither under S. 7 (*iv*) (*c*) nor under Sch. II, Art. 17 (*iii*), but under the residuary article, Sch. I, Art. 1 of the Court-Fees Act and that the court-fee payable on the relief was governed by Sch. I, Art. 1;

(*ii*) that the second relief being similar to the first was governed by the same article.

Held, further, that as the compromise had merged in the preliminary decree and the latter had merged in the final decree, the cancellation of the compromise, the preliminary decree and the final decree were not "distinct subjects" within the meaning of S. 17, but in reality only one subject and the court-fee for the second relief was payable on the value of the final decree only.

A relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Officer for a note to be made by the Registering Officer in his books is much more than a mere declaratory relief.

The expression "consequential relief" in S. 7 (*iv*) (*c*) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. A.I.R. 1932 All. 485=1932 A.L.J. 684=54 All. 812=139 Ind. Cas. 32 (F.B.).

[Overrules 5 All. 331 (F.B.).].

——Sch. 1, Art. 1—Applicability.

Obiter.—The words "from a decree" do not occur in Art. 1, Sch. I, Court-fees Act. No such distinction therefore, can be drawn in regard to Art. 1, Sch. I, between appeals from decrees and appeals which are not from decrees. A.I.R. 1939 All. 127=1938 A.L.J. 1124=I.L.R. (1939) All. 142=1938 A.W.R. 843=180 Ind. Cas. 73.

——Sch. 1, Art. 1—Applicability.

An appeal from order under O. 21, R. 50 (2) (3), Civil P.C., falls under Art. 1, Sch. I, Court-fees Act and the court-fee payable on such appeal is an *ad valorem* fee and not as under Art. 11 of Sch. II to the Court-fees Act. A.I.R. 1939 Sind 161=I.L.R. (1939) Kar. 589=182 Ind. Cas. 470 (F.B.).

——Sch. 1, Art. 1—Applicability—Suit for possession—Landlord.

The suit was filed against three persons of whom defendants 1 and 2 were alleged to be the persons in possession and defendant No. 3 was the admitted landlord. The plaintiff asked for a declaration of title and recovery of possession on the allegation that he had got settlement from defendant No. 3, but that subsequently the other defendants dispossessed him. The plaintiff set up a jote right to the land. The trial Court passed a decree against defendants 2 and 3 and dismissed the suit against defendant 1. The decree declared the plaintiff's jote right and provided that he do get khas possession. An appeal having been prepared by defendant 3 the

same was dismissed. The said defendant thereupon preferred a second appeal. A question of Court-fee having been raised, *held*, that the appeal was governed by Sch. I, Art. 1 read with S. 7, para. (v) of the Court-Fees Act. 34 C.W.N. 217=126 Ind. Cas. 777=A.I.R. 1931 Cal. 333.

——Sch. 1, Art. 1—Applicability—Dismissal against some defendants—Appeal—Sch. 2, Art. 17.

Where plaintiff, who having sued several defendants on a money claim obtained a decree against one of them, appealed to get a decree against the remaining defendants and valued his claim in appeal as one for declaration.

Held, that the plaintiff was bound to pay court-fee on the amount for which the remaining defendants were sought to be made liable. 67 Ind. Cas. 364=24 Bom.L.R. 313=46 Bom. 840=A. I. R. 1922 Bom. 172.

3. Award—Appeal against decree on.

——Sch. 1, Art. 1—Award—Appeal.

Appeal from award of Calcutta Improvement Tribunal—Dispute only as to apportionment—No excess compensation claimed—Appeal held was governed by S. 8 and Art. 1, Sch. I, Court-fees Act. A.I.R. 1932 Cal. 346=35 C.W.N. 1103=59 C. 528=137 Ind. Cas. 469.

——Sch. 1, Art. 1—Award—Appeal.

Where a decree is passed in terms of an award on a reference under C. P. Code, Court-fee for an appeal from such decree is *ad valorem*. 94 Ind. Cas. 646=A.I.R. 1926 Lah. 403.

——Sch. 1, Art. 1—Award—Appeal from a decree in accordance with an award.

The proper court fee payable upon a memorandum of appeal from a decree passed in accordance with an award based on an order of reference under S. 523 C.P. Code is an *ad valorem* fee and not a fixed fee of Rs. 10. 1907 A.W.N. 177=4 A.L.J. 595.

——Sch. 1, Art. 1—Award—Appeal from decree passed on.

An appeal from a decree passed on a private award should be filed with court-fee in accordance with Art. 1, Sch. I. 33 C. 11.

4. Charge.

——Sch. 1, Art. 1—Charge—Appeal for having charge refused by decree—Property valued at Rs. 9,500—Court-fee payable.

The plaintiff sued to recover a sum of Rs. 18,897-0-9 from the defendant as a first charge from and out of the properties possessed by him. The Subordinate Judge gave a decree for the amount claimed but declined to give a first charge as prayed for. The plaintiff preferred an appeal against the decree disallowing prayer in respect of the first charge on the said assets which she valued in the memorandum of appeal at Rs. 9,500:

Held, that court-fee was payable on the sum of Rs. 9,500, the value which the plaintiff placed on the assets. A.I.R. 1942 Mad. 152=54 L.W. 526 =1941 M.W.N. 970=(1941) 2 M.L.J. 774=201 Ind. Cas. 86.

——Sch. 1, Art. 1—Charge—Appeal for having charge which was refused by decree—Court-fee payable.

Where on a suit for possession defendant admits plaintiff's title but claims a charge of Rs. 700 over the property and the defendant's claim is not upheld, appeal by defendant is chargeable with *ad valorem* court-fee on Rs. 700. A.I.R. 1936 Lah. 935=39 P.L.R. 443=167 Ind. Cas. 756.

——Sch. 1, Art. 1—Charge—Appeal to remove charge.

Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability, the value for the purposes of court-fee would be the price of the property or the decretal amount whichever is less. A.I.R. 1938 Peah. 38= 176 Ind. Cas. 319.

——Sch. 1, Art. 1—Charge — Appeal to remove charge.

An appeal, seeking to remove a charge created on property by a decree should bear *ad valorem* Court-fee on the amount of the charge. 11 P.R. 1916= 59 P.W.R. 1916=33 Ind. Cas. 138.

5. Conditional decree.

——Sch. 1, Art. 1—Conditional decree—Decree for possession subject to payment of certain sum—Plaintiff appealing against order of payment—Valuation.

In an appeal preferred by the plaintiff against an order requiring him to pay certain sum being his share of debts binding the property, the possession of which has been decreed to him subject to this payment, the appeal should be valued at the amount of that sum of money. A.I.R. 1940 Mad. 955=1940 M.W.N. 904=52 M.L.W. 397=(1940) 2 M.L.J. 406.

——Sch. 1, Art. 1—Decree for possession on condition of plaintiff paying value of improvement—Appeal relating only to value of improvements—Court-fee should be paid on value of improvements. A.I.R. 1939 Mad. 49=1938 M.W.N. 1016=48 M. L.W. 661=(1938) 2 M.L.J. 840=I.L.R. (1939) Mad. 328=179 Ind. Cas. 421.

——Sch. 1, Art. 1—Conditional decree—Appeal.

Where a holder of a decree, for possession of a plot of land, passed by a Court on condition of his paying to the opposite party a certain sum appeals against the order valuing the suit at a sum different from the above sum.

Held, that the valuation of the appeal must be in accordance with Art. 1, Sch. I, Court-Fees Act, which lays down the court-fees should be paid on the value of the subject-matter in dispute, the subject-matter here being the sum which the lower Court asked the decree-holder to pay as relief to the opposite party. 1 Lah. 234=A.I.R. 1922 Mad. 211 and 13 O.C. 62, Foll. 108 Ind. Cas. 379=10 Lah. L.J. 55.

——Sch. 1, Art. 1—Conditional decree—Appeal.

Relief claiming that condition of payment before

taking possession be removed requires *ad valorem* court-fee on the amount ordered to be paid. 83 Ind. Cas. 780=45 All. 537=A.I.R. 1924 All. 175.

——Sch. 1, Art. 1—Conditional decree—Appeal—Appeal against condition.

It is quite immaterial in what form the suit was originally brought, provided the decree against which the appeal is presented attaches a definite condition as to the payment of a specified sum. Where a decree is in such a form, the relief sought being the removal of this condition precedent, Court-fee must be paid on the amount so fixed. 67 Ind. Cas. 106 =A.I.R. 1922 Lah. 440.

——Sch. 1, Art. 1—Conditional decree of—Appeal.

The plaintiffs had sued for possession of certain land without payment of anything to the defendants, The decree of the lower appellate Court was one for possession on payment of certain sum as mortgage-money; in other words, it was a decree for redemption. In appeal to the High Court the plaintiffs asked that they should be given a decree for possession without payment of anything.

Held, that the proper court-fee stamp upon the memorandum of appeal was *ad valorem* one upon the amount of the mortgage-money. 59 Ind. Cas. 667 =26 P.L.R. 1921=A.I.R. 1921 Lah. 371.

——Sch. 1, Art. 1—Conditional decree—Suit for possession of property—Plea that defendant's dower debt must be paid—Court-fee for appeal by defendant.

Where the defendant's plea in a suit for possession that the plaintiff cannot get possession without payment of Rs. 80,000 for dower debt was rejected by the lower Court and the suit decreed and the defendant appealed. *Held*, that defendant was not bound to pay any Court-fee on the dower amount and the Court could grant a decree to plaintiff conditional on payment of dower debt to defendant. 36 All. 322=12 A.L.J. 481=25 Ind. Cas. 395.

6. Costs.

——Sch. 1, Art. 1—Costs—Court-fee on—Appeal and cross-objection—Difference between.

Costs are not regarded as being any part of a subject-matter in dispute either in the suit or in the appeal. It is the settled practice of the Calcutta High Court that where a part of the main subject-matter is in dispute in appeal, even though there is a specific dispute about the costs, because they have not followed the event, no court-fee has to be paid in respect of the costs calculated separately; in other words, the amount of cost in that case is not taken to be part of the subject-matter in dispute. No difference can be made in the case where the dispute on the main subject-matter, so to speak, in the Appellate Court vanishes to zero and the party affected appeals against the order as to costs alone. The practice should be consistent and the court-fee payable on a memorandum of appeal falling under Art. 1, Sch. I, Court-Fees Act, is consequently *nil* where the relief as to costs is the only relief claimed in the appeal. The Court-Fees Act is in essence a taxing statute and if the interpretation given is deemed by the powers concerned not to achieve the results they wish, there is no difficulty in their making specified provision for this problem of appeals relating to costs only.

There can be no difference between a memorandum of cross-objection and a memorandum of appeal coming under Art. 1, Sch. I, and neither can be held as coming under Art. 11, Sch. II or Art. 1-D of Sch. II. 25 C.W.N. 934, diss. from. 54 C.W.N. 380=A.I.R. 1950 Cal. 296.

——Sch. 1, Art. 1—Costs.

Where a suit is dismissed with costs and the appeal by the plaintiff is directed against the entire decree and is not confined to costs, separate Court-fee is not payable on the amount of costs. A.I.R. 1949 Ajmer 34.

——Sch. 1, Art. 1—Costs.

Appeal on merits also challenging order of costs independently—Value of subject-matter of appeal is total amount of value of subject-matter in suit and amount of costs challenged. A. I. R. 1940 Oudh 182=1940 O. W. N. 167=1940 A. W. R. 85=15 Luck. 392=185 Ind. Cas. 895.

——Sch. 1, Art. 1—Costs.

Where in an appeal, the appellants have prayed for the dismissal of the whole of the claim against them and have paid the proper court-fees on that relief, costs being merely incidental to that relief, it is not necessary for the appellants to pay separate *ad valorem* fees on the costs in the circumstances of the case. A.I.R. 1935 Lah. 379=37 P.L.R. 50=157 Ind. Cas. 96.

——Sch. 1, Art. 1—Costs.

No court-fee is payable on the amount of costs awarded by a decree appealed from if no ground is specifically directed against the award of costs. A.I.R. 1934 All. 805=57 All. 71=1934 A.L.J. 957=4 A.W.R. 922=150 Ind. Cas. 653.

——Sch. 1, Art. 1—Costs.

Ordinarily no court-fee is payable upon costs entered in the decree against which an appeal is presented, but where apart from and independently of any other relief which the appellant seeks, he seeks distinct relief on the ground that by the decree under appeal, the costs of the parties have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purpose of Sch. I of the Court-fees Act. A.I.R. 1934 Lah. 739= 35 P.L.R. 656=155 Ind. Cas. 558.

——Sch. 1, Art. 1—Costs.

Where the plaintiff-respondent filed a memorandum of objections part of which related to the order of the lower court disallowing costs, *held*, that *ad valorem* court-fee was payable on the claim for costs. 1930 A.L.J. 1097=A.I.R. 1930 All. 332.

——Sch. 1, Art. 1—Costs.

Plaintiff's suit in the Court below was dismissed without giving any costs to the defendants. The plaintiff filed an appeal and the defendants filed a cross-objection, stating that the Court below was wrong in not allowing costs to them.

Held, that the cross-objection, which related to costs, should bear Court-fee upon the amount claimed. 3 P.L.J. 443, Foll.; A.I.R. 1921 Cal. 55, not Foll. 117 Ind. Cas. 166=10 P.L.T. 224=8 Pat. 543=A.I.R. 1929 Pat. 286.

——Sch. 1, Art. 1—Costs.

No Court fees are charged on costs awarded by the Court as they are wihthin the discretion of the Court and do not strictly come within the purview

of the subject-mater in dispute between the parties. 104 Ind. Cas. 391=23 S.L.R. 277=A.I.R. 1927 Sind 251.

——Sch. 1, Art. 1—Costs.

When costs are the sole ground of cross-objections it cannot be said that costs are not the subject-matter in dispute, and Court-fees should be *ad valorem* on the amount of costs. 98 Ind. Cas. 272=8 L.L.J. 434=A.I.R. 1926 Lah. 645.

——Sch. 1, Art. 1—Costs.

In a cross-objection as to costs only, the amount and the value of the subject-matter in dispute is the amount or value of the sum claimed as costs. Subject to this, a cross-objection which relates to costs and costs only, must not be treated as petition under cl. (*d*), Art. 1, Sch. II of the Court-Fees Act but must be stamped *ad valorem* under Sch. I, Art. 1, of the Act. 25 C.W.N. 934, Diss. from. 8 M.I.A. 262, Expl. 85 Ind. Cas. 257=3 Bur.L.J. 279=2 Rang. 637=A.I.R. 1925 Rang. 145.

——Sch. 1, Art. 1—Costs.

A memorandum of cross-objections relating to costs only does not fall either within Art. 11, Sch. II, or under Art. 1, Sch. I, or under 17 (*vi*), Sch. II, but may be treated as a petition and comes under Art. 17 (*vi*). Sch. II, but may be treated as a petition and comes under cl. (*d*), Art. I, Sch. II. 64 Ind. Cas. 606=25 C.W.N. 934=A.I.R. 1921 Cal. 55.

——Sch. 1, Art. 1—Costs.

Where an appellant seeks in an appeal distinct relief on the ground that the costs have not been properly assessed or apportioned its value should be reckoned as a part of the subject-matter in dispute, though as a general rule costs are exempt from Court-fees. 12 O.C. 171=3 Ind. Cas. 584.

——Sch. 1, Art. 1—Costs.

Where in a memorandum of appeal the disallowance of costs by the lower court is made the ground of a claim for separate and distinct relief, the value of such distinct relief should be reckoned as a part of the subject-matter in dispute for the purposes of the first schedule of the Court-Fees Act. 1901 A.W.N. 21=1 A.L.J. 5=26 A. 291.

7. "Counter-claim."

——Sch. 1, Art. 1—"Counter-claim", what is.

A "couner-claim" is a cross-action brought by the defendants against the plaintiff and as such the defendants must ask for some kind of relief against the plaintiff. A pleading which asks no cross relief against a plaintiff either alone or with some other person is not a "counter-claim."

A share-holder of a company brought a suit against the company for injunction alleging that the company had no power of sale over his shares in respect of its disputed claim. The defence of the company was that it had the power of sale over the shares of any of its share-holders in respect of any of its claims, disputed or otherwise, against the said share-holder. The whole question for decision was whether the company had such a power of sale or not:

Held, that the written statement did not plead a counter-claim and consequently it did not require to be stamped. A.I.R. 1940 Rang. 300=1940 Rang. L.R. 529=191 Ind. Cas. 644.

8. Cross-objections.

——Sch. 1, Art. 1—Cross-objections. *See also* COURT-FEES ACT, SCH. I, ART. 1—COSTS.

——Sch. 1, Art. 1—Cross-objections—Future interest—Court-fee. *See* COURT FEES ACT, SCH. I, ART. 1—INTEREST—FUTURE INTEREST.

——Sch. 1, Art. 1—Cross-objection—Court-fees on.

A cross-objection must be chargeable with a court-fee calculated *ad valorem* on the amount of "the subject-matter in dispute". The subject-matter in dispute means the subject-matter in dispute in the cross-objection. A. I. R. 1939 Rang. 375=1939 Rang.L.R. 474=185 Ind. Cas. 623.

——Sch. 1, Art. 1—Cross-objections.

Suit falling under Art. 17, Sch. II, Court-fees Act—Appeal—Cross-objections: *Held*, that court-fee payable on cross-objections is *ad valorem* under Art. 1, Sch. I and under Art. 17, Sch. II. 39 P.L.R. 586.

——Sch. 1, Art. 1; Sch. 2, Art. 17—Cross-objections—Court-fee.

The court-fee on cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Art. 1, Sch. I, Court-fees Act, and not on the same principle as laid down for the case of appeals in Art. 17 of Sch. II. 155 Ind. Cas. 293=1935 O.W.N. 505=11 Luck. 79.

——Sch. 1, Art. 1—Cross-objections.

Cross-objections in appeals arising out of redemption suit must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. Where the object of the cross-objections is to wipe off the claim of the respondent in respect of a deed of further charge, court-fee should be paid *ad valorem* on that amount. A. I. R. 1934 Oudh 246=11 O. W. N. 559=9 Luck. 657=149 Ind. Cas. 543.

——Sch. 1, Art. 1—Cross-objections—Subject-matter not capable of valuation.

Cross-objections must bear a court-fee calculated on the amount or value of the subject-matter in dispute. Where the subject-matter is not capable of valuation the plaintiff's valuation, if not unreasonable, should be accepted. 70 Ind. Cas. 286=25 O.C. 275=A.I.R. 1923 Oudh 44.

——Sch. 1, Art. 1—Cross-objections—Petition to support judgment.

If for the purpose of supporting the decree dismissing plaintiffs' claim on any ground, even on a ground other than that taken by the Court of first instance, respondents filed a petition stating the reasons on which they supported the decree, that did not amount to cross-objections for which an *ad valorem* court-fee was payable. 68 Ind. Cas. 861=44 All. 577=A.I.R. 1922 All. 280.

——Sch. 1, Art. 1—Cross-objections.

Mere criticism of judgment cannot be allowed to be filed as a petition of cross-objection and do not amount to cross-objection, so as to require to be stamped. 1 Pat. 258=A.I.R. 1922 Pat. 483.

——Sch. 1, Art. 1—Cross-objections—Court-fee on.

A memorandum of cross-objections must bear Court-fees *ad valorem*. A respondent who files a

memorandum of objections cannot claim to have Court-fees reduced simply because the Appellant has paid more than what he should have paid. 46 Cal. 160=27 C.L.J. 443=45 Ind. Cas. 939.

——Sch. 1, Art. 1 and Sch. 2, Art. 17—Cross-objections.

In an appeal preferred against a decree refusing to grant a declaration, the proper Court-fee is Rs. 10 under Art. 17 of the Act. But if the party fails to prefer the appeal in time but files a cross objection in an appeal by his adversary he should pay *ad valorem* Court-fees and not a fee of Rs. 10. 3 P.L.J. 197=4 P.L.W. 368=45 Ind. Cas. 568.

——Sch. 1, Art. 1—Cross-objections — Ad valorem fee.

Under Art. 1, of Sch. I a cross objector must pay an *ad valorem* fee according to the value or amount of the subject-matter in dispute. 40 All. 93=15 A.L.J. 886=43 Ind. Cas. 179.

9. Garnishee order.

——Sch. 1, Art. 1 and Sch. 2, Art. 11—Garnishee order—Appeal—Court-fee payable.

An order made in execution of a decree against a garnishee directing him to pay an amount equal to the decretal amount, is not between parties to the suit, the garnishee being a stranger. So, an appeal filed by him against the order is not an appeal under S. 47, C. P. Code, and he has to pay *ad valorem* court-fee and not a fixed court-fee. I.L.R. (1946) Kar. 122=223 Ind. Cas. 302=A.I.R. 1946 Sind 116.

——Sch. I, Art. 1—Garnishee order—Appeal.

Judgment-debtor's application for garnishee order allowed—Liability of garnishee held to exist—Appeal by garnishee:

Held, that *ad valorem* court-fee was payable on the memorandum of appeal. A.I.R. 1938 All. 254 =1938 A.L.J. 232=1938 A.W.R. 158=175 Ind. Cas. 310.

10. Instalment decree.

——Sch. I, Art. 1, Sch. II, Art. 17—Instalment decree—Decree directing payment of instalments—Condition for recovery of whole sum on default of two successive instalments—Appeal—Court-fee payable.

Where in a decree, payment of instalments is allowed and a condition is imposed that if two successive instalments are not paid by due date, the whole sum will be recoverable immediately with interest at six per cent. per annum from the date of the decree, court-fee payable on memorandum of appeal is governed by Art. 1, Sch. I and not by Art. 17, Sch. II as the present value of a sum payable by future instalments can be ascertained and calculated at Court rate of 6 per cent. A.I.R. 1936 Pesh. 232=166 Ind. Cas. 289.

——Sch. I, Art. 1—Instalment decree—Appeal—Court-fees.

In an appeal from an instalment decree Court-fees must be paid on the difference between the amount claimed in appeal and the amount decreed and also on the difference to the appellant between getting his money on the date of the decree under appeal and getting it by instalments as ordered. 226 P. L.R. 1914=128 P.W.R. 1914=12 P.R. 1915=24 Ind. Cas. 931.

11. Interest—Future interest.

——Sch. I, Art. 1—Interest—Future interest—Court-fees payable on appeal.

The principle is well settled that court-fees are leviable on sums which can be ascertained with certainty, but not on those which cannot. Consequently, as a general rule, court-fees on a plaint are payable on interest claimed up to date of suit, but not beyond. If, however, the suit is dismissed, and the plaintiff still wants future interest in appeal, he must pay court-fees on the amount he claims up to the date on which he files the appeal, but not beyond. A.I.R. 1937 Nag. 6=167 Ind. Cas. 577.

——Sch. I, Art. 1—Interest—Future interest—Court-fees on cross-objections.

Where cross-objections with regard to future interest are filed, the amount of future interest cannot be determined as it depends upon the date of payment of the amount decreed by the judgment-debtor. Consequently, *ad valorem* court-fee is not necessary. A.I.R. 1936 Lah. 668=38 P. L. R. 276=163 Ind. Cas. 928.

——Sch. I, Art. 1—Interest—Future.

Court-fee on an appeal relating to future interest is charged on the amount up to the date of presenting the appeal. 22 O.C. 1=1 U.P.L.R. (J.C.) 29=50 Ind. Cas. 798.

——Sch. I, Art. 1—Interest—Future interest—Court-fee.

In the case of appeals or cross-objections in suits for redemption or for foreclosure, whether a decree for interest has been made in them or not, where Court-fee declared by the Court due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross objection should be valued and future interest should not be taken into account. In all original appeals the Court-fee should be levied on the sum due at the date of original decree and in all second appeals, it should be levied on the sum due at the date of the decree of the Lower Appellate Court. 3 P.L.J. 443=4 P.L.W. 221=(1918) P.H.C.C. 264=44 Ind. Cas. 50.

——Sch. I, Art. 1—Interest—Future interest, if chargeable to court-fees.

Where the amount due could be ascertained from the judgment and decree, that should be the value of the appeal or cross objection and future interest need not be taken into account. 36 All. 40=11 A. L.J. 1016=21 Ind. Cas. 723.

12. Interest pendente lite.

——Sch. I, Art. 1—Interest pendente lite and future interests—Court-fee.

An appeal from an order disallowing *pendente lite* and future interest in a mortgage suit requires *ad valorem* court-fee on the amount claimed as *pendente lite* interest. A.I.R. 1945 Pat. 145=23 Pat. 905.

——Sch. I, Art. 1—Interest pendente lite and up to date of suit—Appeal.

Decree in suit for profits for certain sum of money with interest up to date of suit and *pendente lite* till the date of decree and thereafter—Appeal by defendant impugning correctness of decree—No ground against award of interest before suit or *pendente lite*—Appeal however seeking reversal of decree in its entirety and dismissal of suit.

Held, that the subject-matter of the appeal should be considered the principal amount of the suit and the interest up to the date of the suit. *Ad valorem* court-fee was payable on the value of the subject-matter of the appeal. A.I.R. 1934 All. 805=1934 A.L.J. 957=4 A.W.R. 922=57 All. 71=150 Ind Cas. 653.

——Sch. I, Art. 1—Interest pendente lite—Court-fees in appeal.

An appellant is bound to pay an *ad valorem* court-fee on the ascertainable amount of *pendente lite* interest if he expressly makes it part of the subject-matter in dispute in appeal. A.I.R. 1931 All. 351=1931 A.L.J. 233=52 A. 1029=131 Ind. Cas. 253.

——Sch. I, Art. 1—Interest pendente lite.

The C. P. Code gives a statutory jurisdiction to the Court to pass a decree for the surplus; and ordinarily, for a relief which is an outcome of a statutory provision no Court-fee is payable. For instance, where interest is decreed during the pendency of a suit, no Court-fee is charged, and as the surplus is the result of accounting directed by the Court under R. 7, O. 34, it cannot be separately charged for the purposes of Court-fees. 113 Ind. Cas. 34=24 N.L.R. 197=11 N.L.J. 232=A.I.R. 1929 Nag. 1.

——Sch. I, Art. 1—Interest awarded.

A suit on a mortgage was dismissed by the first Court. The plaintiffs who appealed, paid on the memorandum of appeal, the same Court-fee as had been paid on the plaint. The appellate Court awarded the plaintiffs the sum claimed in the plaint, together with interest accruing due between the institution of the suit and the date of the decree.

Held, the plaintiffs were bound to pay additional Court-fee on the amount awarded as interest. 77 Ind. Cas. 1039=1 Pat. 19=3 Pat.L.T. 790=A.I.R. 1922 Pat. 387.

——Sch. I, Art. 1—Interest pendente lite.

When a suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization, or to pay any Court-fee thereon. But if any future interest is determined by the trial Court and is entered in the decree, then the plaintiff, on appeal by the defendant, is bound to pay additional Court-fee on the sum of interest so added in the decree as having accrued from the date of the suit up to the date of the preparation of the decree in the lower Court. (Case-law discussed). 50 I.C. 789, Diss.; 6 Pat. L.J. 676, Foll. 77 Ind. Cas. 1054=3 Pat.L.T. 813=1 Pat.L.R. 16=A.I.R. 1923 Pat. 28.

——Sch. I, Art. 1—Interest pendente lite.

Though a decree-holder would be entitled to interest from the date of grace up to the date of realisation, he, as appellant is not liable to pay Court-fees on the amount of interest from the date of grace to the date of the hearing of appeal. 70 Ind. Cas. 953=6 P.L.J. 676=1922 P.H.C.C. 73=3 Pat.L.T. 310=A.I.R. 1922 Pat. 386.

13. Land Acquisition Act—Reference under.

——Sch. I, Art. 1—Land Acquisition Act—Reference under—Decision of Court—Appeal—Court-fee payable.

The decision of the Court in awarding compensation in a land acquisition reference is a decree and as such in an appeal from the decision, an *ad valorem* court-fee is payable under Sch. I, Art. 1, Court-fees Act. A.I.R. 1932 Oudh 224=9 O.W.N. 396=8 Luck. 85=138 Ind. Cas. 199.

——Sch. 1, Art. 1—Land Acquisition Act, S. 30—Reference.

In the case of an appeal against a decision in reference under S. 30, Land Acquisition Act, the court-fee is to be charged under Art. 1, Sch. 1, Court-Fees Act. 115 Ind. Cas. 345=29 M.L.W. 237=1929 M.W.N. 62=A. I. R. 1929 Mad. 223=56 M.L.J. 387.

——Sch. I, Art. 1—Land acquisition Act S. 19—Reference under.

Proceedings before the Court on a reference by the Collector under the provisions of S. 19, Land Acquisition Act, cannot be described as a suit to set aside an award within the meaning of the provisions of Art. 17 (4), Sch. 2, Court-Fees Act and the article applicable is Art. 1, Sch. 1, and court-fees are payable in the appeals *ad valorem* on the difference between the sum awarded by the Court and the sum which the appellant claims should have been awarded. 110 Ind. Cas. 870=6 Rang. 281=A.I.R. 1928 Rang. 197.

——Sch. I, Art. 1—Land Acquisition Act—Reference—Appeal.

Memorandum of appeal against decision by Court on reference by Collector under Land Acquisition Act requires *ad valorem* court-fee under Sch. I, Art. 1, Court-Fees Act. 78 Ind. 435=19 M. L. W. 207=1924 M.W.N. 108=34 M.L.T. 357=A.I.R. 1924 Mad. 489=46 M.L.J. 150.

14. Letters of administration or probate of will.

——Sch. I, Art. 1—Letters of administration or probate of will—Proceedings for—Court-fee payable.

Under Art. 1, Sch. I, Court-Fees Act, court-fee is payable on the value of the subject-matter in dispute according to the scale set out in Col. 3 of the said article. The subject-matter in dispute in a proceeding for either letters of administration or probate of a will is the right to represent the estate of the deceased. It is impossible to place a money value on such a subject-matter and consequently this Article does not apply to a proceeding for letters of administration or probate of a will. In fact, it cannot apply because of Art. 11 of Sch. II under which fees according to the scale set out in Col. 3 have to be paid on the grant of either letters of

probate as the case may be. A.I.R. 1938 Rang. 141=1938 Rang. L.R. 72=176 Ind. Cas. 366.

15. Mesne profits.

——Sch. I, Art. 1, S. 28—Mesne profits—Appeal against order ascertaining mesne profits—Ad valorem fee on subject-matter in dispute, if payable.

After a suit for mesne profits had been decreed, two applications were made for ascertainment of future mesne profits, paying *ad valorem* court-fee on the amount claimed as mesne profits. Decrees were made reducing the amount awardable from what was claimed. Both the plaintiff and the defendant appealed and the High Court entertained the appeals on Rs. 4 each as court-fee. On a reference as to whether the court-fee paid was sufficient:

Held, (*i*) that under Sch. I, Art. 1, Court-Fees Act, the memorandum of appeal in such cases ought to have been stamped *ad valorem*;

(*ii*) that S. 28, Court-Fees Act, empowered the High Court to call for payment of additional court-fee, but as the Court had become *functus officio* after the judgment had been pronounced, signed and sealed, the preparation of the decrees could not be stayed in view of the provisions of S. 33 and O. 20, Rr. 6 and 7, C. P. Code. A.I.R. 1932 Pat. 228 =13 P.L.T. 304=11 Pat. 532=137 Ind. Cas. 855.

——Sch. I, Art. 1—Mesne profits—Decree directing mesne profits to be settled in execution—Application for final decree—Mesne profits disallowed—Appeal—Court-fee payable.

Where a suit for recovery of possession was decreed and in respect of mesne profits, the Court ordered that "the amount will be settled in the execution department" and an application for final decree was made but the same was disallowed on the ground that the judgment did not direct payment of mesne profits and the plaintiff thereupon preferred an appeal:

Held, that the appeal was not against an order in execution but from an order amounting to a decree and the appellant should pay *ad valorem* court-fee on the amount of mesne profits which had been claimed by him and disallowed. A.I.R. 1931 All. 538 =1931 A.L.J. 413=136 Ind. Cas. 77.

16. Mortgage suit.

——Sch. I, Art. 1 and S. 7 (ix)—Mortgage suit—Appeal against decree praying for reduction of price of redemption—Court-fee payable.

The plaintiff in a redemption suit who appeals against the decree praying for the reduction of the price of redemption from Rs. 50,000 fixed in the decree to Rs. 296, is liable to pay court-fees on the difference. 222 Ind. Cas. 194=1946 N. L. J. 110 =A.I.R. 1946 Nag. 160.

——Sch. I, Art. 1—Mortgage suit—Appeal claiming defendant was agriculturist—Appeal, if competent only against finding that he was non-agriculturist.

A mortgage decree was passed under O. 34, R. 4, C. P. Code, against the defendant whose contention that he was an agriculturist was rejected. He appealed claiming he was an agriculturist paying only a court-fee of Rs. 10:

Held, that the defendant had no right to come up in appeal to the High Court merely to get rid of a finding of the trial Court which did not suit him. It was competent to him to appeal only against a decree, and the decree made the mortgaged property liable to sale. In substance, therefore, he was challenging the mortgage decree and praying that a simple money decree might be passed against him. Consequently, he had to pay court-fee *ad valorem* under Art. 1, Sch. I, Court-Fees Act. A.I.R. 1936 Lah. 179=38 P.L.R. 12=162 Ind. Cas. 729.

——Sch. I, Art. 1—Mortgage suit—Appeal by defendants—Exoneration of items—Valuation.

Where a defendant in a mortgage suit appeals against the decree claiming exoneration of the properties in his possession, the appellant is bound to pay *ad valorem* court-fee on the memo. of appeal. 5 O.L.J. 663=48 Ind. Cas. 535.

——Sch. I, Art. 1—Mortgage suit—Final decree in—Appeal—Court-fee—Ad valorem court-fee paid on appeal from preliminary decree—If ground for exemption from payment of court-fee.

In an appeal by the defendants against the final decree in a mortgage suit, attacking the entire final decree, *ad valorem* court-fee is payable under Sch. I, Art. 1 of the Court-Fees Act. It is not open to them to claim exemption from payment of any court-fee on the ground that they paid *ad valorem* court-fee in full in the appeal filed previously against the preliminary decree. 25 Pat. 305=A.I.R. 1947 Pat. 113=230 Ind. Cas. 299=13 B.R. 435.

——Sch. I, Art. 1—Mortgage suit—Final decree—Appeal against requires an ad valorem court-fee.

An appeal against a final decree on the ground that the mortgagor should or should not have been allowed further time in which to pay the mortgage-debt is not an exception to the general rule that an appeal against a final decree requires an *ad valorem* court-fee. 35 All. 476 (F.B.); 57 I.C. 579; A. I.R. 1928 Rang. 194 and A.I.R. 1927 Pat. 46, Rel. on. 7 N.L.R. 41=10 I.C. 736, Overruled.

Per *Jackson, A.J.C.*—There is no difference in the principle applicable, whatever the nature of the final decree may be, and it is immaterial on what ground the final decree is challenged. If an appellant wishes to appeal on the sole ground, that extension of time ought to have been granted, his proper course is to appeal against the order refusing time and not against the decree. He can prefer a separate appeal and if an appeal is successfully preferred against an order refusing time, it will vacate the final decree, if one has been passed. If the appellant, instead of taking this course, prefers an appeal against the decree, he must pay an *ad valorem* court-fee. 14 N. L.R. 25 and A.I.R. 1928 Nag. 333, Rel. on.

Per *Staples, A.J.C.*—Since the coming into force of the Transfer of Property Supplementary Act (1929), preliminary decrees, whether for foreclosure sale or redemption, are all on the same footing, *i.e.* in all of them the Court may for good cause shown extend the time given for payment of the amount, and in all such decrees there is now an appeal under O. 43, R. 1 (*o*), against an order refusing time for payment. There is no appeal against an order for granting an extension of time, though, of course, there may be an application for revision against such an order. An appeal against a final decree, on whatever grounds, must be stamped with court-fees *ad valorem*; but it is not necessary to prefer an appeal against a final decree when the only point raised is the refusal to grant time, the appeal is in effect only an appeal under O. 43, R. 1 (*a*); A.I.R. 1928 Nag. 333,

Appr.; Nag. F.A. No. 100 of 1926, Decided on 3rd February, 1928, Diss. from. A.I.R. 1931 Nag. 1=130 Ind. Cas. 98 (F.B.).

——Sch. I, Art. 1—Mortgage suit—Final decree—Objections to.

Where a mortgagee applied for passing of the final decree and the mortgagor objected pleading an uncertified adjustment, which the Court rejected and passed a final decree:

Held, in an appeal by the mortgagor that it was not an order in execution but was a judgment in the mortgage suit, and if the mortgagor desired to appeal, he must appeal against the final decree for sale of the mortgaged property and must stamp his appeal *ad valorem*. 35 All. 476 (F.B.) and 22 Bom. L.R. 811, Foll. 110 Ind. Cas. 873=6 Rang. 285 =A.I.R. 1928 Rang. 194.

——Sch. I, Art. 1—Mortgage suit—Final decree—Property sought to be exempted from.

Plaintiff purchased certain land from defendant as unencumbered; defendant sold shortly after other properties to appellants; property purchased by plaintiff was mortgaged and the mortgagee sued and the plaintiff paid the decretal amount and sued the defendants and appellants for declaration charging the properties purchased by appellants with the amount so paid and obtained a preliminary decree and applied for a final decree. Appellants objected and their objection to their properties being made liable was overruled and they appealed:

Held, that if the value of the properties is less than the decretal amount they should pay *ad valorem* court-fee upon the value of the properties, but if the decretal amount does not exceed the value of the properties, then they should pay court-fee upon the entire decretal amount. 98 Ind. Cas. 807=5 Pat. 721=8 P.L.T. 284=A.I.R. 1927 Pat. 46.

——Sch. I, Art. 1—Mortgage suit—Final decree.

In case of appeals against a final decree under O. 20, R. 12 (2), C. P. Code, an *ad valorem* court-fee must be charged under Art. 1 of Sch. I of the Court-Fees Act, calculated on the amount of mesne profits in dispute. 69 Ind. Cas. 722=45 Mad. 280 =30 M.L.T. 83=14 M.L.W. 730=A.I.R. 1923 Mad. 19=42 M.L.J. 184.

——Sch. I, Art. 1—Mortgage suit—Foreclosure.

On a memorandum of appeal by a plaintiff whose suit for foreclosure of a mortgage has been dismissed the court-fee payable is an *ad valorem* court-fee on the value of the subject-matter of the appeal. 1922 Oudh 82, Diss.; 36 All. 40 (F.B.), Foll. 88 Ind. Cas. 888=47 All. 926=6 L.R.A. Civ. 457=23 A.L.J. 853=A.I.R. 1925 All. 734.

——Sch. I, Art. 1—Mortgage suit—Foreclosure decree—Appeal.

Appeal in foreclosure and redemption suits—Court-fee payable need not be under Cl. 9, S. 7—It should be payable *ad valorem* on the subject-matter in dispute in appeal. *See* S. 7 (*ix*), COURT-FEES ACT. 67 Ind. Cas. 968=25 O.C. 30=A.I.R. 1922 Oudh 82.

——Sch. I, Art. 1—Mortgage suit—Order rejecting application for making decree final—Appeal—Court-fee payable.

An order dismissing the plaintiff's application for making the decree final in a suit on a mortgage with a condition of foreclosure, on the ground that a scheme had been made by the Debt Relief Court is a decree and an appeal from that order must bear *ad valorem* court-fee. A.I.R. 1945 Nag. 68=1944 N. L.J. 526=219 Ind. Cas. 367.

——Sch. I, Art. 1—Mortgage suit—Preliminary decree—Mesne profits.

Obiter.—Where the preliminary decree for partition merely declares plaintiff's right to mesne profits and makes provision for its subsequent determination, payment of court-fees in respect of the mesne profits is not payable in an appeal against the preliminary decree even where the decision as to mesne profits is challenged in the appeal. 52 M.L.J. 128, Not Appr. 53 Mad. 540=127 Ind. Cas. 128 =1930 M.W.N. 291=31 M.L.W. 826=A.I.R. 1930 Mad. 597=58 M.L.J. 497.

——Sch. I, Art. 1—Mortgage suit.

An appeal against the order refusing the application under O. 34. R. 6 must bear *ad valorem* court-fee under Art. 1, Sch. I, Court-Fees Act. A.I.R. 1941 Pesh. 56=195 Ind. Cas. 239.

——Sch. I, Art. 1—Mortgagee suit—Personal decree under O. 34, R. 6—Appeal—Court-fees.

An order granting a personal decree to the assignee of a decree under O. 34, R. 6 is a "decree" within the meaning of the C. P. Code, and therefore, an appeal from such an order must bear an *ad valorem* court-fee. The appellant cannot be allowed to file a Civil Miscellaneous Appeal and pay a lesser court-fee, merely because the assignee, in one appication, had prayed for recognition of the assignment of the decree under O. 21. R. 16 and for a personal decree under O. 34, R. 6, when, in appeal, the personal decree itself is attacked. A.I.R. 1945 Mad. 425=58 L.W. 318=(1945) 2 M.L.J. 87=1945 M.W.N. 417=I.L.R. (1946) Mad. 299.

——Sch. I, Art. 1—Mortgage suit—Personal remedy.

Where the final decree contained no provision for payment of the balance and for the recovery of such balance from the debtor and the mortgagee was driven to make an application under O. 34. R. 6:

Held, that the application under O. 34, R. 6 was in substance an application for a personal decree of the balance ascertained as a result of the realisation by the sale. Appeal from an order passed in that application is a regular appeal and *ad valorem* court-fee must be paid. 74 Ind. Cas. 21=A.I.R. 1924 All. 292.

——Sch. I, Art. 1—Mortgage suit—Preliminary decree awarding plaintiff principal and interest on part of principal from date of suit till date fixed for redemption—In appeal, plaintiff claiming interest on whole amount of principal from date of suit till realization:

Held, period from date of suit till date of realisation was divisible into two parts: (1) period from date of suit till date of redemption, (2) period from date of redemption till date of realisation. As for second period, the amount claimed was unascertainable and court-fee was payable under Art. 17 (*vi*) and as for first period total amount claimed was ascertainable and *ad valorem* court-fee was payable under Sch. I. Art. 1. A.I.R. 1943 Lah. 275=I.L.R. (1944) Lah. 24=45 P.L.R. 382=211 Ind. Cas. 53 (F.B.).

——Sch. I, Art. 1—Mortgage suit—Preliminary decree—Appeal to have decree set aside—Court-fee payable.

Where a preliminary mortgage decree in a suit

upon a mortgage for sale of the mortgage property directs the payment of the principal with interest from the date of the suit till the dtae of redemption fixed by it, the defendant is bound to pay interest till the date of redemption even if he redeems the mortgage on a date earlier than the date fixed for redemption. Hence in the appeal by the defendant praying for the dismissal of the plaintiff's suit in its entirety, the defendant is bound under Art. 1 of Sch. I, Court-Fees Act, to pay *ad valoorem* court-fee on the principal and interest from the date of the institution of the suit till the date fixed for redemption. A.I.R. 1943 Lah. 275=45 P.L.R. 382=I. L.R. (1944) Lah. 24=211 Ind. Cas. 53 (F.B.).

——**Sch. I, Art. 1—Mortgage suit—Preliminary decree—Appeal.**

The proper court-fee payable by an unsuccessful defendant on a memorandum of appeal challenging the validity of the whole of the preliminary mortgage decree passed against him under O. 34, R. 4, Cl. (2), C. P. Code, *is valorem* on the subject-matter in dispute, namely, not merely the amount claimed in the suit but the amount awarded by the decree inclusive of the interest which is to accrue due up to the date fixed for redemption. 17 Bom. 41, Doubted; 35 All. 94 and 36 All. 40, Diss. from. No court-fees are charged on costs awarded by the Court as they are within the discretion of the Court and do not strictly come within the purview of the subject-matter in dispute between the parties. 104 Ind. Cas. 391=23 S.L.R. 277=A.I.R. 1927 Sind 251.

——**Sch. I, Art. 1—Mortgagee suit—Decree under O. 34, R. 6, C. P. Code—Appeal on—Court-fees payable.**

An appeal against a decree passed under O. 34, R. 6, C. P. Code, is an appeal from a decree within the meaning of Art. 1, Sch. I, Court-Fees Act. Therefore *ad valorem* court-fees must be paid on an appeal preferred from such a decree. 164 Ind. Cas. 423=62 Cal. 568=39 C.W.N. 315.

——**Sch. I, Art. 1—Mortgage suit—Refusal to pass decree under—O. 34, R. 6, C. P. Code—Appeal.**

An order refusing to make a decree under O. 34, R. 6, of the C. P. Code must be regarded as a 'decree' within S. 2 (2) *ad valorem* court-fees must be paid on the memorandum of appeal against the orders. 40 All. 551=16 A.L.J. 437=47 Ind. Cas. 562.

——Sch. I, Art. 1—Mortgage suit.

Order refusing to make a decree under O. 34, R. 6 is a decree within S. 2, C. P. Code and an appeal from it must bear *ad valorem* court-fees calculated on the subject-matter of the appeal. 16 A.L.J. 438=40 All. 553=47 Ind. Cas. 561.

——**Sch. I, Art. 1—Mortgage suit—Decree—Suit for re-opening—Decree reducing the decretal amount, restoring possession of property and fixing instalments—Appeal—Court-fee.**

Defendant No. 1 obtained a mortgage-decree for a certain sum against plaintiff's predecessor and his two brothers. In execution of the decree, he sold the property which fell to the share of the plaintiff's predecessor first and himself purchased it. Some balance was left in favour of defendant No. 1. He then sold the purchased property and the decretal dues to defendant No. 2. Defendant No. 2 sought to execute the decree but proceedings under Bengal Money-lenders' Act were started and in a suit by plaintiff under S. 36, Bengal Money-lenders' Act, a new decree was passed, in which a sum was reduced, instalments were fixed and property sold in auction was restored to plaintiff. Defendant No. 2 preferred an appeal questioning the restoration of possession and the number of instalments and the validity of decree:

Held, that the object of the appellant (defendant No. 2) was not to give up possession of the property. If he succeeded in the appeal, he would retain the possession of the property. He must, therefore, pay *ad valorem* fee on the value of the property under Art. 1. A.I.R. 1945 Cal. 354=49 C.W.N. 385= I.L.R. (1945) 2 Cal. 509.

——**Sch. I, Art. 1—Mortgage suit—Redemption decree—Appeal—Court-fee papable.** *See* COURT FEES ACT, S. 7 (*ix*) AND SCH. I, ART. 1. A. I.R. 1949 E. P. 336=51 P.L.R. 7.

——**Sch. I, Art. 1—Mortgage suit—Redemption decree—Appeal—Appellant only seeking to reduce his liability.**

Where the appellant, in a redemption suit, does not dispute the right of redemption but only seeks to reduce the liability imposed upon him by the trial Court, the appeal is governed by Art. 1 of Sch. I and not by S. 7 (*ix*) and the appellant must pay court-fee on the amount in respect of which he seeks to avoid liability. A.I.R. 1945 Bom. 504=47 Bom. L.R. 400=I.L.R. (1945) Bom. 629=222 Ind. Cas. 110.

——**Sch. I, Art. 1—(U.P.) Mortgage suit—Court-fee — Determination of—Mortgage in favour of S and B—Suit by S upon mortgage—B's widow J added as defendant—J granted joint decree with S and declaration that S and B did form joint Hindu family—Appeal by S against declaration—Ad valorem court-fee held payable.**

Held, that in determining the court-fee payable, the substance of the relief sought, and not merely its form, must be considered. The question of appeal was not merely a question of the manner in which the decree was to be executed but was whether the decree was to remain a joint decree in favour of *S* and *J* or whether it should become a decree solely in favour of *S*. The value of this to *S* was clearly Rs. 2,000, the amount which he would gain if he won the appeal and consequently *ad valorem* court-fee yas payable thereon. *S* could not be allowed to get over the difficulty by claiming in the appeal merely that the declaration in favour of *J* may be reversed. A.I.R. 1943 Oudh 361=1943 A.W.R. 57=211 Ind. Cas. 456.

——**Sch. I, Art. 1—Mortgage suit—Appeal—Dispute in appeal as regards price fixed for redemption—Art. 1, Sch. I, applicability.**

In the case of a mortgage, where the right to redeem or foreclose is challenged, amount of court-fee payable in appeal is provided for in S. 7 (ix), for 'suit' there includes 'appeal', and so court-fees have to be paid in accordance with its provisions. But when none of these is challenged, then the matter is not 'otherwise provided for' in the Act, and so the fees must be paid *ad valorem* on the value of the subject-matter in appeal. A.I.R. 1937 Nag. 6=167 Ind. Cas. 577.

——**Sch. I, Art. 1—Mortgage suit—Appeal against final decree objecting to extension of time for payment—Court-fee.**

Held, by the Full Bench.—An appeal against a

21. Reducing claim for court-fee.

——Sch. I, Art. 1—Reducing claim for Court-fee—Mala fides.

Where the valuation of the suit was put high but when the application to appeal as pauper was rejected the appellant gave up his claim to certain moveables and offered to pay Court-fee on the diminished valuation.

Held, that no bad faith could be inferred from those facts and that the plaintiff could abandon his claim to that extent. 115 Ind. Cas. 678=9 P.L.T. 613.

——Sch. I, Art. 1—Reduced claim on appeal.

Where the plaintiff's prayer was for assessment of rent at Rs. 7, he having received under the decree of the lower appellate Court, Rs. 3, out of his claim for Rs. 10 per katha.

Held, that the value of the plaintiff's claim is reduced in the second appeal and the Court-fee is payable upon the reduced claim. 19 Cal. 272, Foll. 100 Ind. Cas. 913=6 Pat. 17=8 P.L.T. 366=A.I.R. 1927 Pat. 123.

22. Refund of purchase-money.

——Sch. I, Art. 1—Refund of purchase-money—Release of property from decree.

Where a vendor obtained a decree against his vendees and subsequent transferees for the balance of purchase-money for property consisting of a house and a shop, and the decree provided portion of the decretal amount to be realized by selling the shop of which appellant was last vendee and he appealed against so much of the decree as rendered his property liable and sought that he should be released from the decree.

Held, that the proper stamp to be paid was one *ad valorem* on the value of the decree, not exceeding, however, the value of the shop. 30 Mad. 96 (F.B.), Foll. 96 Ind. Cas. 473=7 Lah. 215=27 P.L.R. 412=8 Lah. L.J. 319=A.I.R. 1926 Lah. 408.

23. Rent suit.

——Sch. I, Art. 1—Rent suit—Assessment of rent.

There is no particular provision in the Act applicable to a suit for assessment of fair and equitable rent and therefore *ad valorem* court-fee is to be paid under Sch. 1, and Art. 17 of Sch. 2 does not apply to such a case. 100 Ind. Cas. 913=6 Pat. 17=8 P.L.T. 366=A.I.R. 1927 Pat. 123.

24. Restitution.

——Sch. I, Art. 1—Restitution—Appeal.

An appeal from an order of restitution under S. 144, if such order is not contained in the decree of the appellate Court, is an order which has the force of a decree and, therefore, the Court-fee payable on the memorandum of appeal against such an order must be calculated in accordance with Art. 1, Sch. I, Court-fee Act. A.I.R. 1925 All. 137; A.I.R. 1925 Pat. 1 and A.I.R. 1926 Lah. 685, Rel. on. 113 Ind. Cas. 270=A.I.R. 1930 Lah. 24.

——Sch. I, Art. 1—Restitution—Appeal.

An appeal from an order under S. 144, C. P. Code, does not, according to the practice of the Lahore High Court, required *ad valorem* fee but a Court-fee stamp of Rs. 4 is sufficient. 103 Ind. Cas. 657=A.I.R. 1927 Lah. 635.

——Sch. I, Art. 1—Restitution—Appeal.

After the decree-holder had obtained the possession under the final decree for foreclosure it was set aside in appeal. The application of the judgment-debtor for compensation under S. 144, C. P. Code, was dismissed and he appealed against the order paying 8 annas Court-fee in the memorandum of appeal.

Held, that the question of compensation related to execution, discharge or satisfaction of the decree in appeal and being thus an order coming within S. 47 of the Code, the Court-fee of 8 annas paid on the memorandum of appeal to the District Judge was sufficient. 67 Ind. Cas. 225=18 N.L.R. 15=A.I.R. 1922 Nag. 62.

25. Separate appeals.

——Sch. I, Art. 1—Separate appeals.

Where two distinct and separate appeals arise out of the same suit and are filed by the same person as appellant, full Court-fees must be paid on each appeal. 18 A.L.J. 894=58 Ind. Cas. 230=43 All. 56=A.I.R. 1921 All. 395.

——Sch. I, Art. 1—Separate appeals against one decree.

Where a plaintiff sued for sale upon a mortgage and the first Court gave him only a simple money decree, and both parties preferred appeals against that decree, but that of plaintiff was dismissed while that of the defendants was allowed the result being that the suit was dismissed *in toto* and the plaintiff preferred two appeals against these two decrees, each being valued at the full amount of the claim, *held*, he was liable to pay full Court-fee on each of the appeals and the two appeals cannot be consolidated. 2 U.P.L.R. 295 (All.)=18 A.L.J. 894=58 Ind. Cas. 230.

——Sch. I, Art. 1—Separate appeals—Full Court-fee.

When several defendants who could have preferred a single appeal prefer separate appeals against a decree, each must pay full Court-fee on his appeal. 91 P. R. 1918=48 Ind. Cas. 424.

26. Set-off.

——Sch. I, Art. 1—Set-off—Equitable set-off—Computation of ad valorem court-fee—Basis.

No distinction is made in Sch. I, Art. 1 of the Court-fees Act between legal and equitable set-off. It follows therefore that court-fee is payable on a set-off or counterclaim in a written statement, no matter whether it is a legal set-off or equitable set-off.

The *ad valorem* court-fee is to be determined with reference to the total amount claimed by way of set-off and not only with reference to the difference between such amount and the amount claimed in the plaint. 1950 A.L.J. 706=A.I.R. 1950 All. 237.

——Sch. I, Art. 1—Set-off—Equitable set-off—Court-fees.

No distinction is drawn between a legal and an equitable set-off in Art. 1, Sch. I, Court-fees Act, and, therefore, court-fee is payable also on the latter. A.I.R. 1950 E.P. 225 (F.B.).

——**Sch. I, Art. 1—Set-off.**

There is no difference between an equitable set-off and a legal set-off in the matter of court-fees. In both cases, court-fees must be paid *ad valorem* on the amount claimed. No claim for set-off can be decreed in excess of amount claimed. Payment of further court-fees after decision is not permissible. A.I.R. 1943 Nag. 314=1943 N.L.J. 455=I.L.R. (1944) Nag. 260=209 Ind. Cas. 241.

——**Sch. I, Art. 1—Set-off, equitable—Court-fee, if necessary.**

The expression "set-off" used in Art. 1 of Sch. I, Court-fees Act, as amended, includes an equitable set-off, and the necessary court-fee must be paid thereon. A.I.R. 1943 Bom. 227=45 Bom. L.R. 515 =210 Ind. Cas. 88.

——**Sch. I, Art. 1—Set-off—Court-fee.**

Court-fees must be paid on a set-off, on the full amount of the set-off and not only on the amount claim in excess of that claimed by the plaintiff. A. I. R. 1940 Nag. 177=1940 N.L.J. 176=I.L.R. (1941) Nag. 753=190 Ind. Cas. 651.

——**Sch. I, Art. 1—Set-off.**

Where the defendant deliberately avoided binding himself down to a legal position which would have involved payment of court-fees, it is too late at the stage of revision against the dismissal of the claim for set-off to say that he is willing to pay this fees if called upon to do so. A.I.R. 1940 Nag. 177=1940 N.L.J. 176=I.L.R. (1941) Nag. 753=190 Ind. Cas. 651.

——**Sch. I, Art. 1—Set-off—Includes equitable set-off—Suit for damages—Cross-claim for damages by way of set-off—Claim must be valued accurately and *ad valorem* court-fee paid thereon.** A.I.R. 1939 Cal. 415=43 C.W.N. 838=183 Ind. Cas. 373.

——**Sch. I, Art. 1—Set-off—Plaintiff constructing building for defendant on agreement—Suit by plaintiff to recover price—Defendant claiming set-off for injury to his land—Claim, held not equitable set-off and defendant must pay court-fee.**

Sch. I, Court-fees Act, as amended by Civil P. C., Sch. IV, prescribes an *ad valorem* court-fee for any written statement pleading a set-off or counter-claim. No exception is provided in the amending provision in Sch. IV, Civil P. C., for any equitable set-off.

The defendant contracted with the plaintiff that the plaintiff should make a building for the defendant. The plaintiff made the building and sued for the price. One of the pleas in defence was that the contractors had dug out earth from the land of the defendant and had occupied the land of the defendant by storing bricks and by this injury to the land, the defendants were entitled to recover certain amount as set-off:

Held, that the claim was an ordinary set-off and not equitable set-off. The defendant must pay court-fee on the set-off claimed. A.I.R. 1938 All. 522=1938 A.L.J. 701=1938 A.W.R. 489=177 Ind. Cas. 474.

——**Sch. I, Art. 1—Set-off—Equitable set-off—Claim by defendant for damages arising out of same contract on which plaintiff bases his claim—Separate court-fee, if necessary.**

Where in a suit, the defendant claims an equitable set-off by claiming damages arising out of the same contract in which the plaintiff bases his claim, separate Court-fee is not necessary. A.I.R. 1937 Lah. 73=39 P.L.R. 345=171 Ind. Cas. 649.

——**Sch. I, Art. 1—Set-off, if includes equitable set-off.**

The set-off mentioned in Sch. I, Art. 1, Court-fees Act, includes equitable set-off also and there is no reason to suppose that it is confined to a legal set-off. A.I.R. 1936 Nag. 290=I.L.R. (1937) Nag. 481=170 Ind. Cas. 1004. *See also* A.I.R. 1939 Cal. 415=43 C.W.N. 838=183 Ind. Cas 373.

——**Sch. I, Art. 1—Set-off—Equitable set-off.**

There is nothing to show that the set-off mentioned in Sch. I, Art. 1, Court-fees Act, is confined only to a legal set-off and *prima facie*, the expression "set-off" includes an equitable set-off. Consequently, a written statement pleading an equitable set-off must be stamped in the same way as a legal set-off. A. I. R. 1936 Nag. 222=I.L.R. (1937) Nag. 99=165 Ind. Cas. 430.

——**Sch. I, Art. 1—Set-off.**

Under Art. 1 of Sch. I, Court-fees Act, as amended, a court-fee is payable on a written statement pleading an equitable set-off. There is no reason to confine the article to a written statement in which a legal set-off is pleaded. A.I.R. 1935 Mad. 115 (1)=41 M.L.W. 27=68 M.L.J. 23=1935 M.W.N. 24= 58 Mad. 338=154 Ind. Cas. 432 (2).

——**Sch. I, Art. 1—Set-off—Court, if can go into the question of set-off when no court-fee is paid with written statement.**

In the case of a set-off, court-fee is payable on the whole amount of set-off claimed and not merely on the difference between the set-off and the amount claimed in the plaint or even on the excess of the amount of set-off awarded by the decree over the amount claimed in the plaint. The discretion is given to the Court, even where no part of the court-fee has been paid, at any stage to allow the person by whom the fee is payable to pay it; and the Court is not debarred from going into the question of set-off even if no court-fee is paid at the time of filing written statement. A.I.R. 1935 Pat. 110=1 B.R. 602=16 P. L. T. 76=156 Ind. Cas. 344.

——**Sch. I, Art. 1—Set-off—Legal and equitable set-off.**

A legal set-off requires court-fee because it is a claim that might be established by a separate suit in which a court-fee would have to be paid. But no court-fee is required in case of equitable set-off. An equitable set-off is for an amount that may be equitably deducted from the claim of the plaintiff where the court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim. Where, therefore, there is an agreement between the parties that the value of the timber supplied by the tenant should be deducted from the rent, this agreement has the effect of bringing the matter within the same transaction as the suit for arrears of rent. A.I.R. 1934 All. 115=1934 A.L.J. 421=4 A.W.R. 1566=153 Ind. Cas. 432.

——**Sch. I, Art. 1—Set-off—Suit on promissory note—Claim for set-off on ground of damages for breach of covenant.**

In a suit on promissory note, the defendant claimed, in his written statement, a specified sum of money by way of damages setting out the particulars of the claim made by him as arising from the sale which led

to the execution of the promissory note, and by reason of the breach of covenant alleged to have been committed by plaintiff:

Held, that for purposes of Court-fee, the claim by way of set-off came under Art. 1, Sch. I, Court-fees Act.

The set-off mentioned in Art. 1, Sch. I is not confined only to legal set-off coming under O. 8, R. 6, Civil P. Code, but includes an equitable set-off also. A.I.R. 1933 Mad. 203=142 Ind. Cas. 719.

——Sch. 1, Art. 1—Set-off.

Although proviso to Art. 1, Sch. I, refers only to maximum of fee leviable on a plaint or memorandum of appeal, and leaves out any reference to written statement pleading a set-off or counter-claim, there is no authority for charging a larger sum on a written statement than that paid as maximum in Sch. I. 5 Luck. 621=125 Ind. Cas. 172=7 O.W.N. 147 =A.I.R. 1930 Oudh 146.

——Sch. I, Art. 1—Set-off—Fee an excess claim.

When a set-off is pleaded by defendant, Court-fee is payable only on the amount claimed in excess of that claimed by the plaintiff, and only if the defendant wants a decree for that excess. 16 C. P. L. R. 118, Foll. 97 Ind. Cas. 916=A.I.R. 1927 Nag. 74.

——Sch. I, Art. 1—Set-off—Court-fee on full amount.

Where the defendant in a mortgage suit contended that the plaintiff became liable to him in damages for a sum which actually exceeded the amount of the claim, and contended that he was only liable to pay an *ad valorem* Court-fee on such sum as might be found due to him in excess of the sum due to the plaintiff on the mortgage transaction.

Held, that the defendant must pay an *ad valorem* Court-fee on the full amount of the damages claimed in his written statement and not merely on the excess over the plaint claim. 69 Ind. Cas. 921=20 A.L.J. 1005=45 All. 218=4 L.R.A. (Civ.) 40=A.I.R. 1923 All. 118.

——Sch. I, Art. 1—Set-off—Suit for rent—Set-off claimed as antecedent debt and not as part payment.

In a suit for rent, the defendant claimed a set-off of sums paid for faslis not included in suit in respect of cesses.

Held, that the amount claimed to be set-off was not to be treated as part-payment, but as set-off of an independent claim which constituted the antecedent debt, and that, therefore Court-fee was payable on the amount so claimed. Dictum in 8 C.W.N. 174, not foll. 10 C.W.N. 199.

27. Suit for money due on adjustment of accounts.

——Sch. I, Art. 1, S. 7 (1)—Suit for money due on adjustment of accounts—Ad valorem Court-fee.

Art. 1, of Sch. I applies only to those cases which are not otherwise provided for under the Act. In a suit for a certain amount as damages, deducting a certain sum as the price of goods due to the defendant from plaintiff *ad valorem* Court-fee is payable on the amount actually claimed. 61 P.R. 1919=175 P.W.R. 1918=47 Ind. Cas. 992.

28. U. P. Agriculturists Relief Act—Appeals and Suits.

——Sch. I, Art. 1—U. P. Agriculturists' Relief Act, S. 23—Appeal.

An order passed by the Court under S. 12, U. P. Agriculturists' Relief Act, has the force of a decree for redemption of a mortgage passed in a regular suit in a Civil Court. Hence, Court-fee payable on an appeal filed under S. 23, U. P. Agriculturists' Relief Act, against an order passed under S. 12 of the Act rejecting a claim of the appellant for certain amount, is *ad valorem* under S. 7 (*ix*) and not under Art. 11, Sch. II of the Court-fees Act. A.I.R. 1944 Oudh 113=1943 O.W.N. 479 (2)=1943 A.W.R. 177=213 Ind. Cas. 240.

——Sch. I, Art. 1—U. P. Agri. Relief Act, S. 33—Suit under—Appeal.

Suit under S. 33, U.P. Agri. Relief Act—Decree declaring amount due from plaintiff to defendant—Plaintiff appealing and seeking reduction of amount —*Ad valorem* Court-fee on appeal must be paid, amount to be calculated according to Art. 1 of Sch. I upon the amount by which plaintiff seeks reduction in his appeal—He cannot put fictitious valuation for purpose of S. 7 (*iv*) (*f*), corresponding to S. 7 (*iv*) (*b*) of the amended Act. 204 Ind. Cas. 506= 1942 O.W.N. 789=1943 R.D. 110.

——Sch. I, Art. 1—U. P. Agriculturists' Relief Act (27 of 1934), Ss. 12, 23—Appeal contesting liability under deeds of charge—Court-fee payable.

Where on an application under S. 12, U. P. Agriculturists' Relief Act, for the redemption of a mortgage the Court passes a decree for redemption on payment of the amount due under the mortgage set up in the application and also under certain deeds of further charge executed by the mortgagor and an appeal has been preferred by the applicant against the decree contesting his liability for the payment of dues under the deeds of further charge, the value of the subject-matter of the appeal is the difference between the amount decreed by the trial Court and the amount for which the appellant admits his liability, and the appellant is liable to pay *ad valorem* Court-fee on the amount of difference under Art. 1, Sch. I, Court-fees Act. A.I.R. 1941 Oudh 447=1941 O.W.N. 789=1941 A.W.R. 534=1941 R.D. 443= 194 Ind. Cas. 425.

——Sch. I, Art. 1; Sch. II, Art. 11, U. P. Agriculturists' Relief Act (27 of 1934), S. 12—Application for redemption of mortgage —Court-fee paid on certain sum—Greater amount found due and applicant directed to pay balance—Appeal under S. 23 of U. P. Agriculturists' Relief Act—Court-fee payable on memorandum of appeal.

Held, that the memorandum of appeal could not come within the meaning of Art. 11 of Sch. II, Court-fees Act, but it must come within the provisions of Art. 1 of Sch. I. The result was that an *ad valorem* Court-fee must be paid on the amount of the subject-matter in dispute. A.I.R. 1938 All. 14=1937 A.L.J. 1173=1937 A.W.R. 932=I.L.R. (1937) All. 949=1937 R.D. 575=173 Ind. Cas. 50.

29. U. P. Encumbered Estates Act—Appeal.

——Sch. I, Arts. 1, 11 and 17 (U. P.)—U. P. Encumbered Estates Act—Decree by Special Judge—Appeal—Court-fee.

When on a claim on the basis of a mortgage a decree is passed by the Special Judge under the Encumbered Estates Act and an appeal is filed whether by the landlord or creditor the case falls under Art. 1, Sch. I of the Court-Fees Act and *ad valorem* Court-fee is payable on the amount claimed in appeal. It cannot come under Art. 11 or 17. 20 Luck. 595=1945 O.A. (C.C.) 255=1945 A.W.R. (C.C.) 255 =1945 O.W.N. (C.C.) 403=1945 A.L.W. (C.C.) 368=A.I.R. 1946 Oudh 60.

——Sch. I, Art. 1 and Sch. II, Arts. 11 and 17—U. P. Encumbered Estates Act—Appeal against decree under.

An appeal against a decree passed by the Special Judge under the U. P. Encum. Estates Act falls under Art. 1 and not Art. 11 or 17 of Sch. II of the Court-Fees Act, whether the appellant is the landlord or the creditor. A.I.R. 1946 Oudh 60=20 Luck. 595=1945 O.W.N. (C.C.) 403=1945 A.W. R. (C.C.) 255.

——Sch. I, Art. 1—U. P. Encumbered Estates Act (25 of 1934), S. 14—Amended decree—Appeal—Court-fee payable.

Where an appeal directed against an order of amendment, is to all intents and purposes against the amended decree passed by the Special Judge under S. 14, U.P. Encumbered Estates Act, the Court-fee payable on the memorandum of appeal is *ad valorem* under Art. 1, Sch. I, Court-fees Act. A.I.R. 1941 Oudh 269=1941 O.W.N. 355=1941 R.D. 464=1941 A.W.R. 217=16 Luck. 653=193 Ind. Cas. 354.

——Sch. I, Art. 1; Sch. II, Art. 11—U. P. Encumbered Estates Act (25 of 1934)—Simple money-decree of Special Judge under S. 14—Appeal from—Court-fee payable.

Art. 11 of Sch. II, Court-fees Act, provides for Court-fees on a memorandum of appeal when the appeal is not from a decree or an order having the force of a decree. In S. 14, U. P. Encum. Estates Act, it is specifically stated that the Special Judge shall pass a simple money-decree for the amount which he finds due to the claimant and that such decree shall be deemed to be a decree by a Civil Court of competent jurisdiction. Art. 11, therefore, has no application to an appeal to the High Court from such a decree. Art. 17 of Sch. II, also has no application. If the proceeding in the Court of the Special Judge is not a suit, then Art. 17 of Sch. II cannot apply because that applies to a memorandum of appeal in certain suits. On the other hand, if the proceeding in the Court of the Special Judge is deemed to be a suit, then it must be a suit on the basis of a claim made by the debtor in the written statement for which provision is made in S. 9 of the Act and is a suit for definite amount of money claimed by the creditor. It cannot be said that this is a suit to obtain a declaration only. The fact that the decree of the Special Judge cannot be executed in the ordinary way under the Civil P. Code does not make any difference. There are other decrees of a Civil Court which cannot be executed in the ordinary way but must be executed by Collectors under the provisions of the Civil P. Code, The fact that they are executable in that way does not make them any the less decrees of a Court.

Consequently, such a memorandum of appeal cannot come under the descriptions in Art. 11 or Art. 17 of Sch. 11, Court-fees Act, and, therefore, it must come under the description in Art. 1 of Sch. I of the Act. The Court-fee consequently payable is *ad valorem*. A.I.R. 1938 All. 97=1937 A.L.J. 1373 =1938 A.W.R. 22=1938 O.W.N. 88=1938 R.D. 142=I.L.R. (1938) All. 230=173 Ind. Cas. 353 (F.B.).

——Sch. I, Art. 1; Sch. II, Arts. 17 (iii) and 11, U. P. Encumbered Estates Act (25 of 1934), S. 14, Cl. (7)—Order of Special Judge—Whether decree—Appeal—Court-fees payable—Appellants wanting reduction of amount of interest decreed by lower Court—Sch. I, Art. 1 applies.

An order made by a Special Judge under Cl. (7) of S. 14, U. P. Encumbered Estates Act is a decree and Art. 11, Sch. II of the Court-fees Act does not apply to an appeal from such a decree. Art. 17 (*iii*), Sch. II also does not govern the appeal where the memorandum of appeal shows that the appellantss want a reduction in the amount of interest decreed by the lower Court. It is not a case either of declaratory decree where no consequential relief is prayed to which Cl. (*iii*) of Art. 17, Sch. II, can be made applicable or of an appeal in which it is not possible to calculate the amount of the subject-matter of the appeal so as to attract the application of Cl. (*vi*) of Art. 17. The amount of interest disputed by the appellants in the appeal is capable of being stated with precision. The appeal would be, therefore, clearly governed by Art. 1 of Sch. I, Court-fees Act, and Court-fee required would be *ad valorem* on the amount of interest disputed by the appellants in the appeal. A.I.R. 1937 Oudh 501=1937 O.W. N. 890=1937 R.D. 403=171 Ind. Cas. 78.

——Sch. 1, Arts. 4 and 5.

Synopsis.

(1) Applicability.
(2) Applicant if can confine valuation to smaller figure.
(3) Application for review.
(4) Computation of time for making application.
(5) Interpretation.
(6) Mesne profits—Review.
(7) Partial relief.
(8) Portion of decree—Application for review.
(9) Restoration—Application for.

(1) Applicability.

——Sch. 1, Arts. 4 and 5—Applicability—Policy of legislature.

The policy of the legislature was to put a clog on possible *mala fide* applications for review. A.I.R. 1930 Cal. 631=57 Cal. 679=129 Ind. Cas. 191.

——Sch. 1, Arts. 4 and 5—Applicability.

Order dismissing appeal for non-payment of Court-fee and failure to furnish security under Civil P. Code, O. 41, R. 10 is not a decree—An application

for review of such order, therefore, does not fall under Sch. I. Art. 4, but under Sch. II, Art. 1 (*d*). A.I.R. 1941 Mad. 836=54 M.L.W. 349=1941 M.W.N. 835=(1941) 2 M.L.J. 500=I.L.R. (1941) Mad. 954=196 Ind. Cas. 894 (F.B.).

2. Applicant if can confine valuation to smaller figure.

——Sch. 1, Arts. 4 and 5—Applicant, if can confine valuation to smaller figure than the one which was fixed in second appeal, the decision of which is sought to be reviewed.

For the purposes of Court-fees on review of the appellate d cree, the words, "plaint or memorandum of appeal," do not mean plaint or memorandum of appeal asking for the same relief as that asked for in the application for review, but they mean the plaint or memorandum of appeal in which the judgment review of which is asked for, was passed. The argument that this view might cause considerable hardship to litigants is not sufficient to justify a contrary construction in view of the clear and definite words in Art. 5, Sch. I, Court-fees Act.

Thus, the applicant cannot confine his case in the review application to a valuation smaller than the one which was fixed in the second appeal. He must fix the same valuation as was put on the memorandum of appea and pay half the Court-fee under Art. 5, Sch. I, of what was paid on appeal. A.I.R. 1943 Oudh 225=1943 O.W.N. 14=1943 A.W.R. (C.C.) 1=204 Ind. Cas. 486.

3. Application for Review.

——Sch. 1, Arts. 4 and 5—Application for review—Court-fee payable.

According to the meaning of the words 'the fee leviable on the plaint or memorandum of appeal' in Arts. 4 and 5, Sch. I, Court-fees Act, the Court-fee to be paid on an application for review of judgment must be either the fee or one-half of the fee leviable on the plaint or memorandum of appeal, *i.e.*, which is prescribed for the original plaint or original memorandum of appeal A.I.R. 1937 Lah. 439=I.L.R. (1937) Lah. 238=39 P.L.R. 897 (2)=170 Ind. Cas. 266.

——Sch. 1, Arts. 4 and 5—Application for review—Court-fee payable.

Full fee must be paid in the first instance for an application for review. A.I.R. 1935 Nag. 164=31 Nag.L.R. 260=157 Ind. Cas. 178 (1).

——Sch. 1, Arts. 4 and 5—Application for review—Court-fee — Calculation, basis of — Amendment of law, after filing of appeal but before review, effect of.

The Court-fee on an application for review must be calculated on the basis of the fee leviable on the memorandum of appeal according to the law in force when the memorandum was filed. A.I.R. 1933 All. 20=1932 A.L.J. 908=54 All. 1092=143 Ind. Cas. 481.

——Sch. 1, Arts. 4 and 5—Application for review.

The Court-fee payable on an application for review is that leviable on the plaint which was actually filed and has resulted in the judgment sought to be reviewed, even though the application related to only a small portion of the relief asked for in the plaint. 57 Cal. 679=A.I.R. 1930 Cal. 631=129 Ind. Cas. 191.

——Sch. 1, Arts. 4 and 5—Application for review of interlocutory order referring issues for trial by lower Court—Court-fee.

In execution a Division Bench referred certain issues for trial by the court below. An application was presented by the appellant for review of this interlocutory order referring the issues on Court-fee stamp of Rs. 2. The taxing officer accepted the office report which was to the effect that the application being one for review of judgment, the proper fee was the fee leviable on the memorandum of appeal under Sch. I, Art. 4, of the Court-fees Act; but, considering the question to be one of general importance made a reference under S. 5 of the Court-fees Act. *Held*, that neither Art. 4 nor Art. 5 of Sch. I of the Court-fees Act referred to interlocutory orders, but they referred to judgments ending in decrees and that the application was properly stamped. 1 Ind. Cas. 999=6 A.L.J. 151=31 A. 262.

4. Computation of time for making application.

——Sch. 1, Arts. 4 and 5—Computation of time for making—Time when Court is closed if to be excluded—Delay in making application due to accident of Court being closed on last day of period allowed and not due to laches—Right to certificate under S. 14.

In computing the period of 89 days from the date of decree, within which an application for review of judgment may be presented on payment of half of fee payable on the plaint or memorandum of appeal, the time during which the Court is closed for vacation cannot be excluded. Where the 89th day happened to be a Sunday it cannot be contended that Art. 5 applied where the application for review was filed on the next day. 9 Mad. 134, foll.

As however the applicant cannot be said to be guilty of laches in not being able to comply with Art. 5 of the Court-fees Act a certificate can be issued to the petitioner under S. 14 of the Court-fees Act, enabling him to obtain refund of half of the full court-fee paid by him under Art. 4 of the Court-fees Act. 63 L.W. 951=1950 M.W.N. 689=(1950) 2 M.L.J. 474=A.I.R. 1951 M. 262.

——Sch. 1, Arts. 4 and 5—Computation of time for making application—Time of vacation and time for obtaining copy of judgment cannot be excluded in computing 90 days—In proper case, however, Court has discretion to extend time.

The Court-fees Act and the Limitation Act are not *in pari materia* and in computing the period of 89 days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal, the time during which the Court is closed for vacation or time for obtaining copy cannot be excluded. Though where the delay is not caused by the applicant's laches, the Court has power to give a certificate directing a refund. This power, however, is discretionary. A.I.R. 1941 Nag. 236=I.L.R. (1941) Nag. 392=1941 N.L.J. 205=196 Ind. Cas. 556.

——Sch. 1, Arts. 4 and 5—Computation of time—Application filed after 90th day.

An application for review presented after the 90th day of the High Court's judgment dismissing a second appeal under O. 41, R. 11 (1) arising out of a suit for partition falls within Art. 4, Sch 1, and the fee leviable is according to the provision in the third column irrespective of the provision relating to the levying of the fee on the plaint. 93 Ind. Cas. 909=30 C.W.N. 334=A.I.R. 1926 Cal. 638.

——Sch. 1, Arts. 4 and 5—Computation of time—Application filed on 90th day—Previous day—Sunday.

The liability to pay full stamp accrues on the expiration of eighty nine days from the date of decree. Where an application for review of a judgment is filed on the ninetieth day the eighty-ninth day being Sunday, it must be stamped with the full fee payable on the plaint or the memorandum of appeal. 15 C.L.J. 505=15 Ind. Cas. 455.

5. Interpretation.

——Sch. 1, Arts. 4 and 5—Interpretation—'Fee leviable'.

The phrase "the fee leviable on the plaint or memorandum of appeal" means the proper fee to be levied if the applicant for review were then putting in a plaint or memorandum of appeal for same relief. A. I. R. 1924 Cal. 881, Diss. from; 7 M. H. C. R. App. p. 1 and 4 Bom. 26, Foll. 100 Ind. Cas. 72=50 Mad. 488=38 M.L.T. 40=25 M.L.W. 203 1927 M.W.N. 101=A.I.R. 1927 Mad. 360=52 M. L. J. 128.

——Sch. 1, Arts. 4 and 5—Interpretation—'Leviable'.

For the purpose of ascertainment of the Court-fee payable on the application for review, the application should be considered to relate back to the plaint or memorandum of appeal, as the case may be. *Obiter*, the amount is levied in a fixed proportion, independent of the scope of the application for review. 82 Ind. Cas. 297=28 C.W.N. 403=39 C.L.J. 222=A.I.R. 1924 Cal. 881.

——Sch. 1, Arts. 4 and 5—Interpretation—'Plaint', 'leviable', meaning of.

The words "plaint on memorandum of appeal" mean the plaint or memorandum of appeal in which the judgment sought to be reviewed was passed and the word "leviable" is used to provide for application for review *in forma pauperis*. 31 All. 294=6 A.L.J. 215 =1 Ind. Cas. 209.

——Sch. 1, Arts. 4 and 5—Interpretation—

The words "the plaint" in column 3 mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an imaginary plaint which might be filed at the time of the application for review and asking for the same relief as in that application. Similarly, in the case of a memorandum of appeal a reference to Art. 1 would not support any other construction. 7 Mad. H. C. R. App. 1; A. I. R. 1927 Mad. 360 and 4 Bom. 26, Diss. from. A.I.R. 1930 Cal. 631=57 Cal. 679 =129 Ind Cas. 191.

——Sch. 1, Arts. 4 and 5—Interpretation—Plaint or memo. of appeal'.

The word plaint or memorandum of appeal do not mean plaint or memorandum of appeal asking for the same relief as that asked for in the application for review but they mean the plaint or memorandum of appeal in which the judgment, review of which is asked for, was passed. 31 A. 294, Foll. 74 Ind. Cas. 255=26 O. C. 33=11 O.L.J. 339=A.I.R. 1924 Oudh 108.

6. Mesne profits—Review.

——Sch. 1, Arts. 4 and 5—Mesne profits—Court-fee.

Court-fee must be paid on the mesne profits on the ascertained rate calculated up to the date of the application for review. 100 Ind. Cas. 72=50 Mad. 488 =38 M.L.T. 40=25 M.L.W. 203=1927 M.W.N. 101=A.I.R. 1927 Mad. 360=52 M.L.J. 128.

7. Partial relief.

——Sch. 1, Arts. 4 and 5—Partial relief.

Proper Court-fee payable on an application for review of judgment is the fee leviable on the plaint or memorandum of appeal in the suit in which the judgment sought to be reviewed was passed. The fee would be the same whether the application affects the whole or part of a decree. 4 Bom. 26; 3 C.W.N. 292; 18 A.W.N. 212, Not foll. 31 All. 294=6 A. L. J. 215=1 Ind. Cas. 209. *See also* 254 P.L.R. 1913=159 P.W.R. 1913=20 Ind. Cas. 3.

8. Portion of decree—Application for review.

——Sch. 1, Arts. 4 and 5—Portion of decree—Application for review of—Proper Court-fee.

Under Art. 4, Sch. I, Court-fees Act the Court-fee payable on an application for review is the court-fee payable on the plaint or memorandum of appeal in which the judgment sought to be reviewed was passed even though the review relates only to some only of the reliefs. It is not sufficient to pay Court-fee only on the relief claimed in the application for review. A.I.R. 1933 Nag. 207=142 Ind. Cas. 416.

——Sch. 1, Arts. 4 and 5—Portion of decree—Application for review affecting.

The proper fee for an application for review of judgment is the fee leviable on the plaint or memorandum of appeal in the suit in which the judgment sought to be reviewed was passed, whether the review affects the whole or a part of the decree. Proceedings January 16, 1872. 7 M H.C.R. App. 1. (1879) 4 B. 26, not foll.; (1898) 3 C.W.N. 292, (1898) 18 A.W.N. 212, foll. 6 A.L.J. 215=31 A. 294=1 Ind. Cas. 209.

——Sch. 1, Arts. 4 and 5—Portion of decree—Costs—Review of only that part of judgment dealing with costs.

An application for review of a judgment is to be charged with Court-fee calculated on the basis of the relief which the applicant seeks in review. The word 'leviable' in Art. 5, Sch. I, Court-fees Act, does not mean 'levied'.

Where a review is applied for only against that part of the judgment of the Appellate Court which relates to the order for payment of costs against the applicant, the application for review is to be stamped *ad valorem* on the amount or sum awarded as costs

against the applicant in the Appellate Court. A.I.R. 1933 Rang. 203=11 Rang. 120=146 Ind. Cas. 560.

9. Restoration—Application for.

——Sch. 1, Arts. 4 and 5—Restoration—Application for —Appeal dismissed for non-payment of printing costs—Application for restoration should be treated as an application for review and as such should require to be stamped under Arts. 4 and 5 of Sch. I, Court-fees Act. A.I.R. 1938 Pat. 111=4 B.R. 306=17 Pat. 252=19 P.L.T. 17=173 Ind. Cas. 633.

——Sch. 1, Arts. 4 and 5—Restoration—Application for—Appeal dismissed for default in payment of paper-book costs.

An application for restoration of an appeal dismissed for default in payment of paper-book costs need not be stamped as an application for review under Arts. 4 or 5, Sch. I, Court-fees Act. It is sufficient if it is stamped with a court-fee of Rs. 2 only. A.I.R. 1932 Cal. 641=36 C.W.N. 246 (1)=141 Ind. Cas. 305.

——Sch. 1, Arts. 6 to 9—Copies of judgments and decrees filed with application under S. 81 (2), Government of Burma Act, 1935, (25 and 26 Geo. V, Ch. 42), not stamped—Deputy Registrar admitting copies—Applicant is entitled to time for furnishing necessary stamps. A.I.R. 1941 Rang. 294=196 Ind. Cas. 892.

——Sch. 1, Art. 7—Trial Court refusing costs directed to be paid by Privy Council—Order, has force of a decree—Copy of order filed with appeal requires stamp of Re. 1, under Art. 7. A.I.R. 1937 Pesh. 3=1937 Pesh. L.J. 3=167 Ind. Cas. 879.

——Sch. 1, Art. 8—General Power of Attorney—Copy produced in Court.

A copy of a General Power of Attorney produced in Court for verfication does not require a Court-fee stamp of annas 8 under the Court-fees Act, Sch. I, Art. 8. Art. 8 of Sch. I of the Act is intended to authorize the levy of annas 8 in the case contemplated under O. 13, R. 9 of the C. P. Code. 136 P.W.R. (1917)=9 P.R. 1918=43 Ind. Cas. 383.

——Sch. 1, Art. 9—Search-fee—No power in Court to levy.

There is no provision of law and there is nothing in the Civil Rules of Practice or in any rule which governs the procedure in a Civil Court, authorizing the levy of search-fees for supplying copies to litigants. When an application is made, all that is required by a party is to supply stamps for copies, and if the required number of copy stamps are supplied, it is the Court's duty to furnish copies asked for. 108 Ind. Cas. 656=51 Mad. 599=27 M.L.W. 310=1928 M.W.N. 102=A.I.R. 1928 Mad. 370=54 M.L.J. 229.

——Sch. 1, Art. 11. *See also* COURT FEES ACT, S. 19 (viii).

——Sch. 1, Art. 11.

Synopsis.

(1) "Amount or value of property".
(2) Ancestral property.
(3) Determination of Court-fee.
(4) Interpretation.
(5) Letters of administration.
(6) Order in probate proceedings.
(7) Probate.
(8) Properties covered by grant.
(9) Property—Power of appointment.
(10) Provident fund.

1. "Amount or value of property."

——Sch. 1, Art. 11—"Amount or value of the property"—Net value.

For purposes of Art. 11 the expression, "the amount or value of the property" signifies the net value obtained by the deduction of the debt and expenses from the gross value. 17 C.W.N. 21, Diss. 20 C.W.N. 591=22 C.L.J. 160=30 Ind. Cas. 958.

——Sch. 1, Art. 11—Amount or value—"Value"—Meaning.

"Value" in Sch. I, Art. 11 means net value. 7 Bur. L. T. 272=7 L.B.R. 356=24 Ind. Cas. 793.

——Sch. 1, Art. 11—Amount or value.

To calculate the duty payable on a probate application in respect of the estate of the deceased, the net value of the estate obtained after deducting the debt from the gross value of the estate should be ascertained and the Court-fee should be paid on the ascertained amount. 18 C.L.J. 308=18 C.W.N. 121=21 Ind. Cas. 502.

——Sch. 1, Art. 11—Amount or value—Estate consisting chiefly of a chose in action.

A applied for probate setting forth that the deceased's property consisted of Rs. 125, and the subject-matter of suit was valued at Rs. 17,000. The petitioner declared the value of the estate could not be under Rs. 1,000. *Held*, that the estate could not be said to be undervalued, as the value of the right on suit is not known. Probate was directed to issue without payment of stamp duty (as it was declared at under Rs. 1,000) but the court ordered that the petitioner should file in court a statement showing the result of the suit. 24 M. 241.

2. Ancestral property.

——Sch. 1, Art. 11—Ancestral property—Devise of.

A person who applies for probate is bound to pay stamp duty on the amount of the right, title and interest of the testator in the property bequeathed which in the case of ancestral property is the value of the testator's share therein. 33 Mad. 93, Foll. 100 Ind. Cas. 111=38 M.L.T. 7=A.I.R. 1927 Mad. 1101.

3. Determination of Court-fee.

——Sch. 1, Art. 11—Determination of Court-fee—Date of application.

For purposes of court-fees the true value of the estate must be its value at the date of the application for probate or of letters of administraton, and not the value at the death of the testator. 62 Ind. Cas. 513 =2 P.L.T. 683=6 P.L.J. 411=A.I.R. 1921 Pat. 206.

4. Interpretation.

——Sch. I, Art. 11—Interpretation—Grant under S. 5 of Probate and Administration Act.

The grant of probate contemplated in Art. 11 of the Court-fees Act is the grant under Ss. 62 and 64 of the Probate and Administration Act. The grant made under S. 5 is only an ancillary grant in order to give efficacy to the grant already made by another Court of competent jurisdiction and the procedure laid down in S. 5 is analogous to the procedure in England which enables the Probate Court in England to re-seal Scotch, Irish or Colonial grants. Grant under S. 5 is in no sense a grant of probate or letters of administration either with or without will annexed. 62 Ind. Cas. 513=2 P.L.T. 683=6 P. L. J. 411=A.I.R. 1921 Pat. 206.

5. Letters of administration.

——Sch. I, Art. 11—Letters of administration.

Duty required by Art. 11 should be paid before letters of administration are granted. A.I.R. (Vol. 22) 1935 All. 449=1935 A.L.J. 391=1935 A.W.R. 424=57 All. 881=154 Ind. Cas. 722.

——Sch. I, Art. 11—Letters of Administration to widow—Buddhist Law.

Court-fees on Letters of Administration granted to a Buddhist Burmese widow are to be paid only on half the estate of her husband for it is that alone that she takes as administratrix. The other half she takes as heir. 11 Bur.L.T. 258=50 Ind. Cas. 545.

6. Order in probate proceedings.

——Sch. I, Art. 11—Order in probate proceedings—Appeal against—Fee on value of estate.

The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied. 15 Bom. 408; 23 Cal. 723, Foll. 9 M.L.T. 314=(1911) 1 M.W.N. 237=21 M.L.J. 481=9 Ind. Cas. 538.

7. Probate.

——Sch. I, Art. 11—Probate—Court-fee payable.

The Court-fee payable on an application for probate of a will is not the Court-fee payable in respect of application *per se*, but as a condition precedent to the grant of probate. Therefore, the fee payable must be determined according to the law as it stands at the time of the grant and not as it stood when the application was made. Consequently if an application is made and Court-fee is paid thereon but the Court-fee payable has been increased before the grant of probate, the deficiency must be made good before the probate can be granted. A.I.R. 1945 Pat. 86=11 B. R. 294=23 Pat. 672=218 Ind. Cas. 293.

8. Properties covered by grant.

——Sch. I, Art. 11—Properties covered by grant.

Probate duty is payable in respect of the property as to which a probate is granted; not in respect of the property which may be ultimately administered by the executor, but when it is said that probate duty is not payable in respect of properties which are not the subject-matter of the grant, but are ultimately administered by the executor, all that is meant is this; that such properties are not taxable because in respect of them, probate was not granted. But to take the assets out of the statute it must appear that the assets which are ultimately administered by the executor were altogether outside the grant. 62 Ind. Cas. 513=2 P.L.T. 683=6 P.L.J. 411=A.I.R. 1921 Pat. 206.

9. Property—Power of appointment.

——Sch. I, Art. 11—Property—Power of appointment—Whether liable to probate duty.

Property, over which a person has a general power of appointment, is not property within the ordinary meaning of that word in law. Such property is not liable to probate duty. A.I.R. 1933 Cal. 924=60 Cal. 1016=147 Ind. Cas. 489.

——Sch. I, Art. 11—Property—Power of appointment over a fund conferred by husband's will on his wife—Probate duty paid on it on his death—Power exercised by wife by will—On her death, her estate is liable to probate duty in respect of the power—'Property'.

A power of appointment over a fund was conferred by a person's will on his wife. Probate duty was paid on the fund when he died. The wife exercised the power by will. On her death, the question was if her estate was liable to probate duty in respect of the power. *Held*, that the power of appointment created by the will was property within the meaning of Sch. I, Art. 11 of the Court-fees Act and the estate of the testator was liable to probate duty in respect thereof. 6 B.L.R. Appx. 138 commented on. 25 M. 515.

10. Provident fund.

——Sch. I, Art. 11—Provident fund.

Where a nominee of the provident fund of the deceased applies for letters of administration to the estate of the deceased, the amount of provident fund is not an asset liable to probate duty. 123 Ind. Cas. 646=33 C.W.N. 1148=A.I.R. 1930 Cal. 252.

——Sch. I, Art. 11—Provident fund.

Money standing to the credit of a deceased person in Railway Provident Fund deposit is personal property, that is, an asset of the deceased, and if such sum exceeds rupees one thousand it is liable to assessment under Sch. I, Art. 11. A.I.R. 1925 Nag. 108 and A.I.R. 1926 Nag. 306, Expl. and not Followed. 122 Ind. Cas. 322=7 O.W.N. 324=A. I. R. 1930 Oudh 145 (F.B.).

——Sch. I, Art. 12—Application for leave to file an application for succession certificate, as pauper.

The deposit under S. 379, Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be Court-fee payable on the application for a succession certificate. As a matter of fact, the Court-fee on such certificate is payable under the Court-fees Act, Sch. I, Art. 12, and is paid when the certificate is issued, *i.e.*, after the termination of proceedings under Succession Act. A.I.R. 1935 All. 735=1935 A.W.R. 864=155 Ind. Cas. 1118.

——Sch. I, Art. 12 (Madras)—Application for —Succession certificate—Stamp duty payable—If on the aggregate or on the individual debts specified in the certificate.

The aggregate of the debts and securities specified in the certificate must determine the stamp duty payable under Art. 12 (Mad.) of Sch. I of the Court-fees Act. It cannot be said that such duty is payable on the individual debts only. 1947 Bom. 30 and 60 Cal. 1262, foll. 10 Luck. 196, not foll. I.L.R. (1950) Mad. 772=1949 M.W.N. 809=A.I.R. 1950 Mad. 211=62 L.W. 813=(1949) 2 M.L.J. 632.

——Sch. I, Art. 12 (Bombay)—"Any debt or security"—Meaning of.

The words "any debt or security" in Art. 12 of the Court-fees Act, as amended by Bombay Act, II of 1932, used in the context in which they are found properly mean all the debts and securities specified in and covered by the certificate. That is the plain meaning of the article. It is the aggregate of all the debts and securities specified in the certificate that determines the amount of the fee to be paid. The intention of the Legislature was to make one aggregate fee payable in respect of a succession certificate. 48 Bom.L.R. 498=A.I.R. 1947 Bom. 30=228 Ind. Cas. 486.

——Sch. I, Art. 12 (Bih. & Ori.)—Application for succession certificate.

The fee is payable on each individual security and not on the total. A.I.R. 1945 Pat. 318=24 Pat. 100.

——Sch. I, Art. 12 (Ben.)—Application for succession certificate—Original certificate with extension amounting to less than Rs. 1,000—Duty, if payable—Further extension making total above Rs. 1,000—Duty payable, rate of.

Under Art. 12, Sch. I, Court-fees Act, as amended by S. 8, Bengal Court-fees Amendment Act, 1922, where first certificate together with an extension is for less than Rs. 1,000, no duty is payable. But where an extended certificate is applied for and the total amount exceeds Rs. 1,000, duty becomes payable on the total at the rate of 2 per cent. on the original and 3 per cent. in respect of the extensions. A.I.R. 1934 Cal. 38=60 Cal. 1262=37 C.W.N. 930=147 Ind. Cas. 1016.

——Sch. I, Art. 12—Application for certificate under Succession Act—Court-fees payable whether on individual item or total amount.

According to Art. 12, First Schedule of the Court-fees Act, the amount payable in respect of the application for certificate under Succession Act should be according to the amounts of the individual items comprised in the application, and not according to the total amount of those items. The phraseology of Art. 12 First Schedule, admits only of this construction. The article makes reference to "the amount or value of any debt or security", and it is impossible to interpret these words as referring to anything except individual debts and individual securities. A. I. R. 1934 Oudh 414=11 O.W.N. 1079=10 Luck. 196=151 Ind. Cas. 262.

——Sch. I, Art. 12 (C. P.)—"Any debt or security" mean individual debts and individual securities.

The words "any debt or security" in Art. 12, Sch. I, Court-fees Act, as amended by Court-fees (C. P. Amendment) Act, 1935, cannot be interpreted as referring to anything except individual debts and individual securities. It would be repugnant to the subject to read "any" in the sense of "all" and S. 12, C. P. General Clauses Act, can have no application to such a case. Even if the phraseology gave rise to doubt, the benefit of that doubt would have to be given to the subject rather than to the State in dealing with a fiscal Act. A.I.R. 1940 Nag. 400=1940 N.L.J. 495=191 Ind. Cas. 731.

——Sch. I, Art. 12—Provident fund.

The sum in the provident fund to the credit of a subscriber or depositor remains his property till his death and the nominee takes by succession under the Provident Funds Act. The nominee is not entitled to get a succession certificate in respect of the amount without payment of the Court-fee payable under Art. 12, Sch. I of the Court-fees Act. A.I.R. 1939 Sind 52=I.L.R. (1939) Kar. 359=180 Ind. Cas. 642.

——Sch. I, Art. 12—Provident fund—Railway provident fund.

A sum of money standing to the credit of a deceased person in a Railway Provident Fund does not form what can properly be called an asset of the estate where it passes to the nominee, and so it is exempt from Court-fee for the purpose of Sch. I, Art. 12. 92 Ind. Cas. 525=A.I.R. 1926 Nag. 306.

——Sch. I, Art. 12—Succession certificate—Court-fee payable whether according to law in force on date of its execution by Court.

The succession certificate is to be stamped with the proper Court-fee at the time when it came into existence as a succession certificate, that is, at the time when it was executed by the Court and the amount of fee payable must be calculated according to the Act which was in force on that date. A.I.R. 1936 All. 309=58 All. 752=1936 A.L.J. 55=1936 A. W. R. 111=160 Ind. Cas. 709.

——Sch. I, Art. 12—Succession certificate—Court-fee, whether necessary on when paid by prior applicant.

Court-fee should be paid by a Hindu daughter on an application for certificate in succession to mother who succeeded to her husband's properties though duty was paid by the latter on her application. 20 C. W. N. 1125=36 Ind. Cas. 125.

——Sch. I, Art. 13 (Punj.)—Application for revision against order rejecting objection to award.

An application for revision against an order refusing to set aside an award is really one against the decree passed in accordance therewith and is chargeable with *ad valorem* Court-fee under Sch. I, Art. 13. 4 P.L.R. 1911=13 P.W.R. 1911=9 Ind. Cas. 388.

——Sch. I, Art. 13 (Punj.)—Proper-fee—Award.

Where the objections of a defendant to the award were dismissed on the ground that they were put in after time and against this decision the defendant put in a revision petition on a ten rupee stamp.

Held, that the revision petition was not stamped properly as *ad valorem* fees were necessary. 4 P. L. R. 1911; 1 Lah. 234 and 3 Lah. L. J. 156, Appl. 108 Ind. Cas. 382.

——Sch. I, Art. 14—R(Rang.)—Suit under S. 9, Specific Relief Act—Revision—Court-fee payable is same as paid on plaint.

Art. 14, Sch. I, Court-fees Act, really means that

on an application for revision, the same amount of Court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. Consequently, on an application for revision arising out of a suit under S. 9, Specific Relief Act, the Court-fee payable is the same as has been paid on the plaint. A. I. R. 1941 Rang. 126=1941 Rang. L. R. 54=194 Ind. Cas. 70.

——Sch. II, Art. 1—Appeal in probate proceedings.

Art. 1, Sch. II, does not also apply to the proceedings for letters of administration or probate of a will when it reaches the stage of an appeal. It applies when the proceeding is at the initial stage because the proceeding has to be initiated with an application. A.I.R. 1938 Rang. 141=1938 Rang. L.R. 72=176 Ind. Cas. 366.

——Sch. II, Art. 1—Appeal against order in probate proceedings.

The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied. 16 Bom. 408; 23 Cal. 723, Foll. 9 M.L.T. 3414=(1911) 1 M.W.N. 237=21 M.L.J. 481=9 Ind. Cas. 538.

——Sch. II, Art. 1—Application for setting aside award.

Where an application to set aside an award is not made orally but in writing it must be stamped. It clearly does not fall within the exceptions provided by S. 19 of the Court-fees Act, which *inter alia* exempt a written statement in a pending suit but make no mention whatsoever of written objections to an award. 107 Ind. Cas. 223=23 S.L.R. 91=A.I.R. 1928 Sind 87.

——Sch. II, Art. 1—Cross-objections—Costs.

A memorandum of cross-objections relating to costs only does does not fall either within Art. 11, Sch. II, or under Art. 1, Sch. I, or under Art. 17 (*vi*), Sch. II, but may be treated as a petition and comes under Cl. (*d*), Art. 1, Sch. II. 25 C.W.N. 934=A.I.R. 1921 Cal. 55.

——Sch. II, Art. 1 (a) (Bih.)—The words "judgments, decree or orders passed by such Court, Board or officer," are wide enough to cover an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preparing an appeal to the Commissioner under the Income-Tax Act and such an application therefore requires a Court-fee stamp of two annas. A.I.R. 1932 Pat. 103=11 Pat. 40=13 P.L.T. 437=136 Ind. Cas. 302.

——Sch. II, Art. 1 (a) (Pun.)—Assistant Commissioner, if Revenue Court for purposes of Court-Fees Act—Application for certified of his order, if must be stamped.

The Assistant Commissioner of income-tax is a Revenue Court for purposes of the Court-fees Act. An application, therefore, for a certified copy of the Assistant Commissioner's order requires a stamp under Art. 1 (*a*), Sch. II, Court-fees Act, as amended for the Punjab. A.I.R. 1937 Lah. 876=I.L.R. (1938) Lah. 229=176 Ind. Cas. 171.

——Sch. II, Art. 1 (b) (Mad.)—Applicability—Application under S. 32, Arbitration Act to set aside award..

Where a particular application is not provided for in the Court-fees Act, and the application must be brought under some existing provision, all that is to be done is to use the general article, Art. 1 of Sch. II.

Hence, for an application under S. 33, Arbitration Act, to set aside an award, a Court-fee of 12 annas paid under Sch. II, Art. 1 (*b*) of the Act (as amended in Madras) is correct. A.I.R. 1946 Mad. 104=58 M.L.W. 631=223 Ind. Cas. 450=1945 M. W.N. 764=(1945) 2 Mad.L.J. 536.

——Sch. II, Art. 1 (d) (i) and (ii)—Applicability—Application under Art. 227 of the Constitution and S. 32 (4) of W. B. Premises Rent Control Act, 1950—Court-fee payable.

Art. 1 (*d*) (ii) of Sch. II of the Court-Fees Fees Act, applies to an application made under Art. 227 of the Constitution of India and court-fees will, therefore, be payable under that article and not under Art. 1 (*d*) (*i*) which applies to applications under S. 115, C.P. Code. The resolution of the Full Court that applications undtr Art. 227 of the Constitution of India should be dealt with by the Court in the same manner as that in which applications under S. 115, C.P. Code, are dealt with, is purely an administrative one, and it laid down rules as to which Court should hear such applications and similar matters. The Full Court did not in any way deal with the question of court-fees and indeed it would not have any power to pass any resolution affecting the provisions of the Court-Fees Act.

Separate court-fees are not payable on an application invoking the provisions not only of Art. 227 of the Constitution but also of S. 32 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act. 1950. Where there is only one application, only one court-fee is payable. 54 C. W.N. 795.

——Sch. II, Arts. 1 (d), 17 (vi) and 20—Applicability—Indian and Colonial Divorce Jurisdiction Act—Petition for dssolution of marriage—Nature of proceedings—Court-fee payable.

Art. 20 of Sch. II to the Court-Fees Act, in terms, applies only to petitions under the Divorce Act and can have no application except to petitions under that Act. Hence t cannot apply to proceedings under the Indian and Colonial Divorce Jurisdiction Act. A petition for the dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act is really a suit and not a mere petition, and must be governed for purposes of court-fee by Arf. 17 (*vi*) of Sch. II to the Court-Fees Act. Neither Art. 1 (*d*) nor Art. 20 of Sch. II can apply to the case. Though the proceeding is regulated by the Divorce Act it is not in the nature of a petition under the Divorce Act. 25 Pat. 194=224 Ind. Cas. 297=12 B.R. 500=A.I.R. 1946 Pat. 401.

——Sch. II, Art. 1 (d) (i) (Mad.)—Decree-holder directed to refund sum of Rs. 987-3-11 received by him in rateable distribution—Value of suit or main proceeding, above Rs. 1,000—Revision—Proper court-fee is Rs. 10 and not Rs. 5.

On a revision petition to the High Court against an order directing a decree-holder to refund a sum of Rs. 987-3-11 received by him in rateable distri-

bution, where the value of the main suit or the main proceeding wherein the order is made is above the value of Rs. 1,000, the poper stamp duty is Rs. 10 and not Rs. 5. A.I.R. 1942 Mad. 390=1942 M. W.N. 66=55 M.L.W. 323=(1942) 1 M.L.J. 111= 201 Ind. Cas. 753.

——Sch. II, Art 1 (d) and Sch. I, Art. 4 (Mad.)—Order dismissing appeal for non-payment of court-fee and failure to furnish security under O. 41, R. 10, C. P. Code, whether a decree—Review of order falls within Sch. II, Art. 1 (d).

An order dismissing an appeal for non-payment of court-fee is an order of dismissal for default within the meaning of S. 2 (2), Civil P.C.

An order directing that the appeal should be dismissed for non-payment of court-fee and for failure to furnish security, under O. 41, R. 10 is not a decree within the meaning of S. 2 (2), Civil P.C.

Such an order not being a decree, an application for review of the same falls under Sch. II, Art. 1 *(d)*, Court-fees Act. A.I.R. 1941 Mad. 836=54 M.L.W. 349=1941 M.W.N. 835=(1941) 2 M.L. J 500=I.L.R. (1941) Mad. 954=196 Ind. Cas. 894 (F.B.).

——Sch. II, Art. 1, Cl. (d) (U.P.)—Memorandum of objection to remand finding filed under O. 41, R. 26, C. P. Code, Act (5 of 1908) —Court-fee if payable.

No court-fee is payable in respect of a memorandum of objection filed under O. 41, R. 26, Civil P. C., as it does not seek any relief from the Court and does not contain any request for any order being passed on it and in the circumstasces it can hardly be regarded as an application or petition within the meaning of Sch. II, Art. 1, cl. *(d)*, Court-fees Act. A.I.R. 1936 Oudh 180=1936 O.W.N. 113= 11 Luck. 704=160 Ind. Cas. 38 (1).

——Sch. II. Art. 1 (d)—C. P. Code, O. 41, R. 26 (U.P.)—Memorandum of objection—Whether liable to court-fee.

A memorandum of objection filed under O. 41, R. 26 Civil P.C., is neither an application nor a petition presented to the Court, and consequently no court-fee is chargeable upon it. A.I.R. 1932 All. 526=54 A. 465=1932 A.L.J. 149=140 Ind. Cas. 47.

——Sch. II, Art. 1 (d) (Ben.)—Application for restoration of appeal dismissed for non-payment of paper-book costs—Court-fee payable.

O. 41, R. 19 read with S. 151, Civil P.C., enables an application for restoration of an appeal dismissed for non-payment of paper-book costs to be entertained and the court-fee payable on the application is Rs. 2 under Sch. II., Art. 1, cl. *(d)* Court-Fees Act. A.I.R. 1932 Cal. 770—36 C.W.N. 564= 55 C.L.J. 314=59 C. 1334=138 Ind. Cas. 393.

——Sch. II. Art. 2—Although the fine imposed on the guardian of a lunatic under S. 81, Lunacy Act, for his contumacious conduct, can be recovered as if it were due under a decree of the Court, yet it is doubtful whether the order imposing the fine can be said to have the force of a decree within the meaning of Art. 2, Sch. II. A.I.R. 1934 Lah. 853 (1)=36 P.L.R. 179=150 Ind. Cas. 664.

——Sch. II, Art. 5—Declaration of occupancy right—Memo. of appeal—Court-fee.

In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal should bear a Court-fee of eight annas as provided in Art. 5 of Sch. II. S. 17 (iii) of the Act does not apply to such a suit. 40 All. 358=16 A.L.J. 167=44 Ind. Cas. 608.

——Sch. II, Art. 6—Bond given by guardian under Guardians and Wards Act falls under Art. 57, Stamp Act and not under Art. 6, Court-Fees Act.

Art. 6 of Sch. II, Court-fees Act, only refers to the bail bonds or other instruments of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Criminal P. C., or Civil P.C. A bond given by a person under the Guardians and Wards Act as a guardian of the estate of a minor in accordance with the orders of the Court is covered by Art. 57 of the Sch. to the Stamp Act and not by Art. 6, Sch. II Court-fees Act. A.I.R. 1940 Bom. 275=42 Bom.L.R. 668 =190 Ind. Cas. 224 (S.B.).

——Sch. II, Art. 6—Court, if can accept person as surety on oral statement.

Art. 6, Court-fees Act, does not lay down that it is illegal for the Court to accept a person as surety in proceedings under S. 55, Civil P.C. on oral statements made before it or that it is obligatory to take a bond in writing. A.I.R. 1937 Lah. 772=40 P. L.R. 38=174 Ind. Cas. 965.

——Sch. II, Art. 6—Security bond executed in mofussil by surety under O. 41, R. 5 or R. 6, C. P. Code—Court-fee payable—Stamp duty for bond.

Whes a mortgage deed is executed by a surety under O. 41, R. 5 or R. 6, Civil P.C., it is liable to a court-fee under Art. 6, Sch. II, Court-fees Act, and to stamp duty under Art. 57, Sch. I, Stamp Act. This is so only in relation to deeds executed in the *mofussil*. In Karachi itself, an equitable mortgage only is created by deposit of title deeds. A.I.R. 1936 Sind 41=30 Sind L. R. 1=161 Ind. Cas. 945.

——Sch. II, Art. 6—Provincial Small Cause Courts Act, S. 17—Security bond furnished for setting aside ex parte decree in Small Cause suit—Proper stamp duty.

A security bond furnished under the proviso to S. 17, Provincial Small Cause Courts Act falls within Art. 6, Sch. II, Court-fees Act, and requires a stamp of eight annas only.

An order setting aside an *ex parte* decree in a Small Cause suit is an order made under the Civil P.C., and even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court, the security bond fall within Art. 6, Sch. II, Court-fees Act. A.I.R. 1935 Mad. 280=1935 M.W.N. 57=41 M. L.W. 482=68 M.L.J. 466=58 Mad. 687=155 Ind. Cas. 559 (F.B.).

——Sch. II. Art. 6—Security bond for stay of execution—Execution of bond in pursuance of order of Court—Bond creating only personal obligation—Stamp duty.

A security bond executed by a judgment-debtor for satisfaction of a decree sought to be stayed, in pursuance of an order of Court under the Civil P.C., and imposing only a personal obligation on the surety, falls under Art. 6, Sch. II, Court-fees Act, and is not chargeable with duty under the Stamp Act. A.

I.R. 1943 Lah. 288=34 P.L.R. 480=14 Lah. 708 =143 Ind. Cas. 12.

——Sch. II, Art. 6—Security bond for stay of execution.

A security bond given at the time of stay of execution for the due performance of the decree making the surety personally liable must bear a court-fee stamp as required by Art. 6, Court Fees Act. No stamp under Stamp Act is necessary as it falls under the residuary Art. 15, Stamp Act. A.I.R. 1925 Cal. 906 (F.B.), Appl., A.I.R. 1925 Lah. 552, not Foll. 117 Ind. Cas. 226=30 P.L.R. 131=11 Lah.L.J. 40= A.I.R. 1929 Lah. 205.

——Sch. II, Art. 6—Security bond for stay of execution.

A security bond taken on an order for stay of execution must be stamped in accordance with the Stamp Act and cannot be written on plain paper bearing a court-fee of eight annas. 91 Ind. Cas. 772=26 P.L.R. 634=7 Lah. L. J. 343=A.I.R. 1925 Lah. 552.

——Sch. II, Art. 6—Stamp Act (2 of 1899), Sch. I, Arts. 15, 57—C. P. Code, S. 55 (4)—Personal security bond under S. 55 (4)—Proper stamp duty.

Where on the arrest of a judgment-debtor, a person executed a security bond under S. 55 (4), Civil P.C., containing a personal undertaking that if the judgment-debtor failed to apply for being adjudicated as an insolvent within a month, he (the surety) would pay the amount decreed, and the bond was stamped with a stamp of eight annas only:

Held, that the bond fell within the purview of Art. 6, Sch. II, Court-fees Act, and not within Art. 57, or Art. 15 Sch. I, Stamp Act, and the court-fee paid was sufficient. A.I.R. 1933 Lah. 89=34 P.L. R. 132=14 Lah. 284=141 Ind. Cas. 301 (S.B.).

——Sch. II, Art. 6—Security bond executed by receiver to Court—Stamp Act, S. 2 (5) and Art. 40.

Where a Receiver executes a sucurity bond to the Court binding himself and his heirs and as security thereof pledging immoveable property worth Rs. 200, the bond must be stamped as a bond under the Court Fees Act and under Art. 40 of Sch. I of the Stamp Act, as it came within the definition of a mortgage in S. 2 (5) of the Stamp Act. 43 Mad. 363=38 M.L.J. 503=12 L.W. 537=57 Ind. Cas. 184.

——Sch. II, Art. 6—Security bond for production of attached movable property—Stamp Act, Sch. I, Arts. 15 and 57.

A security bond for the production of attached livestock given in accordance with the rules framed under S. 269, C.P.C., (1882) is a bond given in pursuance of an order made by a Court within Art. 6 and the stamp leviable on a such a bond is under the latter Act, and not under Arts. 15 and 57 of the Stamp Act. 37 Mad. 17=24 M.L.J. 637=20 Ind. Cas. 775.

——Sch. II, Art. 6—Security bond under C. P. Code—When chargeable under the Stamp Act.

Security bonds executed in pursuance of an order of the Court under O. 32 R. 6 (2) or any other rule or section of the C.P. Code must bear a court-fee stamp as required by Art. 6 of Sch. II of the Court-Fees Act, 1870 and they will also be chargeable under the Stamp Act, if they are of the kind described in Art. 40 or Art. 57, of Sch. I to the Stamp Act but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15. 21 C.W.N. 1150=43 Ind. Cas. 376, Overruled. 89 Ind. Cas. 289=53 Cal. 101=29 C.W.N. 851=42 C.L.J. 5=A.I.R. 1925 Cal. 906 (F.B.).

——Sch. II, Art. 6—Security bond under C. P. Code.

Art. 6 applies to instruments of obligation given in pursuance of an order made by a Court under any section of the Civil P.C., 1908. 68 Ind. Cas. 730=49 Cal. 997=A.I.R. 1923 Cal. 269.

——Sch. II, Art. 6—Security bond for—Stay of execution—Court-fee—Non-judicial stamp—Stamp Act, Sch. I, Art. 15.

Security bonds given in pursuance of an order of the Court for stay of execution must be written on paper properly stamped under the Stamp Act and not on a plain paper bearing a Court-fee stamp of annas 8 only, as they are not made by order of the Court within Art. 6 of Sch. II of the Court-fees Act. 21 C.W.N. 1150=43 Ind. Cas. 376.

——Sch. II, Art. 10—Consolidated appeals—Madras High Court Appellate Side Rules, R. 31.

When the Court allows consolidation of cases, the parties to the appeals which are consolidated can treat the appeals as one for purpose of vakalatnama. C.R. Ps. 1517 to 1519 of 1297 and 34 M. L. J. 279, Rel. on. R. 31 of the Appellate Side Rules does not at all apply to cases in which consolidation is allowed by the Court, but the parties are not relieved of the obligation to produce a properly stamped decree in each of the appeals filed by them, though the Court may dispense with the production of the copies of the judgment in all but one. 27 M.L. W. 366=1928 M.W.N. 271=109 Ind. Cas. 651= A.I.R. 1928 Mad. 463=54 M.L.J. 595.

——Sch II, Art. 10—Power filed by barristers.

The power of appointment in writing filed by an advocate, whether he is a barrister or not authorizing him to make or do any appearance application or act on behalf of his client, would require a Court-fee payable upon a vakalatnama as prescribed in Art. 10, Sch. II of the Court-fees Act. 5 Pat. 255=7 P.L.T. 213=1926 P.H.C.C. 4=94 Ind. Cas. 841 =A.I.R. 1926 Pat. 246.

——Sch. II, Art. 10—Power not in favour of a legal practitioner.

A Power of Attorney empowering a person who is neither a Vakil of a Court nor a certified *mukhtear* to represent another in a Civil Court is governed not by Art. 48 of the Stamp Act but by Art. 10 of the Court-fees Act. 108 P.W.R. 1912=202 P.L. R. 1912=15 Ind. Cas. 122 (F.B.).

——Sch. II, Art. 10—Power not in favour of pleader.

A power of attorney not executed in favour of a person who is not a certified mukhtear or pleader is not governed by Art. 10. 33 A. 487=8 A.L.J. 878=9 Ind. Cas. 617.

——Sch. II, Art. 10—Scope.

The Article merely means that when an authority is filed, such authority must be stamped. It does not make it necessary that a vakalatnama or mukhtarnama must be filed in criminal cases. 7 P.L. T. 524=1926 P.H.C.C. 125=27 Cr.L.J. 666=94 Ind. Cas. 714=A.I.R. 1926 Pat. 296.

——Sch. II, Art. 11.

Synopsis.

1. Award.
2. Bengal Money-Lenders Act, S. 38 (3)—Appeal.
3. Final decree.
4. Letters of Administration.
5. Madras Agriculturists Relief Act—Appeals.
6. Mesne profits.
7. Orders not having force of decree.
8. Order refusing leave to appeal.
9. Order rejecting plaint.
10. Orders to which Art. 11 is applicable.
11. Order under O. 21, R. 50 (2), C. P. Code.
12. Order under O. 21, R. 63-H, C. P. Code.
13. Probate proceedings.
14. Restitution.
15. Review.
16. U. P. Agriculturists Relief Act—Appeals.
17. U. P. Encumbered Estates Act—Appeals.
18. Workmen's Compensation Act, S. 30—Appeal.

1. Award.

——Sch. II, Art. 11—Award—Appeal against order filing—Court-fee.

Where a case was referred to arbitration without the intervention of the Court and after necessary enquiry, the Court ordered the award to be filed and pronounced judgment in accordance with the award, and an appeal was preferred from the order filing the award:

Held, that the order filing the award could not be regarded as a decree nor as an order having the force of a decree, and hence the appeal fell within the purview of Art. 11, Sch. II, Court-fees Act, and was consequently chargeable with court-fee of Rs. 2 only. A.I.R. 1932 Oudh 282=9 O.W.N. 800=6 Luck. 703=139 Ind. Cas. 622.

——Sch. II, Art. 11 (Punj.)—Award—Refusal to set aside.

An order refusing an application to set aside the award when the reference was in a suit pending before the Court, is not appealable, but such an order is analogous to an order filing an award under Cl. (21). Therefore Court-fee stamp of Rs. 4 is sufficient. Lahore Civil Revn. No. 814 of 1926; A.I.R. 1928 Lah. 137 and A.I.R. 1929 Lah. 367 Rel. on. 111 Ind. Cas. 145=A.I.R. 1929 Lah. 369.

——Sch. II, Art. 11—Award—Setting aside.

Petitioner's application for filing an award was accepted by trial Court. The order was reversed in appeal. Petitioner filed a revision petition and stamped it with a Court-fee stamp of Rs. 4.

Held, that the order was revisable and that the Court-fee was sufficient. 110 Ind. Cas. 302=A.I.R. 1929 Lah. 367.

——Sch. II, Art. 11—Award—Appeal from—Order on private award.

For the purposes of Court-fees an appeal from an order under S. 104 (*f*), C.P. Code, would be governed by Art. 11, Sch. II, Court-fees Act. A.I.R. 1927 All. 771, Rel. on. 107 Ind. Cas. 756=9 Lah. 380=A.I.R. 1928 Lah. 137.

——Sch. II, Art. 11—Award—Appeal from—Order on private award.

For an appeal under S. 104 (*f*) against an order filing an award without the intervention of the Court, the requisite Court-fee stamp is of eight annas. 103 Ind. Cas. 315=25 A.L.J. 741=A.I.R. 1927 All. 771.

——Sch. II, Art. 11—Award under S. 19, Defence of India Act, is neither decree nor order having force of decree—Rules framed under S. 19 have not effect of changing its nature.

The award of an arbitrator under S. 19, Defence of India Act, 1939, is neither a decree nor an order having the force of a decree. There is nothing in the Defence of India Act to indicate that the award is anything but an award of the arbitrator and sub-Ss. (2) and (3) of S. 19 also do not suggest that the Government may make rules which would have the effect of altering the nature of the award. Rules 6 and 20 have no such effect. A.I.R. 1946 Cal. 524. I.L.R. (1946) 2 Cal. 547=81 C.L.J. 118=50 C.W.N. 820=225 Ind. Cas. 606.

2. Beng. Money Lenders Act, S. 38 (3)—Appeal.

——Sch. 22, Art. 11—Beng. Money-Lenders Act, S. 38 (3)—Appeal.

Appeal under S. 38 (3), Bengal Money-lenders' Act by debtor asking that only Rs. 150 and not Rs. 1085 were due—Appeal is as one from order having force of decree and hence Sch. II, Art. 11 has no application—Fixed court-fee of Rs. 20 is payable under Sch. II, Art. 17, the relief asked for being declaratory. A.I.R. 1944 Cal. 230=48 C.W.N. 347=214 Ind. Cas. 90.

3. Final Decree.

——Sch. 22, Art. 11—Final decree—Appeal from connected order.

The final decree stops the litigation and anyone desiring to appeal against the connected order must clearly pay Court-fees as in any other appeal from a final decree. 35 All. 476 and 22 Bom. L. R. 811, Foll. 107 Ind. Cas. 671=A.I.R. 1928 Nag. 146.

——Sch. 22, Art. 11—Final decree—Order granting.

Appeal from an order passed on an applicatin for final decree in a mortgage suit against the judg.-debtor who objected on the ground that he had satisfied the decree is chargeable with *ad valorem* Court-fee and not only 8 annas. 84 Ind. Cas. 742=27 O. C. 225=A.I.R. 1925 Oudh 102.

——Sch. II, Art. 11—Final decree—Order directing.

An appeal against an order, directing after con-

test, that a final decree shall be passed in a mortgage suit, should not be treated as an appeal against the final decree in that suit for the purpose of court-fee, and, therefore, an *ad valorem* court-fee need not be paid for such appeal. 42 Mad. 52, Expl. 53 Mad. 155=30 M.L.W. 846=1930 M.W.N. 402=A.I.R. 1930 Mad. 20=57 M.L.J. 718.

——Sch. 2, Art. 11 and Sch. I, Art. 1—Final decree in mortgage suit—Appeal—Court-fee.

Ad valorem Court-fee is required for an appeal from a final decree passed under O. 34, R. 5, C. P. Code. 22 Bom.L.R. 811=57 Ind. Cas. 579.

4. Letters of Administration.

——Sch. 2, Art. 11—Letters of Administration—Appeal from refusal or grant of.

The court-fee payable on a memorandum of appeal from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. II, Court-fees Act. A.I.R. 1938 Rang. 41=1938 Rang. L.R. 72=176 Ind. Cas. 366.

5. Madras Agriculturists Relief Act—Appeal.

——Sch. 2, Arts. 11, 17-A—(Mad.)—Madras Agriculturists' Relief Act—Appeal under rules under.

Art. 11, Sch. II, Court-fees Act, applies to cases where the statute provides that an order shall be subject to an appeal as if it were a decree. In such a case, Art. 17-A, has no application. Hence an appeal under R. 9 of the rules framed under the Madras Agriculturists' Relief Act falls under Art. 11, Sch. II. A.I.R. 1941 Mad. 639=1941 M.W.N. 564=(1941) 1 M.L.J. 721=I. L. R. (1941) Mad. 935=53 M.L.W. 637=198 Ind. Cas. 322.

6. Mesne profits.

——Sch. 2, Art. 11—Mesne profits—Suit for partition and possession—Prayer for future mesne profits—Preliminary decree passed—Question of future mesne profits ordered to be left open—Final decree regarding partition—Application by plaintiff under O. 20, R. 12, Civil P. C., for enquiry into future mesne profits—Application dismissed.

Appeal preferred by the plaintiffs against the order with a court-fee of one rupee only:

Held, that the order rejecting the application did not fall within the definition of S. 2 (*d*), Civil P. Code, and would not therefore amount to a decree. Moreover, the fact that a final decree had been passed in regard to partition did not deprive the Court of the power of ordering an inquiry into future mesne profits and of passing a second final decree. The application made by the plaintiffs under O. 20, R. 12 or an appeal from an order rejecting that application could not be regarded as having been made in or arising from an order in execution. Hence the appeal was rightly valued under Art. 11, Sch. II, Court-Fees Act. Since the plaintiffs were asking for future mesne profits only, they could not be required to estimate the relief, the value of which was unknown to them. The court-fee paid by them was therefore sufficient. A.I.R. 1939 Mad. 667=49 M.L.W. 652=1939 M.W.N. 485=(1939) 2 M.L.J. 356.

——Sch. 2, Art. 11—Mesne profits—Executing Court ordering that plaintiff do recover mesne profits from defendant—Such order must be held as one under S. 47, Civil P. C.—Appeal from such order—Court-fee payable.

Where in a case, the High Court directed the executing Court to determine the amount of mesne profits in execution and the executing Court ordered that the plaintiff do recover certain specified sums as mesne profits the order of the executing Court must be treated as one made under S. 47, C. P. Code and on an appeal from such order the court-fee payable is Rs. 2 only under Sch. II, Art. 11, Court-Fees Act. A.I.R. 1938 Bom. 320=40 Bom. L.R. 416=176 Ind. Cas. 254.

——Sch. 2, Art. 11—Mesne profits—Appeal—Order rejecting application for ascertaining mesne profits—Ad valorem fee.

A memorandum of appeal from an order dismissing an application for the ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed. 3 P.L.J. 101=43 Ind. Cas. 489.

7. Orders not having force of decree.

——Sch. 2, Art. 11—Order not having force of decree—Executable order under S. 199, Companies Act, is not equivalent to an order having force of decree.

An executable order of Liquidation Judge made under Companies Act which, under S. 199, Companies Act, can be enforced in the same manner as a decree is not equivalent to an order having force of a decree under Sch. II, Art. 11, Court-Fees Act,

Per *Marten, J.*—Any order made under the Companies Act is intrinsically of the nature of an order having the force of a decree, it will not fall under Sch. II. Art. 11, Court-Fees Act, even though it may be enforceable by virtue of S. 199, Companies Act, and appealable under S. 202 of that Act. A.I.R. 1945 Lah. 146=221 Ind. Cas. 114 (F.B.).

——Sch. 2, Art. 11; Sch. 1, Art. 1—Order not having the force of a decree—C. P. Code, S. 2.

In a reference under S. 18 of the Land Acquisition Act, the District Judge valued the compensation to be given at a certain figure and the amount was placed in deposit with the Collector. One *H* then applied to the District Judge for payment of the amount to him and the application was opposed by other persons who claimed a title to the property, some claiming the whole and others portions of it. The District Judge's order on the application was "This suit is dismissed. The parties may seek redress in the civil Court." *H* appealed to the High Court:

Held (*Maclean*, C.J. and *Banerjee, J.*) on a reference by the Registrar under S. 5, Court-Fees Act:—That the order of the District Judge was not a decree within the meaning if S. 2, C. P. Code, and court-fee was payable in the appeal under Art. 11.

of Sch. II of the Court-Fees Act (two Rupees) and not as computed on the amount in deposit with the Collector and claimed by the appellant under Art. 1 of Sch. I of the Court-Fees Act. 8 C.W.N. 321.

8. Order refusing leave to appeal.

——Sch. 2, Art. 11—Order refusing leave to appeal—Letters Patent—Appeal.

A memorandum of appeal against an order rejecting an application for certificating under the amended Letters Patent that the case is a fit one to be taken on further appeal when the decree in appeal does not make any reference to the application it is governed by Sch. II, Art. 11 (*b*). 56 Cal. 482 =33 C.W.N. 32=117 Ind. Cas. 595=A.I.R. 1929 Cal. 575.

9. Order rejecting plaint.

——Sch. 2, Art. 11—Order rejecting plaint.

An order rejecting a plaint is a decree within the definition of the term in S. 2, Cl. (2), C. P. Code, and therefore a memorandum of appeal against that order must be stamped *ad valorem*. 10 P.L. T. 545=120 Ind. Cas. 765=A. I. R. 1929 Pat. 615.

10. Orders to which Art. 11 is applicable.

——Sch. 2, Art. 11—Orders to which applicable.

Art. 11 clearly lays down that the appeal should not be from a decree or an order having the force of a decree. A.I.R. 1944 Oudh 113=1943 O.W. N. 479 (2)=1943 A.W.R. (C.C.) 177=213 Ind. Cas. 240.

11. Order under O. 21, R. 50 (2), C. P. Code.

——Sch. 2, Art. 11—Order under O. 21, R. 50 (2), C. P. Code.

As the order under O. 21. R. 50 (2), C. P. Code, 1908, has the force of a decree, the court-fee payable on the appeal from such decree is regulated by Art. 1, Sch. I of the Court-Fees Act and not by Sch. II, Art. 11. 8 L.B.R. 300=10 Bur. L.T. 42=35 Ind. Cas. 429.

12. Order under O. 21, R. 63-H, C. P. Code.

——Sch. 2, Art. 11; Sch. 1, Art. 1—Order under O. 21, R. 63-H, Civil P. C. (Act 5 of 1908)—Appeal should be valued at amount sought to be recovered.

An appeal from a decision under O. 21. R. 63, C. P. Code, should be valued at the amount which the decree-holder seeks to recover from the garnishee. This, of course, is not necessarily the same as the amount for which he has a decree against the judgment-debtor. S. 47, C. P. Code has no application to decisions under R. 63-H of O. 21. Appeals from such decisions must be valued by the appellant and court-fee paid *ad valorem* on the value under Sch. I, Art. 1 and not under Sch. II, Art. 11, Court-Fees Act. A.I.R. 1943 Pat. 280=22 Pat. 278=10 B.R. 178=209 Ind. Cas. 394.

13. Probate proceedings.

——Sch. 2, Art. 11—Probate proceedings—Order in.

An order in probate proceedings has the force of a decree and so Art. 11 of Sch. II is not applicable. 9 M.L.T. 314=(1911) 1 M.W.N. 237=21 M.L. J. 481=9 Ind. Cas. 538.

14. Restitution.

——Sch. 2, Art. 11—Restitution—Order under S. 144, C. P. Code—Appeal against—Court-fee.

The C. P. Code, regards Ss. 47 and 144, as quite distinct. An application under S. 144, is no doubt one which carries out the intention of the Appellate Court's decree but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. Appeals filed under S. 144, do not come within the exemption given by Financial Department Notification No. 41, dated 19th September, 1921, and must, therefore, be stamped *ad valorem*. A.I.R. 1939 Rang. 32=1938 Rang. L.R. 635=179 Ind. Cas. 464.

——Sch. 2, Art. 11—Restitution—Burma Financial Department Notification No. 41, dated September 19, 1921—Personal decree for balance found due in execution of mortgage-decree—Whether falls under S. 47, Civil P. C. —Order for personal decree—Appeal to District Judge—Court-fee payable—Burma Stamp Manual.

The matter of the issue of a personal decree against a judgment-debtor for balance due in execution of mortgage decree falls under S. 47, C. P. Code. That being so, under Government of Burma Financial Department Notification No. 41, dated September 19, 1921, Cl. 3, at p. 74, Burma Stamp Manual, the fee chargeable on appeals from orders under S. 47, C. P.C. 1908, is limited to the amounts chargeable under Art. 11, Sch. II, Court-fees Act. The correct court-fees payable on the appeal to the District Court is, therefore, eight annas and not *ad valorem*. A.I.R. 1936 Rang. 352=164 Ind. Cas. 639.

——Sch. 2, Art. 11—Restitution—Ad valorem fee.

An application for restitution consequent on a decree of an Appellate Court is not an application to execute that decree. Hence appeal from an order passed under S. 144, C. P. Code, is not an appeal from an order passed under S. 47 of that Code. Consequently Local Government, Financial Department Notification No. 41, limiting the court-fee chargeable in appeals under S. 47 to amount chargeable under Court-fees Act, Sch. II, Art. 11, does not apply to such an appeal and *ad valorem* court-fee is payable in the case of an appeal from order under S. 144. 8 Rang. 271=A. I. R. 1930 Rang. 241.

——Sch. 2, Art. 11—Restitution—Order under S. 144, C. P. Code—Appeal from such order—Fees payable.

An order under S. 144, Civil P.C., is an order having the force of a decree, and Art. 11, Sch. II, Court-fees Act, has no application where an appeal is preferred from such order. In such a case, fees

payable are *ad valorem*. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212.

——Sch. 2, Art. 11—Restitution application.

Government of Bengal Notification No. 1872-J of 23rd May, 1921, limiting fees chargeable on appeal from order under S. 47, Civil P.C. to amount chargeable under Art. 11, does not extend to orders under S. 144, Civil P.C. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212.

——Sch. 2, Art. 11—Restitution—No ad valorem fee.

It is in consequence of the decree passed by the appellate Court that the application is made under S. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under S. 47 and is compelled to take action under S. 144, C.P. Code. It would be most inequitable that he should be penalised by being forced to stamp his application *ad valorem*. 107 Ind. Cas. 491=A.I.R. 1928 Lah. 143.

——Sch. 2, Art. 11—Restitution.

Appeal from order under S. 144 must be stamped *ad valorem*. (19 A.L.J. 171, Overruled; 1922 All. 223; 1922 All. 238 and 1925 Patna 1 (F.B.), Foll 82 Ind. Cas. 321=47 All. 98=5 L.R.A. Civ. 773=22 A.L.J. 881=A.I.R. 1925 All. 137.

——Sch. 2, Art. 11—Restitution.

Applications in restitution are to be regarded as applications in execution and on appeals from orders on such applications. Court-fee is leviable under Sch. II, Art. 11. 71 Ind. Cas. 173=1922 M.W.N. 831=17 M.L.W. 623=A.I.R. 1923 Mad. 270.

——Sch. 2, Art. 11—Restitution—Mesne profits—Limitation—Date of accrual—Cause of action.

An application for mesne profits made not by the plaintiff but by the defendants against whom the suit had been dismissed by way of restitution under S. 583 Civil Procedure Code, is one under S. 244 (*c*) of the Code. Such application would be chargeable with court-fees under Art. 11, Sch. II, of the Act and not *ad valorem*. The cause of action for mesne profits arises on the day of the rightful owner is restored to possession. 6 Ind. Cas. 125=11 C.L.J. 541.

——Sch. 2, Art. 11.

An order under S. 151, C. P. Code, is not appealable order under Civil P.C. and so the appeal cannot be treated as an appeal from an order within the meaning of Art. 11, Sch. II. A.I.R. 1937 Cal. 152=41 C.W.N. 157=65 C.L.J. 165=I.L.R. (1937) 1 Cal. 637=171 Ind. Cas. 212.

15. Review.

——Sch. 2, Art. 11 and Sch. 1, Arts. 4 and 5—Review.

An application for review of an order under S. 566 C.P.C. is an application for review of judgment and so it may be presented on stamped paper under Sch. II, Art. 11 and not under Sch. 1, Arts. 4 and 5 because it is not an order ending in a decree. 6 A.L.J. 151=31 All. 262=1 Ind. Cas. 999.

16. U. P. Agriculturists Relief Act—Appeals.

——Sch. 2, Art. 11—U. P. Agriculturists Relief Act—Appeals.

Application under S. 12, U. P. Agricultural Relief Act for redemption of mortgage—Court-fee paid on certain sum—Greater amount found due and applicant directed to pay balance—Appeal under S. 23 of the Act—Court-fee. held. was not under Sch. II, Art. 11. A.I.R. 1938 All. 14=1937 A.L.J. 1173=1937 A.W.R. 932=1937 R.D. 575=I.L.R. (1937) All. 949=173 Ind. Cas. 50.

17. U. P. Encumbered Estates Act—Appeals.

——Sch. 2, Art. 11—U. P. Encumbered Estates Act—Appeals under.

The rejection of a written statement filed beyond the time prescribed by U. P. Encumbered Estates Act cannot have the force of a decree of a Civil Court. It is only when an order is passed under S. 14, U. P. Encumbered Estates Act, that the order becomes a decree. The creditor who is aggrieved by the order rejecting his written statemenet filed beyond the prescribed time is entitled to appeal on payment of Court-fee payable under Art. 11, Sch. II, Court-fees Act. A.I.R. 1941 All. 163=1941 A.L.J. 109=I.L.R. (1941) All. 323=1941 R. D. 80=1941 A.W.R. (H.C.) 59=1941 A.W.R. (Rev.) 171=193 Ind. Cas. 867.

——Sch. 2, Art. 11—U. P. Encumbered Estates Act (25 of 1954), claim application dismissed as time-barred—Court noting in order that claim was to be deemed as duly discharged—Such order, if decree—Appeal from such order—Court-fee payable.

Where a claim application made by a person under U. P. Encumbered Estates Act is dismissed by the Special Judge on the ground that it was made beyond limtation prescribed by S. 9 (2) and (3), noting at the same time in his order that the claim was to be deemed to be duty discharged under S. 13, there has not been any adjudication at all and the nature of the decision is that it is an order only and not an order having the force of a decree. On an appeal from such order the proper Court-fee payable is under Art. 11, Sch. II, Court-fees Act and not *ad valorem*. A.I.R. 1939 Oudh 43=1938 O.W.N. 1221=1938 A.W.R. 136=1938 R. D. 927=14 Luck. 344=179 Ind. Cas. 45 (1).

——Sch. 2, Art. 11—U. P. Encumbered Estates Act—Appeals under, Court-fee.

An order quashing proceedings under S. 20 of the Encumbered Estates Act is one which is covered by Sch. II Art. 11 of the Court-fees Act and an appeal against such an order has to be stamped according to that article. It must be remembered that where the law says that an order shall be deemed to be a decree or that it shall be appealable as if it were a decree, it does not follow that the order has the force of a decree for the purposes of the Court-fees Act. The is a fiscal statute and must be construed strictly. 21 Luck. 444=223 Ind. Cas. 596=1946 O.A. (C.C.) 92 (2)=1946 A.W.R. (C.C.) 92 (2)=1946 O. W. N. 132=A.I.R. 1946 Oudh 254.

——Sch. 2, Art. 11—U. P. Encumbered Estates Act—Appeal under.

An appeal against a decision under S. 14, U. P. Encum. Estates Act, falls within the scope of Art. 11 of Sch. II, Court-fees Act and *ad valorem* fee is not necessary. A.I.R. 1941 Oudh 60=1940 O.W.N. 852 =1940 R. D. 416=1940 A.W.R. (C.C.) 412=15 Luck. 153=190 Ind. Cas. 184.

——Sch. 2, Art. 11—U. P. Encumbered Estates Act—Appeal under.

An order made by Special Judge under Cl. 7 of S. 14, U. P. Encumbered Estates Act, is a decree and Art. 11 of Sch. II, does not apply to an appeal from such decree. A.I.R. 1937 Oudh 501=1937 O.W.N. 890=1937 R.D. 403=171 Ind. Cas. 78.

18. Workmen's Compensation Act, S. 30—Appeal.

——Sch. 2, Art. 11—Workmen's Compensation Act, S. 30—Appeal under.

In an appeal under S. 30, Workmen's Compensation Act, against the order of Commissioner awarding compensation under the Act, Court-fee payable is that fixed by Art. 11 of Sch. II of Court-fees Act, for such an order has not the force of a decree. A.I.R. 1944 Oudh 83=1943 A.W.R. (C.C.) 137=1493 O. W. N. 427=19 Luck. 460=210 Ind. Cas. 288.

——Sch. 2, Art. 12—Probate proceedings—Objections by persons to whom citations are issued if must be stamped as caveat.

A petition, by which a party upon whom citation has been issued, opposes the grant of probate is not a caveat and need not be stamped as such. 20 C. W. N. 787=36 Ind. Cas. 38.

——Sch. 2, Arts. 15, 17—Declaration that a marriage took place and possession of wife prayed for—Stamp paid under Arts. 17 and 15—Legality of—Placing a suit under two articles.

A party cannot place his suit under two different articles of the Schedule of the Court-fees Act saying that he pays Rs. 10 for a declaratory decree and Rs. 5 for possession of his wife. Such a computation is utterly unknown under the Court-fees Act and opposed to the practice of the Court. 28 C. 567.

——Sch. II, Art. 17. See also COURT-FEES ACT, S. 7 (iv) (b).

——Sch. II, Art. 17 (i).

Synopsis.

1. Accounts.
2. Applicability.
3. Attachment—Declaration against.
4. Attachment—Setting aside.
5. Civil Court.
6. Cross-objections.
7. Declaration in appeal.
8. Interpleader suit.
9. Suit under C. P. Code, O. 21, R. 63.
10. Suit for possession after dismissal of application under O. 21, R. 97, C. P. Code.
11. Suit under O. 21, R. 103, C. P. Code.
12. Suit for partition.
13. Suit for declaration.

1. Accounts.

——Sch. II, Art. 17—Accounts.

Where the defendant has already appealed against the preliminary decree, and in the meanwhile the final decree is passed against him it is the final decree that the appellant attacks and there is no escape from the conclusion that it is on the amount of final decree that the Court-fee must be paid. Due allowance will be made for Court-fee already paid. 33 C.W.N. 743=A.I.R. 1929 Cal. 815.

2. Applicability.

——Sch. II, Art. 17 (i)—Applicability.

Suit for cancellation of the certificate signed by the certificate officer under S. 6 of Bengal Public Demands Recovery Act comes under Sch. II, Art. 17 (i). A.I.R. 1940 Cal. 215=71 C.L.J. 203=44 C. W. N. 255=188 Ind. Cas. 402.

——Sch. II, Art. 17—Applicability.

Art. 17, Sch. II cannot apply to proceedings for letters of administration or probate of a will as the proceeding is always commenced by an application and not by a plaint though the trial may take the form of a regular suit when it becomes contentious. A.I.R. 1938 Rang. 141=1938 Rang. L.R. 72=176 Ind. Cas. 366.

——Sch. II, Art. 17 (i)—Applicability.

A suit by unsuccessful applicant to Collector for registration as a land-holder under S. 3 (5), Madras Estates Land Act, is not a suit to set aside a summary order governed by Art. 17 (i), Sch. II, Court-fees Act. A.I.R. 1936 Mad. 383=1936 M.W.N. 45=43 M.L.W. 364=71 M.L.J. 493=59 Mad. 882 =161 Ind. Cas. 879.

——Sch. II, Art. 17 (i) and (iii)—Applicability—Suit under S. 25-A, Sonthal Parganas Settlement Regulation for declaration that Record of Rights in wrong—Whether governed by Art. 17 (i) and (iii).

Where a person institutes a suit under S. 25-A, Sonthal Parganas Settlement Regulation claiming a share in an estate, for declaration that the Settlement Officer's decision on his objection for recording his name is wrong and that the entries in the Record of Rights are incorrect inasmuch as the alleged share of the plaintiff is not recorded therein, the suit is governed by Art. 17 (i) and (iii), Sch. II of the Court-fees Act, as the plaint simply asks for a declaration that the Record of Rights is wrong as it omits the plaintiff's name and the extent of his share and the Court-fee payable is Rs. 15.

The fact that the plaintiff's name has not been recorded by the Settlement Officer is no ground by itself for holding that he must sue for possession. The fact whether plaintiff is or is not in possession and, therefore, is or is not entitled to the declaration is a matter which has to be decided in the trial of the suit. A.I.R. 1936 Pat. 171=17 P.L.T. 115=2 B. R. 366=15 Pat. 386=15 Pat. 386=161 Ind. Cas. 706.

——Sch. II, Art. 17—Applicability—Appeal relating to future interest—Court-fee.

In appeals relating to future interest, the proper Court-fee is *ad valorem* on the amount of interest claimed or decreed up till the date of the presentation of the appeal. A.I.R. 1936 Oudh 151=1935 O.W.N. 919=11 Luck. 396=157 Ind. Cas. 633.

——Sch. II, Art. 17—Applicability — Decree for a definite sum.

Art. 17 was never intended to apply to a case where a person with a definite decree for a particular amount of money against him seeks to set it aside. The question whether or not the decree is at the moment capable of being executed without payment of certain amount by the plaintiff as additional Court-fee is not a question which affects the method in which the relief in a memorandum of appeal may be valued. 33 C.W.N. 743=A.I.R. 1929 Cal. 815.

——Sch. II, Art. 17—Applicability—Rent suit—Assessment of fair rent.

There is no particular provision in the Act applicable to a suit for assessment of fair and equitable rent and therefore *ad valorem* Court-fee is to be paid under Ch. I, and Art. 17 of Sch. II does not apply to such a case. 100 Ind. Cas. 913=6 Pat. 17=8 P.L.T. 366=A.I.R. 1927 Pat. 123.

——Sch. II, Art. 17—Applicability — Time for additional Court-fee, refusal of.

Where the subject-matter in dispute is the correctness of the lower appellate Court's decision demanding additional Court-fee and refusing to grant time to comply with it and the resultant rejection of the memorandum of appeal as insufficiently stamped, the relief is not capable of being properly valued and the case cannot be brought under Art. 1 of Sch. I and must therefore fall under the residuary Art. 17 of the 2nd Schedule. 98 Ind. Cas. 663=A.I.R. 1927 Nag. 100.

3. Attachment—Declaration against.

——Sch. II, Art. 17—Attachment — Declaration against—Memo. of objection for rent capable of valuation.

A decree declaring a distraint partly valid was passed and the question raised in the memorandum of objection filed was as regards the exact amount of rent due and none that went to the root of the whole matter and rendered the whole distraint invalid.

Held, that the case does not come within Cl. 17 (vi) and that it being possible to estimate at money value the subject-matter in dispute in these memoranda of objections, *ad valorem* fees were necessary and not fixed fees of Rs. 15. (13 C.W.N. 815, Rel. on.) 122 Ind. Cas. 526=30 M.L.W. 357=1929 M.W.N. 608 =A.I.R. 1930 Mad. 22=57 M.L.J. 260.

——Sch. II, Art. 17—Attachment — Declaration against.

A suit for declaration that a certain property was not liable to be attached in execution of a decree against the plaintiff was valued at less than Rs. 5,000. It was dismissed. An appeal was presented to the High Court by the plaintiff himself, valuing the subject-matter at more than Rs. 5,000, it being found that property was worth more than Rs. 5,000.

Held, that the suit being one on which Court-fee is payable, as under Court-fees Act, Sch. II, Art. 17, S. 8 of the Suits Valuation Act did not apply, that the plaintiff was not debarred from showing that the property was worth more than Rs. 5,000, and that the appeal lay to the High Court. 103 Ind. Cas. 819=6 Pat. 420= A.I.R. 1927 Pat. 289.

4. Attachment—Setting aside.

——Sch. II, Art. 17—Attachment—Setting aside.

Where a person whose claim to properties attached in execution of a decree has been dismissed for default, sues to set aside the decisions a Court-fee of Rs. 10 is payable upon the plaint under Art. 17 of the Court-fees Act. 64 Ind. Cas. 713=26 C.W.N. 126=A.I.R. 1922 Cal. 166.

5. Civil Court.

——Sch. II, Art. 17 (i)—Civil Court—Registrar of Co-operative Societies acting under S. 57-A of Madras Co-operative Societies Act — Suit to set aside order—Court-fee.

A Registrar acting under S. 57-A of the Madras Co-operative Societies Act and in accordance with the rules framed by the Government must be deemed to be a Civil Court for purposes of Art. 17 (i) of Sch. II of the Court-fees Act. For a suit by a claimant to set aside an order by the Registrar only a Court-fee of Rs. 15 is payable. 62 L.W. 146= A.I.R. 1949 Mad. 595=1949 M.W.N. 67 (1)= (1949) 1 M.L.J. 107.

6. Cross-Objections.

——Sch. II, Art. 17—Cross-objections—Suit for partition dismissed—Court holding some property to belong to one M deceased and his two sons—Plaintiffs appealing—Cross-objections by sons of M that property belonged exclusively to them and their father had no share in it—Held, cross-objection did not require ad valorem court-fee.

A suit for partition was dismissed *in toto* on various grounds and plaintiff in the suit presented an appeal. In the course of his judgment, the Judge found that certain property belonged to *M* deceased and his two sons. These two sons filed, what were called, cross-objections to the appeal and their case was that the property in question belonged exclusively to them, and that their late father had no share in it:

Held, that the suit of the plaintiffs was entirely dismissed by the Court below, and that there was, therefore, nothing in that decree against which the applicants required to object. What they really wanted to do was to support the decree on some of the grounds that have been decided against them in the Court below, and that this was really only a means of giving notice to the opposite parties of the intentions of the applicants; consequently no *ad valorem* Court-fees were needed on the cross-objections.

Held, also, that strictly speaking, the objections raised by the applicants on the point of ownership of the properties, were not cross-objections.

Held, further, that strictly speaking, the parties need not have paid any Court-fee at all, though, probably having regard to the contents of Art. 17 of Sch. II of the Court-fees Act, a Court-fee of Rs. 15 was paid by them. A.I.R. 1937 Oudh 512=1937 O.W.N. 1057=171 Ind. Cas. 459.

——Sch. II, Art. 17—Cross-objections.

The omisssion of word "cross-objection," from Sch. II, Art. 17 (*iii*) is a mere clerical error and by a memorandum of appeal, a cross-objection is also intended to be included. A.I.R. 1934 All. 728= 1934 A.L.J. 743=3 A.W.R. 803=57 All. 151= 152 Ind. Cas. 196.

——Sch. II, Art. 17, Sch. I, Art. 1—Cross-objections—Court-fee payable.

Court-fee on memo. of cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Art. 1, Sch. I of the Court-fees Act and not on same principle as laid down for the case of appeals in Art. 17 of Sch. II. A.I.R. 1933 Oudh 528=10 O.W.N. 1202=9 Luck. 406=147 Ind. Cas. 186 (1).

——Sch. II, Art. 17—Cross-objections.

In the case of a cross-objection claiming possession of an immoveable property the Court-fee is payable *ad valorem* on the value of the property and should not be calculated on five times the land revenue in accordance with S. 7 (v). (40 All. 93, Foll.)

An *ad valorem* fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Art. 17 of Schedule II, for Art. 17 does not provide for cross-objections but only for plaints and appeals. (1924 All. 175, Foll.) 85 Ind. Cas. 270=47 All. 89=5 L.R.A. (Civ.) 712=22 A.L.J. 911=A.I.R. 1925 All. 119.

——Sch. II, Art. 17—Cross-objections—Applicability—Article does not apply.

Art. 17 of Sch. II does not apply to cross-objections. 70 Ind. Cas. 286=25 O.C. 275=A.I.R. 1923 Oudh 44.

7. Declaration in appeal.

——Sch. II, Art. 17—Declaration in appeal—Decree against some defendants only.

Where plaintiff, who having sued several defendants on a money-claim obtained a decree against one of them appealed to get a decree against the remaining defendants and valued his claim in appeal as one for declaration.

Held: The plaintiff was bound to pay Court-fee on the amount for which the remaining defendants were sought to be made liable. 67 Ind. Cas. 364=46 Bom. 840=24 Bom.L.R. 313=A.I.R. 1922 Bom. 172.

8. Inter-pleader suit.

——Sch. II, Art. 17—Interpleader suit —Money suit.

In an appeal from a decision in an interpleader suit in respect of money, a Court-fee of Rs. 10 is sufficient and appellant need not pay a Court-fee calculated according to S. 7 (iv) (c) of the Court-fees Act. 61 Ind. Cas. 820=2 P.L.T. 280=A.I.R. 1921 Pat. 305.

9. Suit under O. 21, R. 63, C. P. Code.

——Sch. II, Art. 17 (i) and Art. 17-A (Mad)—Suit by attaching decree-holder under O. 21, R. 63, C. P. Code to set aside order of executing Court allowing a claim under O. 21, R. 58, and for declaration that assignment in favour of claimant was void—Proper Court-fee payable.

When property was attached in execution of a money-decree, the wife of the judgment-debtor filed petition under O. 21, R. 58, C. P. Code, objecting on the ground that the said properties had been assigned to her by her husband and that she was in possession thereof. The Court upheld the claim and referred the decree-holder to a regular suit under O. 21, R. 63, C. P. Code. The decree-holder filed a suit claiming that the order should be set aside in the interests of herself and the other creditors, and that an earlier mortgage and the deed of assignment in favour of the wife should be declared void against them. On a question as to the proper Court-fee,

Held, that the appropriate Article was Art. 17 (i) of Court-fees Act and not Art. 17-A (Mad.). Substantially it was not a suit for a declaration merely but for setting aside the order of the executing Court, the declaration asked for being merely a relief without which the setting aside of the order would be of little value to the plaintiff. The fact, that to the claim to set aside such an order is added some other relief does not necessarily alter the substantial character of the suit. 60 L.W. 325=1947 M.W.N. 40=A.I.R. 1947 Mad. 275=(1947) 1 M.L.J. 1.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

Suits under O. 21, R. 63, Civil P. C., fall within the purview of Art. 17, Sch. II. A.I.R. 1941 Cal. 28=72 C.L.J. 526=45 C.W.N. 50=192 Ind. Cas. 679.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

Suit under O. 21, R. 63, Civil P. C., for declaration of title and injunction restraining defendant from taking possession of suit property and preventing him from taking illegal action to plaintiff's detriment falls under Sch. II, Art. 17 (i), Court-fees Act (7 of 1870) A.I.R. 1941 Pat. 174=21 P.L.T. 1019=7 B.R. 610=193 Ind. Cas. 782.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63.

Prayer for injunction—Single Court-fee under Art. 17 (i) of Sch. II, is sufficient—Court demanding *ad valorem* Court-fee on value of property—Appeal—Court-fee payable on the memo is *ad valorem* on the difference between the value of the stamp on the plaint and the value of the stamp demanded by the trial Court. A.I.R. 1939 Pat. 571=5 B.R. 620=18 Pat. 323=20 P.L.T. 710=181 Ind. Cas. 611.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

When an application to the execution Court under O. 21, R. 58, Civil P. C., is dismissed, the only remedy is by suit under O. 21, R. 63, and such a suit falls within Art. 17 of the Sch. II, Court-fees Act. A.I.R. 1937 Nag. 253=I.L.R. (1937) Nag. 342=169 Ind. Cas. 590 (1).

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63—Objection under O. 21, R. 58, C. P. Code—Suit for mere declaration under O. 21, R. 63, C. P. Code, if lies—Value for court-fees and jurisdiction.

When a claim or objection to attachment has been made under O. 21, R. 58, Civil P. C., a suit for a bare declaration under O. 21, R. 63, Civil P. C., will lie. In such a suit the proper Court-fee payable thereon is that prescribed by Cl. (1), Art. 17, Sch. II, Court-fees Act, namely Rs. 10. The valuation of the suit for Court-fee and the valuation thereof for jurisdiction will always be different, the valuation for the latter purpose being the value of the attached properties. A.I.R. 1934 Rang. 332=12 Rang. 670=153 Ind. Cas. 942.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

Suit under O. 21, R. 63, Civil P. C., for declaration of title to property and for raising of attach-

ment and for an injunction against continuing of execution:

Held, that suit being one in substance for avoiding attachment, Court-fee was payable under Sch. II, Art. 17. A.I.R. 1933 Mad. 439=37 M.L.W. 552=1933 M.W.N. 402=64 M.L.J. 568=56 Mad. 716=144 Ind. Cas. 243.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code—Property sold.

Where plaintiff sues for declaration under R. 63, O. 21 against an order made under R. 58, O. 21, Art. 17, Sch. II, Court-fees Act applies. The fact that the property was actually sold two days later but before the suit was brought does not affect the nature and scope of the suit. 70 Ind. Cas. 332=3 P.L.T. 832=1 Pat. L.R. 51=A.I.R. 1923 Pat. 152.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

In suits under S. 283, C.P.C. (1882), (O. 21, R. 63) the test for the purpose of Court-fee is, what is the value of the quantum of interest which the plaintiff wishes to establish. (1914) M.W.N. 910=27 Ind. Cas. 265.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

A suit under O. 21, R. 63, C.P.C., should bear a stamp of Rs. 10 as prescribed by Art. 17 (1), (1913) 1 U.B.R. 181=22 Ind. Cas. 676.

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code.

A suit under S. 283, (=O. 21, R. 63) C.P. Code, is governed by Art. 17 Cl. (1) and a Court-fee of Rs. 10 only is payable thereon. 12 C.W.N. 169=10 Bom. L.R. 1=17 M.L.J. 618=2 M.L.T. 506=35 C. 202=5 A.L.J. 10=7 C.L.J. 36=35 I.A. 22 (P.C.).

——Sch. II, Art. 17 (i)—Suit under O. 21, R. 63, C. P. Code—Prayer for injunction restraining sale in execution—Consequential relief—Ad valorem fee.

A suit under S. 283, C. P. Code for declaration of title and possession of the plaintiff and for a perpetual injunction on the defendant not to execute his decree against the properties is one in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee only. 13 C. 162; 15 C. 104; 15 L. R. Ap. 14, foll. 31 C. 511.

10. Suit for possession after dismissal of application under O. 21, R. 97, C. P. Code.

——Sch. II, Art. 17 (i)—Private purchaser from party to suit—Obstruction to delivery of possession—Dismissal of application under O. 21, R. 97, C. P. Code—Suit for recovery of possession—Court-fee payable.

A private purchaser from a party in whose favour delivery of possession of properties was ordered in a preliminary decree on condition of his depositing certain moneys in Court by a certain date but who failed to satisfy the condition and get an unconditional order of delivery of possession of the properties was afterwards obstructed by persons not parties to the suit. He thereupon put in a petition under O. 21, R. 97, C. P. Code, for delivery free from their obstruction. The petition was however summarily rejected without investigation and he was directed to file a separate suit against the obstructors in the usual course for possession of the properties. The purchaser having filed a suit against the obstructors to obtain possession,

Held, that the plaint was leviable to Court-fee as in an ordinary suit for possession on the market value of the property, and that Art. 17 (i) of Sch. II of the Court-fees Act had no application. 1948 M.W.N. 770=61 L.W. 759=A.I.R. 1949 Mad. 545 =(1948) 2 M.L.J. 480.

11. Suit under O. 21, R. 103, C. P. Code.

——Sch. II, Art. 17 (i) and S. 7 (iv-A)—Suit under O. 21, R. 103, C. P. Code.

Where the dominant idea of the plaintiff in a suit under O. 21, R. 103, Civil P. C., is not to avoid the summary order passed by the execution Court under O. 21, R. 98, Civil P. C., the suit is, in substance, not one for avoiding the decree passed in favour of defendants but in reality, is a suit which seeks the reversal of the order of the execution Court and falls within the purview of Sch. II, Art. 17 (i) and not of S. 7 (iv-A).

Assuming, however, that the reliefs in such a suit under O. 21, R. 103, Civil P. C., also come under sub-S. (iv-A) of S. 7 of the Act, the special provisions for suits of this nature contained in Art. 17 (i) of Sch. II would override the general provisions contained in sub-S. (iv-A) of S. 7. A.I.R. 1945 All. 111=1945 O.W.N. (H.C.) 30=1945 A.L.J. 109=1945 A.W.R. (H.C.) 32=I.L.R. (1945) All. 68=219 Ind. Cas. 335.

12. Suit for partition.

——Sch. II, Art. 17—Suit for partition of joint family property—Court-fee payable. *See* COURT-FEES ACT, S. 7 (iv) (b) AND SCH. II, ART. 17. 1949 N.L.J. 1.

——Sch. II, Art. 17—Suit for partition—Plaintiff claiming to be in actual or constructive possession—Appeal arising from such suit—Plaintiff found not to be in possession—Court-fee payable.

The wordings of Art. 17, Court-fees Act, which are plain and explicit should be given their ordinary meaning. They show clearly and indubitably that when a suit falls under any one of the clauses of Art. 17, Sch. II, the plaint as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed Court-fee of ten rupees only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. Therefore in appeal, arising from a suit for partition of alleged joint properties, of which the plaintiff claimed to be in actual or constructive possession, a Court-fee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court had found the plaintiff not to be in possession of some or all such properties. A.I.R. 1941 Lah. 123=43 P.L.R. 147=I.L.R. (1941) Lah. 234=194 Ind. Cas. 230 (F.B.).

——Sch. II, Art. 17—Suit for partition—Plaintiff in possession of portion of joint family property—Plaintiff asking for partition—Plaintiff dispossessed—Partition suit on court-fee stamp under Art. 17—Maintainability.

Where the parties formed a joint family and the plaintiff at the time of the institution of the suit for partition was actually in possession of some joint family property, the fact that he ceased to live in the family after the dispute arising on the refusal of the

defendants to accede to partition cannot be interpreted as a relinquishment of possession of his share in the family house. While the plaintiff was a member of the joint family, he had a vested right in the whole property. He was not out of possession at the time the suit was instituted and was clearly entitled to sue for a partition of whatever share may be found due to him. Consequently, he can bring a suit for partition of joint family property on a Court-fee stamp of Rs. 10 in accordance with Art. 17, Sch. II, Court-fees Act. Such a suit cannot be said to be one for the enforcement of a disputed right. 163 Ind. Cas. 821=18 N.L.J. 207.

——Sch. II, Art. 17—Whole property dealt with in two separate suits and two separate orders—Suit in respect of such order.

Where the whole of the property is alleged to have been dealt with in two separate suits and under two separate adverse orders, the plaintiff cannot avoid payment of separate Court-fee under Art. 17, Sch. II, in respect of each order. A.I.R. 1935 Sind 129 =156 Ind. Cas. 702.

13. Suit for declaration.

——Sch. II, Art. 17—Suit for declaration that certain deeds were invalid and spurious and for cancellation and setting aside of the deeds—Court-fees.

A suit raying for a declaration that a certain agreement to cultivate certain lands with indigo was spurious and fabricated and wholly null and invalid and for setting aside and cancelling the deed, is not a suit for mere declaration, but a suit for a declaration and consequential relief and *ad valorem* fees are necessary. 28 C. 334.

——Sch. II, Art. 17 (ii)—Suit for declaration of title and cancellation of mutation—Mutation relief does not require Court-fee. A.I.R. 1936 Pesh. 140 =163 Ind. Cas. 462.

——Sch. II, Art. 17 (iii).

Synopsis.

1. Adoption.
2. Alteration in relief.
3. Appeal against manner in which decree is to be executed.
4. Appeal against part of a decree.
5. Appellate Court—Powers of.
6. Applicability.
7. Bengal Tenancy Act, S. 106—Suit under.
8. Commutation suit.
9. Declaration.
10. Declaratory suit.
11. Different causes of action.
12. Effect on jurisdiction.
13. Further declaration.
14. Injunction and confirmation of possession.
15. Mandatory.
16. Mortgage.
17. Revenue sale.
18. Suit for declaration only.

1. Adoption.

——Sch. II, Art. 17 (iii)—Adoption—Declaration that adoption is valid—No consequential relief—Valuation.

A suit for declaration without consequential relief that an adoption is valid is a suit which does not, on the face of it, admit of being satisfacotrily valued and falls under Sch. II, Art. 17 (*iii*) of the Court-fees Act. 15 N.L.R. 24=43 Ind. Cas. 64.

2. Alteration in relief.

——Sch. II, Art. 17 (iii)—Alteration in relief—Consequential relief unnecessary pending appeal.

Where the suit was for a temporary injunction as a consequential relief and the injunction was sought for pending the disposal of the suit and thereafter the suit was reduced into a mere suit for declaration and it was tried as such with the result that the declaration was given in favour of the plaintiffs and at the stage when the plaintiffs filed their memorandum of appeal they appealed against suit in which declaration without consequential relief was prayed.

Held, the nature of the relief sought may vary at the stage when the appeal is preferred and the Court-fee leviable will be upon the altered relief in appeal and the suit should be treated as falling under Art. 17, Sch. II. 5 Pat.L.J. 394, Foll. 80 Ind. Cas. 563=3 Pat. 640=2 Pat.L.R. (Civ.) 193= 6 P.L.T. 62=A.I.R. 1924 Pat. 582.

3. Appeal against manner in which decree is to be executed.

——Sch. II, Art. 17 (iii)—Appeal against manner in which decree is to be executed—Court-fee payable.

Where the appellant is appealing only against the manner in which the decree is to be executed, and pays the declaratory Court-fee in additoin to the Court-fee on the costs the Court-fee paid is sufficient. 186 Ind. Cas. 392=1940 O.W.N. 207=1940 A.W.R. 112=15 Luck. 413.

4. Appeal against part of a decree.

——Sch. II, Art. 17 (iii)—Appeal against a part of the decree.

A suit for a declaration that a certain alienation made by the plaintiff's father should not be binding upon the plaintiff's reversionary interests was decreed on payment of a certain sum to the defendant-mortgagee. On an appeal by the plaintiff,

Held, that a Court-fee of Rs. 10 was proper. Court-fee payable on part of a whole claim in appeal cannot, in the absence of express direction to the contrary, exceed the Court-fee payable on the whole claim. 92 P.R 1900, foll. 83 Ind. Cas. 332=5 Lah. 137=A.I.R. 1924 Lah. 530.

5. Appellate Court—Powers of.

——Sch. II, Art. 17 (iii)—Appellate Court—Powers of.

One of the grounds for dismissal of suit for mere declaration by the trial Court was that the plaintiff ought to have asked for consequential relief, which he had not done. On an appeal from that decision.

Held, that Court-fee of Rs. 20 only should be charged on the memo. of appeal. It is, however, not within the province of the Taxing Officer to see whether the suit is properly framed whether the plaintiff is entitled to have the declaration asked for or what would be the effect if the plaintiff succeeded in obtaining a declaration as prayed for. If the Court trying the appeal finds that the suit as framed is not maintainable, it will either dismiss it or make such other order as it considers proper. 89 Ind. Cas. 589=27 C.W.N. 972=A.I.R. 1924 Cal. 183.

6. Applicability.

——Sch. II, Art. 17 (iii)—Applicability.

Application by debtor under S. 38, Beng. Money-Lenders' Act—Declaration that amount due was Rs. 1,085, obtained—Appeal under S. 38 (3) of the Act by which he asked that only Rs. 150 were due —Appeal must be regarded as one from order having force of decree and hence Sch. II, Art. 11 had no application the relief asked for being declaratory. A. I.R. 1944 Cal. 230=48 C.W.N. 347=214 Ind. Cas. 90.

——Sch. II, Art. 17 (iii)—Applicability—Suit for management of trust property.

A suit between rival managers for the right to manage the trust property is not a suit for possession within the meaning of S. 7 (*v*) but falls under Sch. II, Art. 7 (*iii*). A.I.R. 1944 All. 279=1944 A.W.R. (H.C.) 194=1944 O.W.N. (H.C.) 166 =1944 A.L.J. 408=I.L.R. (1944) All. 564=218 Ind. Cas. 50.

——Sch. II, Art. 17 (iii), S. 7 (iv) (c)—Applicability—Suit for declaration that property is not wakf and liable to registration under Mussalman Wakf (Bombay Amendment) Act of 1935.

A suit for a declaration that a certain *darga* and other properties belonging to the *darga* are not *wakf* within the meaning of the Mussalman Wakf Act, 1923, and are not liable to registration under the Mussalman Wakf (Bombay Amendment) Act of 1935 is not governed by Sch. II, Art. 17 (*iii*) but by S. 7 (*iv*) (*c*). A.I.R. 1946 Bom. 167=47 Bom.L.R. 859.

——Sch. II, Art. 17 (iii) and S. 7—Applicability —Suit for declaration by legal representative of deceased debtor that agreement registered under C. P. Debt Conciliation Act is unenforceable.

A suit brought by the legal representative of a deceased debtor who is a party to an agreement registered under the C. P. Debt Conciliation Act having the force of a decree, to have that 'decree' made unenforceable against him requires an *ad valorem* Court-fee under S. 7 (*iv*) (*c*) and not under S. 7 (*iv*) (*c*) and not under Art. 17 (*iii*) of Sch. II. Tests for determining whether Court-fee is payable under S. 7 (*iv*) (*c*) or Sch. II, Art. 17 (*iii*) formulated. A.I.R. 1946 Nag. 30=I.L.R. (1954) Nag. 975=1945 N.L.J. 431.

[Overrules, A.I.R. 1941 Nag. 243=199 Ind. Cas. 765.]

——Sch. II, Art. 17 (iii)—Applicability — Mortgagee's appeal in a suit for partition of joint property—Court-fee.

When in a suit for partition of joint family property, a mortgagee is also impleaded as a party and he appeals against the decree in connection with a finding affecting his rights, the Court-fee payable by him is the fixed one under Art. 17 (*iii*). A.I.R. 1945 Oudh 30=1944 O.W.N. 318=1944 A.W.R. (C.C.) 220=20 Luck. 101.

——Sch. II, Art. 17 (iii)—Applicability—Suit for declaring a widow's alienation as void with other incidental reliefs—Single declaration — Declaration by implication.

A declaration cannot be said to be asked for by necessary implication where no declaration in the true sense is necessary before the plaintiff can be given relief.

A plaintiff claiming to be reversioner sued for a declaration that a sale by a widow did not affect his reversionary interest and *inter alia* prayed for the following reliefs:—

(*i*) that the widow has only life interest in respect of the lands in suit and that the plaintiff is the next reversioner;

(*ii*) that the Court may in addition to relief No. (*i*) declare that the loan taken under the sale deed executed by the widow in respect of lands specified was unnecessary and illegal and as such the sale deed is void against the plaintiff who neither is nor can be bound thereby;

Held, that no declaration regarding the plaintiff's character as reversioner is necessary. It neither need be asked nor it can be granted.

Held, that the suit is in substance for a single declaration, the other reliefs are only incidental to the main relief. A.I.R. 1945 Pat. 81=23 Pat. 749 =11 B.R. 423=219 Ind. Cas. 453.

——Sch. II, Art. 17 (iii)—Applicability.

Suit cast in form of declaratory relief in substance aiming at setting aside deed formally executed and registered—Suit is not governed by Sch. II, Art. 17 (iii). A.I.R. 1944 Pat. 17=22 Pat. 783=24 P. L. T. 446=11 B. R. 111=216 Ind. Cas. 132 (F.B.).

——Sch. II, Art. 17 (iii) and S. 7 (iv) (c)—Applicability—Suit by stranger for declaration that property sold at auction sale was his and was not liable to be sold in execution of decree passed in suit in which he was not represented—Suit, held fell under Sch. II, Art. 17 (iii) and not S. 7 (iv) (c)—Relief for cancellation, held mere surplusage. A.I.R. 1943 Lah. 348=I.L.R. (1943) Lah. 565=46 P.L.R. 83=210 Ind. Cas. 218.

——Sch. II, Art. 17 (iii)—Applicability.

An order made by Special Judge under S. 14 (7) U. P. Encumbered Estates Act, is a decree and Art. 17 (iii) does not govern the appeal from such decree where appellant wants reduction in interest decreed by lower Court. A.I.R. 1937 Oudh 501= 1937 O.W.N. 890=1937 R.D. 403=171 Ind. Cas. 78.

——Sch. II, Art. 17 (iii)—Applicability.

Suit by decree-holder for declaration of his right to pursue attached property—Injunction to restrain defendants from objecting to attachment and sale—Suit, held merely one for declaration—Court-fee payable held under Sch. II, Art. 17 (iii). A.I.R. 1937 Sind 248=171 Ind. Cas. 900.

——Sch. II, Art. 17 (iii)—Applicability.

Mortgage decree against father—Ancestral home put to sale—Son's suit for declaration that it cannot be sold being ancestral—Art. 17 (iii) applies. 163 Ind. Cas. 678=16 Lah. 752=37 P.L.R. 860.

——Sch. II, Art. 17 (iii)—Applicability.

In a suit for declaration that certain villages were not subject to any charge of the defendants and to avoid a declaratory decree so far as these properties were concerned it is the amount of decree sought to be realised that determines the value of the suit where the property involved is of larger value than the amount due under decree. A.I.R. 1936 Oudh 317= 1936 O.W.N. 522=162 Ind. Cas. 750.

——Sch. II, Art. 17 (iii) and (i)—Applicability.

Suit under S. 25-A, Sonthal Parganas Settlement Regulation, for declaration that Record of Rights is wrong is a suit governed by Art. 17 (i) and (iii), Sch. II, Court-fees Act. A.I.R. 1936 Pat. 171=17 P.L.T. 115=15 Pat. 386=2 B.R. 366=161 Ind. Cas. 706.

——Sch. II, Art. 17 (iii)—Applicability.

A suit for the reversal of a sale under the Putni Regulation of 1819 is not a suit for declaratory decree without prayer for consequential relief. 81 Ind. Cas. 763=51 Cal. 216=28 C.W.N. 683=39 C.L.J. 212 =A.I.R. 1924 Cal. 731.

7. Bengal Tenancy Act, S. 106—Suit under.

——Sch. II, Art. 17, Cl. (iii)—Bengal Tenancy Act, S. 106—Suit transferred to Civil Court—Court-fee.

A suit under S. 106 of the B. T. Act before the Settlement Officer, although transferred to the ordinary Civil Court for the purpose of trial, is a suit for a declaratory decree within Art. 17, Cl. (3) of Sch. II and is not chargeable with an *ad valorem* fee. 28 C.L.J. 301=48 Ind. Cas. 552.

——Sch. II, Art. 17, Cl. (iii)—Bengal Tenancy Act, S. 106—Suit under—Court-fee.

In the case of a suit under S. 106 of the Bengal Tenancy Act, claiming only those reliefs that are provided for, thereunder the Court-fee is Rs. 10. But where such suit is transferred to a Civil Court under S. 106 the Court is not bound to confine itself to those reliefs alone. It should determine the proper Court-fee and should compel plaintiff to pay *ad valorem* Court-fee for consequential relief. 17 C.L.J. 416=18 Ind. Cas. 275.

8. Commutation Suit.

——Sch. II, Art. 17 (iii) and (vi)—Commutation suit.

A memo. of appeal from a decree in a suit by the landlord for commutation of grain rents into money rents on the ground that the rate fixed by the lower Court was too low falls either under Sch. II, Art. 17, Cl. (iii) or (vi). Neither S. 7, Cl. (1) nor Cl. (iv) (c) has any application. 78 Ind. Cas. 968 =19 M.L.W. 629=34 M.L.T. 216=A.I.R. 1924 Mad. 623=46 M.L.J. 450.

9. Declaration.

——Sch. II, Art. 17 (iii)—Declaration—Property deposited in bank—Suit by plaintiff for mere declaration of his title to property on ground of depositors being *benamidars*, falls under Sch. II, Art. 17 (iii)—Whether suit is barred by S. 42, Specific Relief Act, depends on proof of allegations in plaint. A.I.R. 1943 Lah. 39=45 P.L.R. 22=205 Ind. Cas. 145.

——Sch. II, Art. 17 (iii), S. 7 (iv) (c)—Declaration—Decree against *tavazhi* with *A* as *karnavan*—Suit by junior members for declaration that decree did not bind them as *A* was not *karnavan*—*Ad valorem* Court-fee on decretal amount held not necessary. A.I.R. 1943 Mad. 474=1943 M.W.N. 265=56 M.L.W. 255=(1943) 1 M.L.J. 296=210 Ind. Cas. 477.

——Sch. II, Art. (iii), Sch. I, Art. 1—Declaration—Suit for mere declaration that plaintiffs are mortgagees falls under Art. 17 (iii) of Sch. II—Substance of relief should be seen.

Where the plaintiffs who have been directed by the Revenue Court to go to Civil Court for establishing their title, file a suit for a declaration that they are the mortgagees of the land in suit and there is no consequential relief involved or prayed for, the suit is one for pure declaration and is governed by Art. 17 (iii) of Sch. II and not by Sch. I, Art. 1. In considering such cases, the Court has to see what is the substance of the relief asked for; it should not import any other considerations. A.I.R. 1942 Pesh. 62=202 Ind. Cas. 450.

——Sch. II, Art. 17 (iii)—Declaration—Suit by *G's* grandson against *G's* widow for declaration that he was an adopted son of *G* under his will—*A* collateral of *G* not made party—Decree passed—*A's* suit for declaration that decree in suit by grand-son was not binding on him and that suit was collusive and that will set up was not genuine—Suit, held fell under Sch. II, Art. 17 (iii). A.I.R. 1941 Lah. 159=43 P.L.R. 126=194 Ind. Cas. 613.

——Sch. II, Art. 17 (iii) — Declaration—Criterion for determination of question of court-fees in declaratory suits.

In a suit for a declaration that a deed or a decree is null void, neither the answer to the question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of S. 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the Court-fee payable. The true criterion for determining the question of Court-fee in cases of this description is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple, and involves no other relief, the suit would fall under Cl. (iii) of Art. 17 of Sch. II, Court-fees Act, and the Court-fee payable would be Rs. 10 only. At the initial stage of determining the Court-fee on a plaint, the question whether the declaratory suit is liable to be dismissed, either because it does not fall within the purview of S. 42, Specific Relief Act, or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise. That question will arise only after the necessary Court-fee on the true relief as disclosed by the plaint is paid and the plaint is properly before the Court. A.I.R. 1941 Lah. 97 =43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.).

[Overrules (1), 18 P.R. 1913=19 Ind. Cas. 219 (2); (2) A.I.R. 1923 Lah. 373=73 Ind. Cas. 767; (3) A.I.R. 1935 Lah. 611=156 Ind. Cas. 13; (4) 18 P.R. 1913=19 Ind. Cas. 211; (5) A.I.R. 1930 Lah. 755=129 Ind. Cas. 753.]

——Sch. II, Art. 17 (iii) — Declaration—Plaint asking for declaration that certain sale deeds are void against plaintiff—Court-fee payable.

Where the plaintiff deliberately seeks the relief of declaration and further deliberately avoids claiming consequential relief, such as the cancellation of an instrument, the Court-fee on the plaint and the memorandum of appeal in the lower Appellate Court should be Rs. 10 only in each Court under Art. 17 (iii), Sch. II, Court-fees Act, and not *ad valorem* Court-fee on the value of the subject-matter.

The plaintiff claimed the following relief: "It may be declared that by virtue of the purchase made under the sale deed, dated 24th October 1931, in favour of defendant No. 1 and under the sale deed, dated

October 21, 1931, in favour of defendant No. 2, which are null and void and ineffectual as against the plaintiff and the joint family property, defendants Nos. 1 and 2 did not acquire any right to any part of the houses mentioned at the foot thereof":

Held, (Per *Full Bench*) that the Court-fee of Rs. 10 for each relief was sufficient.

Held, (*Bennett, J.*, dissentient), that the plaint required *ad valorem* Court-fee under Art. 1, Sch. I, Court-fees Act.

Per *Niamatullah, J.*—The relief that a certain sale is void against the plaintiff and does not affect his rights is not a relief of cancellation, but only a declaratory relief. A.I.R. 1935 All. 817=1935 A.L.J. 869 =1935 A.W.R. 896=58 All. 146=156 Ind. Cas. 494 (F.B.).

——Sch. II, Art. 17 (iii)—Declaration.

Suit for a declaration that a certain gift deed was illegal and ineffectual as against the plaintiff and that the defendant had no right to interfere with possession of the plaintiff—Court-fee of Rs. 20 was paid for two declarations on plaint on memos. of appeal in lower Appellate Court and also of the High Court:

Held, that sufficient Court-fee was paid in all the three Courts. A.I.R. 1934 All. 56=1933 A.L.J. 1537=149 Ind. Cas. 802.

——Sch. II, Art. (iii), Sch. I, Art. 1—Declaration—Declaration as to priority—Appeal for cancelling declaration.

Where a suit for recovery of a certain sum of money from a company and debenture-holders of that company and for a declaration that the amount is recoverable in priority to the debentures was decreed and the debenture-holders appealed to modify the decision of the trial Court by refusing the declaration as to priority:

Held, that Art. 17 (*iii*) of the Court-fees Act did not apply and the Court-fee was payable *ad valorem* under Sch. I, Art. 1 of the Court-fees Act on the decretal amount or on the value of their debentures whichever was less. A.I.R. 1933 All. 45=1932 A. L.J. 385=54 All. 553=136 Ind. Cas. 837.

——Sch. II, Art. 17 (iii)—Declaration.

Suit for declaration that property belonged jointly to plaintiff and defendant. Prayer to declare that certain documents do not affect jointness of family:

Held, that Court-fee of Rs. 10 was sufficient for plaint. A.I.R. 1932 All. 560=1932 A.L.J. 466=141 Ind. Cas. 112.

——Sch. II, Art. 17 (iii) — Declaration—Suit for declaration that registered deed is null and void and does not affect property hypothecated—Whether involves consequential relief.

A suit for a declaration that a registered deed was null and void and that it did not affect the property hypothecated thereunder, where there is no prayer for the document being delivery up, cancelled and its registration set aside, is a simple declaratory suit involving no consequential relief and hence a Court-fee of Rs. 10 is sufficient. A.I.R. 1933 Oudh 116=10 O.W.N. 19=8 Luck. 674=141 Ind. Cas. 798.

——Sch. II, Art. 17 (iii) — Declaration—Suit for declaration that decree is not binding on plaintiff, whether suit for mere declaration.

A suit for a declaration that a decree is null and void as against the plaintiff is a suit for a declaratory decree without consequential relief within the meaning of Sch. II, Art. 17 (*iii*), Court-fees Act, and the plaintiff is not bound to pay *ad valorem* Court-fee on the value of the subject-matter of the suit. A. I.R. 1931 All. 369=53 All. 552=1931 A.L.J. 235 =131 Ind. Cas. 604.

——Sch. II, Art. 17 (iii)—Declaration.

A suit by the heir of a lunatic for a declaration that he is entitled to the property of the lunatic which is in the custody of the manager appointed by the Court requires Rs. 10, Court-fee stamp. 72 Ind. Cas. 495=A.I.R. 1924 Pat. 385.

——Sch. II, Art. 17 (iii) and S. 7, Cl. (iv) (c)—Declaratory decree—Consequential relief.

A plaint praying that a decree may be declared ineffectual falls within Art. 17, Cl. (*iii*) and not under S. 7 (*iv*) (*c*). The safest course in such cases is to ascertain what the plaintiff actually asks for in his plaint and not to speculate upon what may be ulterior effect of his success. 2 M. 230, approved. 30 C. 788.

10. Declaratory suit.

——Sch. II, Art. 17 (iii)—Declaratory suit—Person not party to deed suing to have it declared void.

Where a person who is not a party to a deed sues to have it declared void, Art. 17, Sch. II, Court-fees Act applies and a Court-fee of Rs. 10 only is sufficient.

The plaintiffs claiming to be worshippers of a shrine brought a suit for a declaration that certain shops and other property described in the plaint were *waqf*, that the sale of a portion of this property which was effected by defendants was void and invalid and that the defendants had no right to fritter away the said *waqf* property in any way. The plaintiffs not parties to the sale transaction and it was admitted, that if they succeeded in proving their allegations and the declaration asked for was granted to them, they themselves would not be put in possession of the property. They claimed to be some of the worshippers of the shrine and as such sue to have the interests of the institution protected:

Held, that *ad valorem* Court-fee was not necessary and that Art. 17, Sch. II, Court-fees Act, applied and hence Court-fee of Rs. 10 was sufficient. A.I. R. 1935 Lah. 611=156 Ind. Cas. 13.

[Overruled in A.I.R. 1941 Lah. 97=I.L.R. (1941) Lah. 451=193 Ind. 641 (F.B.).]

——Sch. II, Art. 17 (iii)—Declaratory suit—Suit for declaration that plaintiff is nearest reversionary heir filed before summary decision under S. 194, Succession Act—Plaint amended after summary decision without adding a prayer to set aside that decision—Suit held not one under Sch. II, Art. 17 (1).

A suit to set aside a decision of the District Judge under S. 194, Succession Act is a suit to set aside a summary order within Sch. II, Art. 17 (*i*), Court-fees Act, and a fixed Court-fee is payable on the plaint in such a suit.

Plaintiff brought a suit for declaration that he being the nearest reversionary heir was entitled to succeed to the property of the last male holder after

the death of the widow of the last male holder. After the institution of the suit a proceeding started by the defendant on an application under S. 192, Succession Act, was disposed of by the District Judge resulting in an order under S. 194 in favour of the defendant. The plaintiff thereupon applied for amendment of the plaint by adding a relief as to possession but no prayer for setting aside the decision of the District Judge was asked for:

Held, that the suit could not be treated as a suit to set aside a summary decision of the District Judge and consequently Sch. II, Art. 17, Court-fees Act was not applicable. A.I.R. 1946 Pat. 408=227 Ind. Cas. 177=12 Cut.L.T. 10.

——Sch. II, Art. 17—Declaratory suit.

A suit for a declaration that a previous decree declaring certain wakfnamas invalid is not binding on the plaintiff falls under Art. 17, Sch. II, and not under S. 7, Cl. (4) (*c*). 34 C.W.N. 1129=130 Ind. Cas. 369=53 C.L.J. 91=A.I.R. 1930 Cal. 787.

——Sch. II, Art. 17—Declaratory suit.

A suit for declaration that a certain wakfnama is valid as against a defendant who is in possession and claims the properties (covered by the deed) as his own private property is not maintainable without a consequential relief by way of joint possession, injunction or the like. Such a suit cannot, therefore, be brought upon a fixed Coutr-fee payable under Sch. II, Art. 17. 34 C.W.N. 1129=130 Ind. Cas. 369=53 C.L.J. 91=A.I.R. 1930 Cal. 787.

——Sch. II, Art. 17—Declaratory suit.

A suit for declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage decree which has been passed in a suit to which the plaintiff has not been a party does not involve any consequential relief and does not require *ad valorem* Court-fee. 85 Ind. Cas. 349=A.I.R. 1925 Oudh 500.

——Sch. II, Art. 17—Declaratory suit—Right of future contribution.

Where in a suit, for a declaration that the plaintiff will be entitled to contribution from the defendant if and when occasion arose, the plaintiff had paid a Court-fee of Rs. 10 only.

Held, the fee was correct,—(4 Pat.L.J. 302, Foll.) 63 Ind. Cas. 38=1 Pat 1=3 Pat.L.T. 793 =A.I.R. 1922 Pat. 392.

——Sch. II, Art. 17 (iii), S. 7 (iv) (c)—Declaratory suit in Court-fees Act, whether covered by S. 42, Specific Relief Act (I of 1877).

The Court-fees Act was passed in 1870, while the Specific Relief Act was passed in 1877. Section 42, Specific Relief Act, was therefore, not in force when the Court-fees Act, was enacted. The declaratory suits referred to in the Court-fees Act cannot therefore be taken to be necessarily those covered by S. 42 only. A.I.R. 1941 Lah. 97=43 P.L.R. 106= I.L.R. (1941) Lah. 451=195 Ind. Cas. 641 (F.B.).

——Sch. II, Art. 17 (iii)—Declaratory suit.

Suit for declaration that property is *waqf* and alienations thereof are ineffectual against *waqf* property—Relief claimed, held does not fall under Sch. II, Art. 17 (*iii*). A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.).

——Sch. II, Art. 17 (iii)—Declaratory suit.

Suit for declaration that decree is void and illegal —Declaration involves a consequential relief of setting aside the decree—Court-fee held is payable under Sch. I, Art. 1 and not a declaratory fee as given in Sch. II, Art. 17 (*iii*). 191 Ind. Cas. 413=1940 O.W.N. 1121=1940 A.W.R. 454=16 Luck. 526.

——Sch. II, Art. 17 (iii)—Declaratory suit—

Suit for declaration that order of Revenue Officer fixing reduced rent under S. 112, Bihar Tenancy Act (VIII of 1885), was illegal and of no effect and for enhancement of rent to original one—Suit does fall under S. 104-H, Bihar Tenancy Act, but it is for declaration, pure and simple—Court-fee is payable under Sch. II, Art. 17 (*iii*). A.I.R. 1941 Pat. 463=22 P.L.T. 453=7 B.R. 755=194 Ind. Cas. 378.

——Sch. II, Art. 17 (iii)—Declaratory suit—Suit for declaration that gift deed to which plaintiff was not party does not affect his right, title or interest to land is one for declaration without consequential relief.

Because the plaintiff by mistake over-paid the Court-fees both in the Court of first instance and in the lower Appellate Court by treating the suit as one for declaration with consequential relief, it does not follow that he should be called upon to do so in second Appellate Court. A.I.R. 1941 Rang. 269 =1941 Rang.L.R. 387=197 Ind. Cas. 220.

——Sch. II, Art. 17 (iii)—Declaratory suit—Suit under S. 33, U. P. Agriculturist's Relief Act.

Suit under S. 33, U.P. Agriculturists's Act, is a suit for accounts and is not a declaratory suit. Art. 17 (iii), Sch. II, has therefore no application; the the suit is governed by S. 7 (iv) (f), and Court-fee payable is *ad valorem*. A.I.R. 1940 All. 504=1940 A.L.J. 689=1940 O.W.N. 1130=1940 R. D. 538 =I.L.R. (1940) All. 762=1940 A.W.R. 549=191 Ind. Cas. 337 (F.B.).

[Overrules 1936 R. D. 237 (All.).]

——Sch. II, Art. 17 (iii) and Sch. II, Art. 22 (Pun.)—Declaratory suit.

Suit for declaration that alienation of ancestral land by widow would not affect plaintiff's reversionary right—Plaintiff alleging special custom—Suit, held was governed by Sch. II, Art. 22 (Pun.) and not by Sch. II, Art. 17 (iii). A.I.R. 1939 Lah. 58= I.L.R. (1938) Lah. 450=40 P.L.R. 1059=181 Ind. Cas. 426.

——Sch. II, Art. 17 (iii)—Declaratory suit.

Suit for declaration to recover dower debt from certain property—Declaration falls under S. 42, Specific Relief Act—Decree sought held declaratory one without consequential relief and Art. 17 (iii), Sch. II, applied. 1939 O.W.N. 152.

——Sch. II, Art. 17 (iii)—Declaratory suit—Consequential relief.

Prayer for "such relief as Court may think fit"— Such prayer involves consequential relief and S. 7 (iv) (c) applies and not Sch. II, Art. 17 (iii). A.I.R. 1938 Nag. 183=I.L.R. (1939) Nag. 373 =174 Ind. Cas. 891.

——Sch. II, Art. 17 (iii)—Declaratory suit—Hereditary right.

A claim to be declared holder of, or entitled to, an Ayo, *i.e.*, a hereditary right to apply to Government for grants of oil-well sites in certain areas known as "Reserves" and to receive such sites from Government is covered by Art. 17 (iii) and a Court-fee of Rs. 10 is enough. 5 Bur. L.J. 107=98 Ind. Cas. 196=A. I. R. 1926 Rang. 184 (F.B.).

——Sch. II, Art. 17 (iii)—Declaratory suit—Money jointly due from Court.

No *ad valorem* fee need be paid, when a suit is brought by *A* for a declaration that the money decreed by Court as belonging to *B* is jointly due to *A* & *B* and *A* does not object to its being received by *B*. (71 P. R. 1911, Foll.) 75 Ind. Cas. 774=A.I.R. 1923 Lah. 359.

——Sch. II, Art. 17 (iii)—Declaratory suit—Suit to declare that a declaratory decree is not binding on ground of fraud.

Court-fee payable on a suit by the plaintiff for declaration that a decree passed in a previous suit declaring that certain alienations were not valid and not binding on her, is Rs. 10 only, because no consequential reliefs is needed or sought for. 21 C.W.N. 375=35 Ind. Cas. 797.

11. Different causes of action.

——Sch. II, Art. 17 (iii)—Different causes of action.

Suit for deleration that holdings by several tenants were fixed rate holdings and the decrees for rent obtained by their common landlord were inoperative, does not come under Sch. II, Art. 17 (iii) and Court-fee will have to be paid in respect of each cause of action. 4 P.L.J. 297=50 Ind. Cas. 328.

12. Effect on jurisdiction.

——Sch. II, Art. 17 (iii)—Effect on jurisdiction—Value.

In a declaratory suit in which no consequential relief is asked, S. 8 of the Suits Valuation Act can have no application as the Court-fees are not paid *ad valorem* and it is the real value of the property and not the notional value that would determine the valuation for jurisdiction apart from the valuation for purposes of the Court-fees. A.I.R. 1932 Bom. 160=33 Bom. L. R. 1437=56 Bom. 8=135 Ind. Cas. 467.

13. Further declaration.

——Sch. II, Art. 17 (iii)—Further declaration.

Where a mere declaration is sufficient to give the plaintiff full relief, a further declaration will be deemed to be redundant; and the fact that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and make the suit one for a declaration with consequential relief. Where the suit is for declaration that certain transactions diminishing defendant's share in joint family property so as to save it from attachment and sale in execution of plaintiffs' decree, were void, and for declaration of plaintiffs' right to realize their decree from the property, the latter relief is unnecessary, and the suit is only a suit for declaration and not for declaration with consequential relief. It falls within Sch. II, Art. 17 (iii) and not S. 7. (iv) (c) of the Act. 80 Ind. Cas. 655=6 Pat.L.T. 82=3 Pat. 795=A.I.R. 1925 Pat. 44.

14. Injuction and confirmation of possession.

——Sch. II, Art. 17 (iii)—Injunction and confirmation of possession.

Prayers for injunction and for confirmation of possession of are prayers for consequential relief. 81 Ind. Cas. 763=51 Cal. 216=28 C.W.N. 683 =39 C.L.J. 212=A.I.R. 1924 Cal. 731.

15. Mandatory Injunction.

——Sch. II, Art. 17 (iii)—Mandatory injunction—Trust Suit.

Where the plaintiff among other reliefs under S. 92, C.P. Code, claimed a temporary mandatory injunction to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 due from him to the trust.

Held, that the suit was covered by Art. 17 (*iii*) as the prayer was in effect for an account falling within S. 92, C. P. Code. 85 Ind. Cas. 801=20 M. L.W. 716=35 M.L.T. 124=A.I.R. 1924 Mad. 882 =47 M.L.J. 656.

16. Mortgage.

——Sch. II, Art. 17 (iii) and S. 7 (iv) (c)—Mortgage—Suit for declaration that plaintiff's interest in property not liable to be sold in execution of mortgage-decree against father—Court-fee.

A suit for a declaration that the interest of the plaintiff in the joint family property was not liable to be sold in execution of the mortgage decree passed against his father on the ground that the mortgage was not for legal necessity or for the payment of antecedent debt, is a suit for a pure declaration in which no consequential relief is involved, where the plaintiff was not a party either to the mortgage or to the decree. Accordingly a fixed court-fee is payable under Art. 17 (*iii*), Sch. II and not *ad valorem* court-fee under S. 7 (*iv*) (*c*) of the Court-Fees Act. I. L. R. (1948) Nag. 210=A.I.R. 1949 Nag. 37=1948 N.L.J. 121.

——Sch. II, Art. 17 (iii)—Mortgage—Suit for declaration that hypothecation bond was not enforceable and family property mortgaged was not saleable in execution of mortgage-decree.

Where a suit was brought for a declaration that a hypothecation bond executed by the plaintiff's father in favour of the defendant was unenforceable and that the family property mortgaged by that deed was not saleable in execution of an *ex parte* decree for sale obtained by defendant on the basis of the said mortgage deed:

Held, that the relief for a declaration that the family property was not saleable in execution of the decree was a declaratory relief and not a consequential relief and as the plaintiff merely prayed for a declaratory decree, for purposes of court-fee, the case was governed by Art. 17 (*iii*), Sch. II, Court-Fees Act. A.I.R. 1935 All. 667=1935 A. L.J. 498=1935 A.W.R. 545=57 All. 943=155 Ind. Cas. 546.

——Sch. II, Art. 17 (iii)—Mortgage—Suit for recovery of mortgage-money—Plaint mentioning plaintiff's prior mortgage—Prayer for sale of property subject to prior mortgage—Court-fees paid on amount to be recovered on subsequent mortgage only—Proper Court-fee payable.

A suit was brought by the plaintiffs for enforcement of a mortgage, dated 5th July. 1924. The sum claimed under that mortgage was Rs. 2,06,091-10-3. In the plaint, it was alleged that

besides the mortgage in suit the plaintiffs had a prior charge under a mortgage-deed, dated 21st June, 1923. The principal sum advanced thereunder was said to be Rs. 65,000. In the concluding paragraph of the plaint it was prayed that the mortgaged property be sold subject to the charge arising from the prior mortgage of 24th June, 1923. The plaintiff paid court-fee on the sum of Rs. 2,06,091-10-3, alleged to be due under the puisne mortgage in suit. No separate court-fee was paid in respect of the prior mortgage:

Held, that the plaintiffs in effect claimed the mortgage money due under the puisne mortgage coupled with a declaration that the prior mortgage of 24th June, 1923, was valid and binding on the defendants. Consequently, the plaintiffs were not bound to pay court-fee *ad valorem* on the amount due under the prior mortgage; the plaintiff's suit should be considered to be one for recovery of money due under the subsequent mortgage and a declaration in respect of the prior mortgage. They were, therefore, bound to pay an additional court-fee of Rs. 10. A.I.R. 1935 All. 100=1935 A.L.J. 168=4 A.W.R. 1205=57 All. 602=152 Ind. Cas. 814.

——Sch. II, Art. 17 (iii)—Mortgage.

Suit for cancellation of mortgage-deed and decree thereon—First relief, held, did not fall under Sch. II, Art. 17 (*iii*). A.I.R. 1932 All. 485=1932 A.L.J. 684=54 All. 812=139 Ind. Cas. 32 (F.B.). Overrules 5 All. 331 (F.B.).]

——Sch. II, Art. 17 (iii)—Mortgage—Mortgage suit—Appeal seeking declaration of priority of mortgage.

The appellants were impleaded as defendants in a suit for sale on a mortgage upon the allegation that they were subsequent mortgagees. They claimed to be prior mortgagees but the trial Court found that they were subsequent mortgagees and decreed the plaintiff's suit against all the defendants. The appellants appealed praying for declaration that the mortgage deeds held by them were prior to that of the plaintiff and though the appeal was valued at Rs. 1,600, a court-fee of Rs. 10 only was paid:

Held, that Art. 17 (*iii*), Sch. II, Court-Fees Act, had no application to the case and appellant was bound to pay an *ad valorem* court-fee on the value of the subject-matter in dispute in the appeal. A.I.R. 1932 All. 221=1932 A.L.J. 45=54 All. 347=142 Ind. Cas. 770.

——Sch. II, Art. 17 (iii)—Mortgage—Invalidity of a mortgage by a co-parcener.

A suit, brought by a Hindu co-parcener in a joint family for declaration that the mortgage executed by another co-parcener of joint family property does not bind the property mortgaged, is not a suit for cancellation of the mortgage but merely a suit for a declaration coming under Court-Fees Act, Sch. II, Art. 17 (*iii*) and does not require *ad valorem* fee. 78 Ind. Cas. 782=A.I.R. 1925 Lah. 90.

——Sch. II, Art. 17 (iii)—Mortgage suit—Appeal against portion of decree.

When a plaintiff seeks to make a certain property liable for the mortgage or charge, this is not a declaratory suit but a suit involving further relief, and *ad valorem* fee is payable. Nor is it a suit not capable of being valued in money under Art. 17 (*vi*) (23 Cal. 645, Dist.) Where a plaintiff objects in appeal to that portion of the decree which excludes certain property from liability under his mortgage and ask to have it made liable, he must pay court-fees on the value of the property. (17 O.C. 90, Foll.) 65 Ind. Cas. 114=24 O.C. 295=A.I.R. 1921 Oudh 237.

——Sch. II, Art. 17 (iii)—Mortgage—Decree for mortgage money by sale of some properties only—Appeal seeking to make the other properties also liable—Court-fee payable.

Where the decree providing for realisation of mortgage money by sale of only some of the properties mortgaged was appealed against, only on the point that the other properties are also liable and a court-fee of Rs. 10 only was paid, *held, ad valorem* fee on the value of the property, was payable. 17 O.C. 90=24 Ind. Cas. 286.

17. Revenue sale.

——Sch. II, Art. 17 (iii)—Revenue sale—Suit for setting aside and for a declaration that plaintiff is entitled to possession of land so sold—Amount of Court-fee to be paid.

A suit to set aside a revenue sale and for a declaration of the plaintiff's right to possession of land so sold is a suit for declaration where consequential relief is prayed and a fee of Rs. 10 is not enough. 6 C.W.N. 157.

18. Suit for declaration only.

——Sch. II, Art. 17 (iii)—Suit for declaration only—Consequential relief not sought—Order for payment of ad valorem Court-fee—Whether proper.

Where the relief sought in the plaint is merely to the effect that the property in suit or at least the plaintiff's share therein was not liable to attachment and sale in execution of certain decree obtained by the defendant's against his father, and the plaint read as a whole shows clearly that the plaintiff seeks nothing more than a declaration about the property not being liable to attachment and sale, no consequential relief is sought and an order requiring the plaintiff to pay *ad valorem* court-fee cannot be supported and in passing such an order, the Court would be acting with material irregularity. A.I.R. 1934 Oudh 212 (2)=11 O.W.N. 617=148 Ind. Cas. 908 (1).

——Sch. II. Art. 17 (iii)—Suit for declaration only—Suit for mere declaration where no consequential relief is prayed.

When the suit as framed is one for a mere declaration where no consequential relief is prayed, the Court must, for the purpose of fixing the amount of court-fee, look primarily to the language of the plaint. The plaint should be treated as if a consequential relief had been prayed. The court-fee is hence payable under Art. 17, cl. (*iii*) of Sch. II, Court-fees Act. A.I.R. 1936 Oudh 317=1936 O.W.N. 522=162 Ind. Cas. 750.

——Sch. II. Art. 17 (iii)—Suit for declaration only—Plaintiff merely asking for declaration that prior decree is not binding on him.

Where the plaintiff in a case merely asks for a declaration that a previous decree is not in any way binding on him and is altogether void and ineffectual, his suit is one for a declaratory decree only and falls under Art. 17 (iii), Sch. II, Court-fees Act, and a court-fee of Rs. 10 is sufficient. A.I.R. 1933 All. 488=1933 A.L.J. 673=55 All. 791=149 Ind. Cas. 198 (F.B.).

——Sch. II. Art. 17 (iv). *See also* COURT FEES ACT, S. 8.

——Sch. II, Art. 17 (iv)—Applicability—Suit by reversioner for appointment of receiver of property

held by widow alleging acts of waste—No prayer for declaration—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). 27 Pat. 11=A.I.R. 1949 Pat. 346.

——Sch. II, Art. 17 (iv)—Applicability—Reference under S. 19, Land Acquisition Act.

Proceedings before the Court on a reference by the Collector under the provisions of S. 19, Land Acquisition Act cannot be described as a suit to set aside an award within the meaning of the provisions of Art. 17, (iv), Sch. 2, Court-fees Act and the article applicable is Art. 1, Sch. I, and Court-fees are payable in the appeals *ad valorem* on the difference between the sum awarded by the Court and the sum which the appellant claims should have been awarded. 6 Rang. 281=110 Ind. Cas. 870=A.I.R. 1928 Rang. 197.

——Sch. II, Art. 17 (iv) and S. 8—Scope of.

S. 8 applies only to appeals by persons who claim compensation. For an appeal by Secretary of State against the compensation award of the Court, a court-fee of Rs. 10 only is required under Art. 17 (*iv*). 17 P.L.R. 1912=57 P.R. 1913=19 P. W.R. 1913=17 Ind. Cas. 764.

——Sch. II, Art. 17 (iv)—Suit to set aside award—Jurisdiction.

In a suit to set aside an award the plaintiff cannot place arbitrarily his own valuation on the relief and it need not be accepted as conclusive for purposes of jurisdiction. 75 Ind. Cas. 115=18 M. L.W. 399=1923 M.W.N. 747=A.I.R. 1924 Mad. 84.

——Sch. II, Art. 17 (v) (Bom.)—Suit for declaration that decree is void and ineffective, whether governed by Art. 17 (v) or S. 7 (iv) (c).

A suit for declaration that a decree of Rs. 5366 odd is void and ineffective is governed by Art. 17 (*v*) of the Court-fees Act as amended by Bombay Finance Act and not by S. 7 (*iv*) (c). Section 8 of the Suits Valuation Act does not govern the suit, which must bear a court-fee stamp of Rs. 15. A.I. R. 1945 Bom. 474=47 Bom.L.R. 386=I. L. R. 1945 Bom. 1033.

——Sch. II, Art. 17 (v) (Bom.)—Suit to set aside decree or award—Court-fee—Valuation.

Court-fee payable in respect of a suit to set aside a suit both for purposes of court-fee and jurisdiction is the same. A.I.R. 1944 Bom. 316=46 Bom. L.R. 663=218 Ind. Cas. 54.

——Sch. II, Art. 17 (v) (Bom.)—There is nothing in the Bombay Court-fees Amendment Act, (Bombay Act III of 1926) which affects the application of the general provisions of O. 7, R. 11, Civil P.C., to suits to set aside decree with a prayer for consequential relief. Clause (*v*) of Art. 17 introduced by the Amending Act merely provides a fixed fee in a suit to set aside a decree. but it does not provide for a fixed fee when the suit is to set aside a decree and also for consequential relief. A.I.R. 1937 Sind 241=31 S.L.R. 442=171 Ind. Cas. 420 (F.B.).

——Sch. II, Art. 17 (v)—Declaratory suit—Adoption.

Where the reversioners sought for a declaration that the adoption by the widow was not binding on them and paid a Court-fee of Rs. 10, while they valued the suit at Rs. 6,895-15-0, and on the trial Court dismissing the suit they preferred an appeal to the District Court, where the appeal was allowed in part.

Held, on an objection by the defendants as to the forum that as the suit was not one for annulling an adoption but for declaring that the adoption must not affect the plaintiff's reversionary rights was correctly valued for purposes of jurisdiction of Rs. 6,895-15-0 and therefore, the appeal from the trial Court decree must be made to the High Court and not to the District Court. 5 Lah. 440=6 L.L.J. 585= 84 Ind. Cas. 486=A.I.R. 1925 Lah. 229.

——Sch. II, Art. 17 (v)—Declaration that adoption is valid and that plaintiff is owner—Appeal—Court-fee.

Where a suit for a declaration that plaintiff is the adopted son of the last male owner and therefore entitled to property in his possession was dismissed, the Court-fee payable on the appeal is an *ad valorem* fee on the value of the property in possession of the appellant as the adopted son of the last male owner. 15 N.L.R. 24=43 Ind. Cas. 64.

——Sch. II, Art. 17 (v)—Adoption—Suit to set aside—Valuation of relief by plaintiff.

The plaintiff may value the relief claimed in his suit to set aside an adoption, and that valuation determines the Court which is to decide the suit. 37 Cal. 860=14 C.W.N. 929=6 Ind. Cas. 636.

——Sch. II, Art. 17 (vi). *See also* (1) COURT FEES ACT, S. 7 (*iv*) (*b*) (*c*). (2) SCHEDULE I, ARTICLE 1.

——Sch. II, Art. 17 (vi).

1. Applicability
2. Mortgage suit.
3. Partition suit.
4. Partition and possession.
5. Preliminary decree for accounts—Appeal.
6. Recovery of trust property.
7. Refusal to grant letters of administration.
8. Restitution of conjugal rights—Suit for.
9. Trust suits.
10. Miscellaneous.

1. Applicability.

——Sch. II, Art. 17 (vi)—Applicability—Appeal from decree for possession in suit for possession and mesne profits—Cross-objection against rejection of claim to mesne profits—Court-fees payable.

In a suit for possession of immovable property, mesne profits were claimed from the date of suit till decree and also future mesne profits up to recovery of possession. The suit was dismissed, but on appeal, it was decreed. The claim for mesne profits was, however, rejected. The defendants preferred a scond appeal from the decree for possession and the plaintiffs preferred a memorandum of cross-objections in respect of their claim for mesne profits, but without paying any court-fee thereon. On a reference under S. 5 of the Court-Fees Act.

Held, (1) that the cross-objectors must pay *ad valorem* court-fees on the value of that claim to mesne

profits for the period between the institution of the suit and the date of the decree appealed against.

(2) that Art. 17 (*vi*) of the Court-Fees Act has no application to the case. 26 Pat. 119=A.I.R. 1948 Pat. 103.

——Sch. II, Art. 17 (vi). *See also* COURT FEES ACT, S. 7 (*iv*) (*b*), (*c*) anl SCH. I, ART. 1.

——Sch. II, Art. 17 (vi)—Applicability—Relief of appointment of receiver—Relief cannot be valued in terms of money—Court-fee payable is fixed under Sch. II, Art. 17 (vi)—Neither Art. 1, Sch. I nor S. 7 applies.

The appointment of a receiver is not a relief the money value of which can be estimated. Hence a fixed court-fee should be paid on such relief under the provisions of Art. 17 (*vi*) of Sch. II. That being so, the provisions of Art. 1 of Sch. I do not apply. S. 7 is also not applicable as it is intended merely to define the valuation to be put to reliefs when court-fees are to be paid *ad valorem*. A.I.R. 1946 All. 392=I.L.R. (1946) A. 455=1946 A.L.J. 129=1946 O.W.N. (H.C.) 131=227 Ind. Cas. 574.

——Sch. II, Art. 17 (vi)—Applicability.

It is not possible to value a claim for appointment of receiver. 1905 A.W.N. 6=27 A. 406=2 A.L.J. 84.

——Sch. II, Art. 17 (vi) and S. 7 (iv) (c)—Applicability—Suit for reducing maintenance decree by certain amount.

A suit for reducing the amount of maintenance awarded by decree in favour of a widow by a certain amount is not one for a declaration and S. 7 (*iv*) (*c*) does not apply. The case does not also fall under any other sub-section of S. 7. It must, therefore, be relegated to the subsidiary Art. 17 (*vi*) of Sch. II. A.I.R. 1945 Nag. 264=I.L.R. (1945) Nag. 661=1945 N.L.J. 365.

——Sch. II. Art. 17 (vi)—Applicability.

Art. 17 (*vi*) cannot apply to a case where the subject-matter of the claim has any money value. A. I. R. 1943 Pat. 433=11 B. R. 149=217 Ind. Cas. 49.

——Sch. II, Art. 17 (vi)—Applicability—Appeal not relating to amount of decree but to manner of its execution—Art. 17 (vi), Sch. II applies.

Where an appeal does not relate to the amount for which the decree has been passed but to the manner in which the decree can be enforced or executed, the appeal falls under Art. 17 (*vi*), Sch. II. A.I.R. 1940 Oudh 183=1940 O.W.N. 26=1940 A.W.R. 32=1940 R.D. 26=15 Luck. 321=185 Ind. Cas. 766.

——Sch. II, Art. 17 (vi)—Applicability—Appeal against mode of execution.

An appeal not attacking the decree as a whole but only the manner in which the trial Court's decree was enforced falls under Art. 17 (*vi*) and a stamp of Rs. 10 is sufficient. 90 Ind. Cas. 629=7 L.L.J. 364=26 P.L.R. 645=A.I.R. 1925 Lah. 496.

——Sch. II, Art. 17 (vi)—Applicability—Appeal for interest till realization—Court-fee to be paid.

When a party appeals on the ground that interest should have been allowed up to the date of realisation, the proper court-fee payable on the memorandum of appeal is Rs. 10 as provided by Art. 17, Cl. (*vi*), Sch. II, Court-fees Act. A.I.R. 1934 Lah. 32=154 Ind. Cas. 470.

——Sch. II, Art. 17 (vi)—Applicability—Claim for interest after suit disallowed by lower Court—Proper Court-fee.

Where interest after the date of suit not allowed by the lower Court is claimed in appeal, it is necessary to pay court-fee either *ad valorem* on the sum due up to the date of the appeal or at least a court-fee of Rs. 10 as provided by Art. 17 (*vi*), Second Schedule, Court-Fees Act. A.I.R. 1933 Lah. 941=35 P.L.R. 325=148 Ind. Cas. 213.

——Sch. II, Art. 17 (vi)—Applicability.

A suit between rivals managers for the right to manage trust property is not a suit for possession within the meaning of S. 7 (*v*) but falls under Sch. II. Art. 17 (*vi*). 1944 O.W.N. (H.C.) 166=I.L.R. (1944) A. 564=A.I.R. 1944 A. 279=1944 A.L.J. 408=218 Ind. Cas. 50.

——Sch. II, Art. 17 (vi)—Applicability—Claim for specific performance of contract for executing deed of trust falls under Art. 17 (vi).

In order to ascertain the exact nature of the relief claimed, the benefit to the plaintiff should be considered: it is wrong to look to the consequences of the relief rather than to the relief itself.

Plaintiff's father created a trust in respect of some properties and in respect of certain charitable institutions he had intended to set apart certain other properties for their maintenance. But before he could make any definite arrangement, he died. Subsequently the plaintiff and his brother came to terms and executed two agreements, by the second of which it was stipulated that the parties should join in executing a deed of trust for the benefit of the charitable institutions and after the execution of the said deed, they would divide the remainder of the estate into two equal shares. The opposite party failed to comply with this agreement that the properties specified in the family agreement were dedicated to the charitable institutions mentioned therein or in the alternative, for a decree for specific performance against the defendant directing him to execute and register the deed of trust jointly with the plaintiff:

Held, that the claim was clearly one for specific performance of a contract for executing a deed of trust and fell under Sch. II, Art. 17 (*vi*), Court-fees Act. The plaintiff did not seek a change in the character of ownership and it was not possible to estimate the money value of the subject-matter in dispute. A.I.R. 1939 Cal. 155=I.L.R. (1938) 2 Cal. 411=42 C.W.N. 667=181 Ind. Cas. 766.

——Sch. II, Art. 17 (vi), S. 7 (v)—Applicability—Constructive possession through tenant, if good possession for purposes of Court-Fees Act—Person out of possession, claiming property—S. 7 (v) and not Art. 17 (vi) of Sch. II, applies.

Possession obtained by force, fraud or collusion is a valid possession in the eye of the law for the for the purposes of the Court-fees Act. Possession may be actual or constructive and there can be no doubt that possession through tenants is constructive possession recognized by law. If a person is out of possession of property to which he considers he is entitled on the strength of any right, title or interest that he claims in relation thereto

and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession, bare and simple, to which the provisions of S. 7 (*v*), Court-Fees Act, apply and no occasion arises to invoke Art. 17 (*vi*) of Sch. II, Court-fees Act, in his favour. A.I.R. 1938 Lah. 275=40 P.L.R. 27=I.L.R. (1938) Lah. 240=176 Ind. Cas. 762.

——Sch. II, Art. 17 (vi)—Applicability.

An order made by Special Judge under cl. (7) of S. 14. U.P. Encumbered Estates Act, is a decree. An appeal from such decree is not one in which it is not possible to calculate the amount of subject-matter so as to attract application of Art. 17 (*vi*). A.I.R. 1937 Oudh 501=1937 O.W.N. 890=1937 R.D. 403=171 Ind. Cas. 78.

——Sch. II, Art. 17 (vi)—Applicability—Suit for money against joint family consisting of two brothers—Personal decree against one only but decree against both in respect of their shares in joint family property—Appeal, praying for personal decree against other—Court-fees of Rs. 10 paid—Sufficiency of.

Where in a suit for recovery of money against a joint Hindu family consisting of two brothers, the plaintiff gets a decree against both the brothers with respect to their shares in the joint family property but personal decree against one only, and the plaintiff appeals praying for a personal decree against the other also, the relief sought by him being impossible to be valued in money, Art. 17 (*vi*) of Sch. II, Court-fees Act, applies and the court-fees on appeal of Rs. 10, is, therefore, sufficient. A.I.R. 1937 Pesh. 89=1937 Pesh. L.J. 94=171 Ind. Cas. 13.

——Sch. II, Art. 17 (vi)—Applicability—Decree against one defendant—Appeal for joint decree—Court-fee.

Plaintiff who obtained a money decree against only one of several defendants appealed with the object of getting a joint decree for the same amount against the other defendants as well. *Held* he should pay an *ad valerem* Court-fee on the amount of the decree and not a Court-fee of Rs. 10 under Cl. (*vi*), Art. 17. 86 P.R. 1912=222 P.L.R. 1912=225 P.W.R. 1912=16 Ind. Cas. 777.

——Sch. II, Art. 17 (vi)—Applicability—Decree against one defendant but refusing relief against assets of deceased in the hands of another defendant—Appeal for relief against assets—Court-fee.

Where the plaintiffs sued for the recovery of a certain sum of money from the person and personal property of defendant No. 1 and from the assets of a deceased person in the possession of defendants Nos. 2 to 5 but obtained a decree only against defendant No. 1 and they preferred an appeal praying that the suit may be decreed also against the assets of the deceased in the hands of defendants Nos. 2 to 5:

Held, that the value of subject-matter in dispute in the appeal was the value of the assets of the deceased in the possession of defendants Nos. 2 to 5 or the sum claimed by the plaintiffs, whichever was less and the plaintiffs were bound to pay *ad valorem* court-fee on the lesser amount.

Art. 17 (*vi*) of the Court-fees Act cannot apply to the case of the property which clearly has a money value although it may be difficult to estimate such value. A.I.R. 1932 All. 406=1932 A.L.J. 387=54 All. 608=138 Ind. Cas. 622.

——Sch. II, Art. 17 (vi)—Applicability.

Suit on the basis of a pro-note—Plea by defendant for instalments under S. 3, Agricultural Relief Act—Court decreeing six half-yearly instalments—Appeal seeking for 15 years' imprisonments—Appeal is not a miscellaneous one under S. 5 (2), Agricultural Relief Act, and requires Court-fee under Art. 17 (*vi*) of Sch. II. 1936 R.D. 236.

——Sch. II, Art. 17 (vi)—Applicability.

Where, therefore, a suit for accounts valued at rupees 1200 was decreed for Rs. 9154:

Held, that the appeal from such a decree should be valued at Rs. 9154. The appeal was not governed by Sch. II, Art. 17 (*vi*) as it could not be said that the money value of the subject-matter was not even approximately ascertainable. A.I.R. 1934 Cal. 786=51 C.L.J. 447=152 Ind. Cas. 97.

——Sch. II, Art. 17 (vi) (Pat.)—Applicability—Exact money value on appeal difficult to be placed—Court-fee on memorandum of appeal.

In cases where it is difficult to place an exact money value on the appeal for the calculation of *ad valorem* court-fees under Art. 17 (*vi*), Court-fees Act, the memorandum of appeal should bear a court-fee stamp of Rs. 15. A.I.R. 1934 Pat. 473 (1)=15 P.L.T. 696=151 Ind. Cas. 937 (1).

——Sch. II, Art. 17 (vi)—Applicability—Appeal for expunging remarks in judgments—Court-fee.

Where a Subordinate Judge after holding that he had no jurisdiction to try a claim with regard to a particular piece of land gave a decision on the merits and an appeal was preferred praying that either these findings be expunged from the judgment of the Subordinate Judge or they may be declared to be *obiter dicta* and consequently not binding on the parties:

Held, (*i*) that as the relief claimed was not capable of being estimated in money value, a court-fee stamp of Rs. 10 under Art. 17 (*vi*), Sch. II to the Court-fees Act must be paid:

(*ii*) that the findings given by him on the merits of the dispute between the parties were obviously *obiter dicta* and were not binding on the parties;

(*iii*) that there was no provision under which on appeal those findings could be expunged but that the appellate Court could merelp declare that they were not binding, having been made by a Court which had no jurisdiction. A.I.R. 1933 Lah. 678 (2)=144 Ind. Cas. 620.

——Sch. II, Art. 17 (vi)—Applicability.

A suit brought for a declaration with consequential relief, for purposes of Court-fee and jurisdiction is governed by S. 7 (*iv*) (*c*) of the Court-Fees Act. Art. 17 (*vi*) of Sch. II of the Court-Fees Act cannot apply where it is possible to estimate the money value of the claim. 71 Ind. Cas. 31=A.I.R. 1922 Nag. 264.

——Sch II, Art. 17 (vi)—Applicability—Two reliefs.

Where a person was sued by certain members of a joint family on a bond executed by the former to the latter and he made payment to some of them but the suit was decreed in full on the ground that

payment to some could not be regarded as payment to the plaintiffs and the defendant appealed against the decree on a Rs. 10 stamp *held*, that the memorandum of appeal was sufficiently stamped as regards his prayer for a declaration as to who was entitled to the money, but that he must pay *ad valorem* fee on the amount of the decree which he wants to have reduced. 71 P.R. 1911=30 P.L.R. 1912 =205 P.W.R. 1911=13 Ind. Cas. 305.

2. Mortgage suit.

——Sch. II, Art. 17 (vi)—Mortgage suit—Preliminary decree awarding plaintiff principal and interest on part of principal from date of suit till date fixed for redemption—In appeal plaintiff claiming interest on whole amount of principal from date of suit till realization—Court-fee payable.

Held, that the period from the date of institution of the suit till the date of realization was divisible into two parts: (1) the period from the date of the institution of the suit up to the date of redemption, and (2) the period from the date of redemption up to the date of realization. As far as the second period was concerned, the amount claimed by the plaintiff was unascertainable. He must, therefore, pay a court-fee of Rs. 10 under Art. 17 (*vi*) of Sch. II, in respect of this second period. As far as the first period was concerned the total amount caimed by the plaintiff was ascertainable. The total amount awarded to the plaintiff in respect of this period was also ascertainable. From the total amount claimed in appeal in respect of this first period must be deducted the total amount awarded to the plaintiff in respect of this period by the trial Court. The difference between these two sums would be a definite and ascertainable sum. Court-fee on this sum must be paid *ad valorem* under Art. 1 of Sch. I, Court-fees Act. A. I. R. 1943 Lah. 275=45 P. L. R. 382=I.L.R. (1944) Lah. 24=211 Ind. Cas. 53 (F.B.).

——Sch. II, Art. 17 (vi)—Mortgage suit—Appeal from final decree for sale—Amount due under decree not challenged—Relief claimed that extension of time should have been allowed—Court-fee.

Where in an appeal from a final decree for sale in a mortgage suit, the amount due under the decree is not challenged and the only relief claimed is that a prayer which had been made before the passing of the final decree for extension of time should have been allowed, the relief claimed is not capable of valuation and a fixed court-fee of Rs. 15 only is payable under Sch. II, Art. 17 (*vi*), Court-fees Act, and not *ad valorem*.

If under similar circumstances, the appellant does not challenge the amount due under the decree but merely asks for instalments, the relief being incapable of valuation, the same court-fee is payable.

Where in an appeal from a final decree for sale in a suit, the appellant claims two separate reliefs, one for extension of time and the other for instalments but the amount due under the decree is not challenged, the court-fee payable is Rs. 15 in respect of each of the two reliefs. A.I.R. 1938 Nag. 409,=1938 N.L.J. 269=I.L.R. (1938) Nag. 423 =177 Ind. Cas. 274 (F.B.).

——Sch. II, Art. 17 (vi)—Mortgage suit—Decree granting sum to be paid in instalments—Mortgagor asking for decree under Civil P. C., O. 34, R. 4—Decree passed under R. 2—Appeal demanding decree without instalments and under O. 34, R. 4—Court-fee payable.

In a suit on mortgage, the mortgagee claimed a decree for Rs. 32,000 against the mortgaged property and person of the mortgagor. The plaintiff was granted a decree for Rs. 32,000 payable in eight annual instalments and entitling the mortgagee to possession under O. 34, R. 2, Civil P.C., in case the mortgagor failed to pay three instalments regularly. The plaintiff appealed claiming Rs. 32,000 without instalments and a decree under O. 34, R. 4:

Held, that the Court-fee payable in appeal was on the difference between the amount of Rs. 32,000 claimed and the present value of the sum decreed which worked out to Rs. 25,498, *i.e.*, on Rs. 6,502.

Held, also, that in respect of the second relief asking for a decree under O. 34, C. P. Code, Art. 17 (*vi*), *Sch.* II, Court-Fees Act, appied and that the appellant should pay Rs. 10 court-fee and as the failure to pay the court-fee was due to misunderstanding on the part of his counsel, under S. 149, C. P. Code, he should be directed to make up the court-fee:

Held, *further*, that the plaintiff was entitled to a decree against the property as contemplated by O. 34, R. 4, C. P. Code. The stage at which the mortgagor should ask the Court for fixing instalments would be reached when an application is given by the decree-holder to the Court to proceed against the person of the mortgagor under O. 34, R. 6, C. P. Code. A.I.R. 1937 Pesh. 31=1937 Pesh. L.J. 31 =167 Ind. Cas. 26.

——Sch. II, Art. 17, Cl. (vi); Sch. I, Art. 1—Mortgage suit—Defendants holding prior and subsequent mortgages—Suit by plaintiff—Decree on the basis of plaintiff's being first mortgagee—Appeal—Advantages sought by defendants, if can be assessed at money value—Court-fee payable on appeal.

The appellants held a prior mortgage and two subsequent mortgages in respect of certain properties which were also covered by a mortgage in favour of the plaintiff. In a suit by plaintiff he was given relief on the basis of his being the first mortgagee ignoring the appellant's prior mortgage. The appellants sought to bring the case within the words of Sch. II, Art. 17 (*vi*):

Held, that although the appellants were asking for certain advantages, they were doing so only on the footing of their being prior as well as subsequent mortgagees who were made parties to the suit, that their position in the appeal must be that as defendants in the plaintiff's suit, they are entitled to have certain right of theirs protected in the decree which the plaintiff obtains or has obtained, and hence the dues on the appellants' mortgage or mortgages cannot be regarded as the value of the subject-matter in dispute and that the advantages which appellants are asking cannot be assessed at a money value, so long as they are asking for them in the suit or in the appeal and hence the memo. of appeal would come within the words of Cl. (*vi*) of Art. 17, Sch. II, Court-Fees Act, and not within Art. 1, Sch. I.

It has not been the policy of the law to tax with court-fees *ad valorem* every advantage which a party is seeking for in Courts. Until the amendment of

the C. P. Code in 1929, a prior mortgagee's rights were not required to be adjudicated on in a suit by a puisne mortgagee in the manner now provided for and the Legislature while it has now enacted Form No. 10 and given it statutory recognition in Rr. 2 and 4 (4) of O. 34, has not yet made any provisions for court-fee which may be payable by the prior mortgagee. A.I.R. 1934 Cal. 377=58 C.L.J. 542=38 C.W.N. 248=61 Cal. 320=148 Ind. Cas. 1084.

——Sch. II, Art. 17 (vi)—Mortgage suit—Defendant's application for extension of time—Final decree passed.

An application was made for a mortgage decree being made final as defaults were made in payment of the decretal amount. Defendants applied for an extension of time for payment of instalment. The application was refused and the mortgage decree was made final. An appeal was preferred to the High Court:

Held, that the appeal was under Cl. (*c*), R. 1, O. 43, C. P. Code, from an order under O. 34, R. 3, refusing to extend time for the payments of the mortgage money and not one from a final decree. Success of the defendants in such a case will necessarily have the effect of vacating the final decree which followed the refusal to extend time. The defendants need not appeal from the final decree which automatically followed by refusal to extend time for payment. *Ad valorem* court-fees were not necessary. 111 Ind. Cas. 294=25 N.L.R. 175=A.I.R. 1928 Nag. 333.

——Sch. II, Art. 17 (vi)—Mortgage suit—Appeal—Payment after date.

The memo. of appeal against a redemption decree absolute on the grounl that the money was deposited at a later date than that allowed and that it should not have been so received should bear Rs. 10 stamp as the value of the relief cannot be determined. 7 N.L.R. 41=10 Ind. Cas. 736.

——Sch. II, Art. 17 (vi)—Mortgage suit—Appeal—Ground of non-liability of certain properties.

Some defendants in a mortgage suit appealed from the decree in the suit. They did not question the amount decreed, but urged that the mortgage was not binding on them so far as their shares in the mortgaged properties were concerned:

Held, that the value of the appeal for court-fee is the value of their shares in such properties and that Sch. II, Art. 17 (*vi*) does not apply. 30 Mad. 96 (F.B.); 13 C.W.N. 815, Rel. on. 37 Cal. 914 =8 Ind. Cas. 1145.

3. Partition suit.

——Sch II, Art. 17 (vi) — Partition suit—Suit alleging joint possession with other co-sharers—Court-fee payable — Evidence that plaintiff is not in possession—If affects nature of suit.

In a suit for partition on the allegtion of joint possession with other co-sharers, a fixed court-fee of Rupees Fifteen is payable. The question as to what court-fees are payable on a plaint has to be decided on the allegation in the plaint and the nature of the relief claimed. Whatever may transpire in the evidence, the plaint remains the same until and unless it is amended, and a conclusion on a consideration of the evidence that the plaintiff is or is not in possession cannot affect the nature of the suit as instituted in the plaint. If and when a Court comes to the conclusion that the allegation of joint possession in the plaint is not borne out by the evidence the obvious result would be that the plaintiff's suit would fail unless the plaint is suitably amended and further court-fees paid. 54 C.W.N. 454=A.I.R. 1950 Cal. 397.

——Sch. II, Art. 17 (vi) and S. 7 (iv) (b) and (c)—Partition suit—Court-fees payable—Considerations for Court. *See* COURT-FEES ACT, S. 7 (*iv*) (*b*) AND (*c*) AND SCH. II, ART. 17. 1950 N.L.J. 107=A.I.R. 1950 Nag. 81.

——Sch. II, Art. 17 (vi) (Bih.)—Partition suit.

Suit for partition of houses and for separate possession of share—Alienees from manager made parties—Alienations in their favour challenged as sham and without consideration—Nature of suit—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART. 17 (6). 30 P.L.T. 214.

——Sch. II, Art. 17 (vi) and S. 7 (iv) (b)—Partition suit—Plaintiff claiming to be in joint possessionn of that property—Court-fee.

It is well-established (*a*) that the provisions of the Court-Fees Act should be construed strictly and in favour of the subject, bearing in mind always that the object of the Act is not to arm a litigant with a weapin to harass his opponent, (*b*) that a suit for partition and separate possession of the plaintiff's share in joint family property of which he claims to be in possession, either actual or constructive, falls for the purpose of payment of court-fee within Art. 17 (*vi*) of Sch. II and not within S. 7 (*iv*) (*b*) of the Court-Fees Act, (*c*) that the amount of court-fee payable should be determined on the allegations of the plaintiff in the plaint as to the cause of action and the reliefs and not on what is pleaded by the defendant in his pleadings; it is however open to the Court for this purpose to look to the substance and not merely to the form of the plaint. To attract the date of suit be in actual physical possession of application of Art. 17 (*vi*) of Sch. II of Court-Fees Act it is not necessary that the plaintiff should at the property in which he claims a share. It is sufficient if he claims to be in joint or constructive possession. I.L.R. (1948) Nag. 117=A.I.R. 1949 Nag. 97=1948 N.L.J. 203.

——Sch. II, Art. 17 (vi)—Partition suit.

Where there is no dispute about a share in a suit for partition and where the only question is whether one particular property should be allotted to one party or the other, it is really quite impossible to attach any pecuniary value to the dispute and S. 7 (*vi-A*) does not apply. In such a case, recourse should be had to Art. 17 (*vi*) in Sch. II of the Act. A.I.R. 1943 All. 281=1943 A.L.J. 247=1943 A. W.R. (H.C.) 118=I.L.R. (1943) All. 507=209 Ind. Cas. 411.

——Sch. II, Art. 17 (vi) — Partition suit—Plaintiff in possession—Art. 17 (vi) applies.

(Per *Fazl Ali, Meredith and Chatterji, JJ.*).—A suit for partition of the joint property where the plaintiff is already in possession falls under Sch. II, Art. 17 (*vi*). A.I.R. 1943 Pat. 433=11 B.R. 149. =217 Ind. Cas. 49.

——Sch. II, Art. 17 (vi)—Partition suit.

The plaintiff simply askel for partition of the joiut family properties. The plaint asked neither for any-

declaration nor for the cancellation of any document nor for recovery of possession but contained recital to the effect that the defendant had got up a colourable deed of partition of the joint family estate with a false recital of previous partition and got the same executed by the plaintiff during the plaintiff's minority and that the deed was not intended to be acted upon:

Held, that if the allegations in the plaint were true, the document was void and since in order to give relief to the plaintiff, a declaration that the document was void was not necessary and a finding that no such document was ever actually executed by the plaintiff would be enough the suit fell within the purview of Sch. II, Art. 17 (*vi*) and the court-fee of Rs. 15 was sufficient. A partition suit pure and simple falls within Sch. II. Art. 17 (*vi*) Court-fees Act. A.I.R. 1942 Pat. 60=20 Pat. 780=8 B.R. 471=23 P.L.T. 218=198 Ind. Cas. 866.

——Sch. II. Art. 17 (vi)—Partition suit.

Art. 17 (*vi*), Sch. II Court-Fees Act, applies to a suit by a coparcener for partition and equally to a similar suit by a co-owner. It makes no difference for this purpose, that in one case the joint property is held by the parties as 'joint tenants' while in the other they own it as 'tenants-in-common.' And in the latter class of cases, it is again immaterial that the parties are governed by Muhammadan law, or that they do or do not belong to the same family. A.I.R. 1941 Lah. 152=43 P.L.R. 238=I.L.R. (1941) Lah. 308=194 Ind. Cas. 125 (F.B.).

——Sch. II. Art. 17 (vi) — Partition suit—Suit for declaration that sale-deed executed by plaintiff's brother was fraudulent and for possession of his half share in house as it stood on date of suit including improvements made by purchaser—Court-fee must be paid on value of house as it stood on date of suit.

Where a plaintiff brings a suit for a declaration that the sale-deed executed by his brother for himself and on his behalf was bogus and fraudulent and for possession of his half share in the house as it stood on the day of the institution of the suit including the improvements made by the purchaser he is liable to pay court-fees not on value of the house as it stood at the date of the sale but as it stands on the day of the institution of the suit inasmuch as he cannot on the one hand get the benefit of the improvements and on the other hand refuse to pay court-fee on the value of the improvements. A.I.R. 1941 304=I.L.R. (1941) Nag. 629=1941 N.L.J. 410 =197 Ind. Cas. 43.

——Sch. II. Art. 17 (vi)—Partition suit.

Plaintiff not alleging his actual or constructive possession—Prayer for delivery of his share to him and also for accounts and his share in amount found to belong to joint estate—Suit held does not fall under Sch. II. Art. 17 (*vi*). A.I.R. 1941 Rang. 297 =1941 Rang.L.R. 249=197 Ind. Cas. 111.

——Sch. II. Art. 17 (vi)—Partition suit.

In a suit for partition of joint family property where plaintiff alleges joint possession, court-fee is levied under Art. 17 (*vi*), Sch. II. A.I.R. 1940 Oudh 47=1939 A.W.R. 310=1939 O.W.N. 1055= 15 Luck. 76=184 Ind. Cas. 371.

——Sch. II. Art. 17 (vi)—Partition suit.

Sch. II. Art. 17 (vi) applies to a partition suit where plaintiff is in joint possession. A.I.R. 1940 Mad. 113=(1940) 1 M.L.J. 32=1940 M. W. N. 126=51 M.L.W. 11=I.L.R. (1940) Mad. 259=186 I.C. 494 (F.B.).

[Overrules 21 M.L.J. 21=1910 M. W. N. 755= 8 Ind. Cas. 512 (F.B.).]

——Sch. II, Art. 17 (vi)—Partition suit.

In suits for partition the question of court-fee must always be decided upon the allegations contained in the plaint. If a relief for possession is claimed by the plaintiff, the Court would be justified in calling upon him to make good the deficiency in court-fee, otherwise if the plaintiff alleges to be in joint possession of the property, in that case the matter would be governed by Art. 17 (*vi*) of Sch. II of the Court-fees Act. When the plaintiff alleges his joint possession, and in fact proves the same by his actual residence in a portion of the house sought to be partitioned, he can no longer be considered to be in need of possession, and his right to share the property is certainly beyond question. An *ad valorem* court-fee is payable only by such a plaintiff who is out of possession, and by means of his suit tries to obtain possession as well as partition. The plaintiff may be in actual possession of even a smaller share than is his due, yet be cannot be considered to be out of possession. By the very act of his occupation, his right to share in the property becomes established, and his asking for a partition by metes and bounds simply amounts to a prayer for enabling him to enjoy his share separately and more fully. This request amounts to nothing more than a desire for a change in the mode of enjoyment of the joint property. A relief like this is not measurable in terms of money and therefore properly falls within the purview of Art. 17 (*vi*) of Sch. II the Court-fees Act. 189 Ind. Cas. 681.

——Sch. II, Art. 17 (vi)—Partition suit.

Suit for partition of alleged joint family property—Court holding property to be self-acquired one of defendant and dismissing suit—Appeal—Court-fee payable is not *ad valorem*. A.I.R. 1939 Oudh 90=14 Luck. 346=1938 O.W.N. 1265=1938 A.W.R. 139=179 Ind. Cas. 59.

——Sch. II, Art. 17 (vi)—Partition suit by person in possession as co-tenant—Defendant denying plaintiff's title and possession.

Where a person who alleges that he is in possession of immovable property as a co-tenant on his own behalf and on behalf of others, files a suit for partition of that property, the suit is not converted into a suit for declaration of title and recovery of possession by a mere denial on the part of the defendant as to the plaintiff's title and possession. The suit is governed by Art. 17 (*vi*) of Sch. II, Court-fees Act; no *ad valorem* court-fee is required. A.I.R. 1938 Rang. 76=1937 Rang. L.R. 447=174 Ind. Cas. 794.

——Sch. II, Art. 17 (vi) — Partition suit—Property charged to meet marriage expenses—Held, on facts, that Court-fee of Rs. 15 was not sufficient—Court-fee ad valorem on sum equal to share in charge—Necessity of paying.

In a suit for partition in the original Court it was held that two of the plaintiff-appellants each had a share of one-sixth in the property and that the rest of the property belonged in equal shares to their father and mother and two half brother, *i.e.*, that there were six persons who were each to receive equal shares in the property. It was also found that the property was charged with a sum of

Rs. 5,000 to meet the marriage expenses of two of the plaintiffs' sisters. From that decree, there was an appeal by four of plaintiffs. The first Court had held that the charge was only on the property of the first two plaintiffs and the father and the mother. It held that there was no charge on the property of two half-brothers, defendants Nos. 2 and 3. The plaintiff-appellants paid only a sum of Rs. 15, as in suits for partition under Sch. II, Art. 17 (*vi*) of the Court-fees Act:

Held, that the provisions of Sch. II, Art. 17 (*vi*) apply when it is impossible to value the subject-matter in dispute in the Appellate Court. In this case, the appellants, on the findings of the first Court, were bound to pay half of Rs. 5,000 on account of the marriage expenses of their sisters. What they said in memorandum of appeal was that their half-brothers, defendants Nos. 2 and 3, should also pay their share of those expenses. According to the contention in appeal, the share of the half-brothers between them was one-fourth. Therefore, if the contention of the appellants was correct, these brothers had between them to pay one-fourth of Rs. 5,000. If this contention alone succeeded, the appellants would escape the burden of this charge to the extent of one-half of one-fourth of Rs. 5,000 and the father and the mother would escape the charge to the extent of the other half of one-fourth. The subject-matter in appeal, so far this point was raised, was one-eighth of Rs. 5,000 and hence the plaintiff appellants in the lower Appellate Court, besides the sum of Rs. 15 on account of the dispute of their share, should also have paid the court-fee *ad valorem* on a sum equal to one-eigth of Rs. 5 000. A.I.R. 1936 All. 221=1936 A.W.R. 340=1936 A. L. J. 513=159 Ind. Cas. 802.

——Sch. II, Art. 17 (vi)—Partition suit.

Suit for partition of his share by co-proprietor in joint possession should be stamped under Sch. II, Art. 17 (*vi*). A.I.R. 1935 Pesh. 30.

——Sch. II, Art. 17 (vi) — Partition suit—Plaintiff in possession—Court-fee.

If a person is out of possession on his own allegation, he cannot sue for partition without suing for possession also and he would have to pay court-fee on the market value of his share. But where the plaintiff sues for partition on the footing that he is in actual possession. it is unnecessary for him to pay court-fee upon a claim for recovery of possession. He need not do so even if the defendants deny his title.

Where the plaintiff had claimed unnecessary relief, such as declaration of title and injunction in a partition suit, it is open to him on appeal to confine his relief to the proper reliefs and to pay court-fee on such relief alone. A.I.R. 1932 Cal. 227=59 Cal. 315=35 C.W.N. 942=136 Ind. Cas. 600.

——Sch. II, Art. 17 (vi) — Partition suit—Joint possession.

Where in a suit for partition alleging joint possession, the Court decided that plaintiff had no possession and demanded additional court-fee and in the plaintiff's default the suit was dismissed, he filed an appeal paying Rs. 10. Court-fee on the memorandum under Sch. 2, Art. 17 (*vi*) without challenging the order as to court-fee.

Held, that the omission to include in the memorandum of appeal a ground expressly challenging the finding on the question of court-fee is immaterial and the plaintiff was not liable to make good the alleged deficiency of court-fee until the question of joint possession was not finally settled in appeal. 124 Ind. Cas. 708=A.I.R. 1930 All. 443=1930 A. L.J. 984=52 A. 756.

——Sch. II, Art. 17 (vi) — Partition suit—Setting aside prior deed.

The plaintiff filed a suit for partition against his father and step-brother. It happened that prior to the filing of the suit there was a registered deed of partition but the plaintiff alleged that it was voidable at his option and sought for relief on the basis that the partition-deed was avoided. *Held*, that substantially the plaint was one for a declaration that the partition deed is not binding on him and for further reliefs following such declaration. The court-fee payable so far as the immovable properties mentioned in the plaint is the same as that prescribed bp S. 7 (4) (*c*) and that as regards other moveable properties the plaintiff was entitled to value them in the way he liked:

Held, further that under those circumstances, Art. 17 (*vi*) of the Second Schedule was inapplicable. 1930 M.W.N. 358=129 Ind. Cas. 824=A.I.R. 1931 Mad. 94.

——Sch. II, Art. 17 (vi)—Partition suit.

Where hhe plaintiff alleged that he was in joint possession of the land which formed the subject-matter of the suit for partion, *held*, that Art. 17, (*vi*) of Seh. II applied to the case. 31 Punj.L.R. 315=123 Ind. Cas. 525 (2)=A.I.R. 1930 Lah. 839.

——Sch. II, Art. 17 (vi)—Partition suit—Joint possession.

In an appeal from a suit for possession by partition of certain land where the plaintiff alleges that he was in joint possession of the property in suit and the finding of the trial Court is to the effect that he was in such possession, the provisions of Court-Fees Act applicable are Art. 17 (*vi*), Sch. II and not S. 7 (4) (*b*). The court-fee payable in such case is, therefore, Rs. 10 and not an *ad valorem* court-fee on the market price of plaintiff's share of the property: (8 Cal. 757; 34 All. 184; 43 Mad. 396; 44 Ind. Cas. 216; 43 Mad. 996 Rel. on). 123 Ind. Cas. 525=31 P.L.R. 315=A.I.R. 1930 Lah. 839.

——Sch. II, Art. 17 (vi)—Partition suit—Relief as to accounting by karta.

Even though there may be a relief asking for account on the ground of fraud and improper conduct of the "karta" of a joint Hindu family, a suit for partition by a junior member against the "karta" of the family cannot become a suit for account. The allegation of fraud and improper conduct do not change the character of the suit. 120 Ind. Cas. 770 =8 Pat. 818=10 P.L.T. 491=A.I.R. 1930 Pat. 1.

——Sch. II, Art. 17 (vi)—Partition suit—Appeal.

Since in a suit for partition by a co-sharer claiming to be in possession of a part of the property, court-fee of Rs. 10 and not *ad valorem* court-fee is payable, the defendant appellant in such a suit also entitled to file his appeal on the same court-fee. A.I.R. 1930 Rang. 164=126 Ind. Cas. 645.

——Sch. II, Art. 17 (vi)—Partition suit—Appeal.

Where in a suit for partition the defendant appeals from the decree for partition he is not entitled to stamp the appeal memorandum with Rs. 10, court-fee stamp simply on the ground that he is in possession of the property. A.I.R. 1930 Rang. 164=126 Ind. Cas. 645.

——Sch. II, Art. 17 (vi)—Partition suit—Appeal.

In appeals against decrees from partition suits, the proper court-fees payable are Rs. 15. It does not matter whether the ground of attack is with reference to the allotment of specific portion of immovable or movable property or the ground of attack is the question of costs. 56 Cal. 188=116 Ind. Cas. 383 =32 C.W.N. 1105=A.I.R. 1928 Cal. 878.

——Sch. II, Art. 17 (vi)—Partition suit—Declaration of title and possession.

Where the plaint clearly asked for a declaration of title and possession as well as partition:

Held, that *ad valorem* court-fee was payable. A. I.R. 1923 Pat. 113, Foll. 85 Ind. Cas. 538=A.I. R. 1925 Pat. 703.

——Sch. II, Art. 17 (vi)—Partition suit—Plaintiff in possession and out of possession—Court-fee.

Where the plaintiff affirms that he is in possession of a portion of the joint estate and claims a change in the mode of enjoyment of the property and prays for separate possession of his share as the result of redistribution of the property under the separate management of the parties his suit is one for partition of his share in the entire property, and as such the claim falls under Art. 17 (*vi*) of Sch. II, Court-Fees Act, and a fixed fee of Rs. 10 only is payable thereon. Where, however, the plaintiff admits that his title is disputed and that he is out of possession and enjoyment of the property sought to be partitioned and that he does not hold or possess or occupy any portion or item of the divisible property and asks for partition, his suit must be treated practically as an ejectment suit and an *ad valorem* court-fee is leviable. 81 Ind. Cas. 643=7 N.L.J. 91=A.I.R. 1924 Nag. 105

——Sch. II, Art. 17 (vi)—Partition suit—Plaintiff in and out of possession—Court-fee.

In a suit for partition, pure and simple, where the plaintiff is in possession of his share of the property and simply wants to alter the mode of its enjoyment by claiming to hold his proportionate share in the properties separately from the other joint holders the court-fee payable will be Rs. 10 only under Sch. II, Art. 17 (*vi*) of the Court-Fees Act. Where the plaintiff is out of possession of his share in the joint property, he is required to pay *ad valorem* court-fee under S. 7 Cl. (4) of the Court-Fees Act inasmuch as it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay Court-fee upon the valuation of the share in the property. A prayer, in a partition suit, asking for a declaration that certain decrees are void, comes under S. 7, Cl. (4) (*c*) of the Court-Fees Act and the court-fee payable thereon is *ad valorem* on the loss to the plaintiff. The valuation of the relief made by the plaintiff should be the criterion for the purpose of determining jurisdiction unless the said valuation is wrong or arbitrary. 1921 P.H.C.C. 89=A.I.R. 1921 Pat. 78=1 P.L.T. 595=5 P.L.J. 540=58 Ind. Cas. 236.

——Sch. II, Art. 17 (vi)—Partition suit—Mode of partition—Appeal as to.

Where in an appeal from a partition suit, there is no dispute as to the respective shares of the parties and the appellant seeks only to impeach the mode of partition, the case falls within Art. 17 (*vi*) of Sch. II to the Court-Fees Act and the memorandum of appeal requires only a rupees 10 stamp. 62 Ind. Cas. 979 (Lah.).

——Sch. II, Art. 17 (vi)—Partition suit—Substance of the relief.

Where the plaintiffs claim under the guise of a partition suit a declaration of their title, which is the proper subject-matter of a title suit, the suit must be valued as if it is a suit on title for the purpose of court-fee. 65 Ind. Cas. 294=3 P.L.T. 293=1922 P.H.C.C. 65=6 P.L.J. 662=A.I.R. 1923 Pat. 113.

——Sch. II, Art. 17 (6) and S. 7 (i) and (iv)—Partition suit—Prayer for accounts—Valuation—Court-fee payable.

If a suit is a plain suit for partition, the court-fee payable thereon is Rs. 10, if it is in essence a suit to obtain a decree for money or a decree for immovable property then *ad valorem* court-fee must be paid. 49 Ind. Cas. 115 (Pat.).

——Sch. II, Art. 17 (vi)—Partition suit—Order of Court directing defendants to put in stamped applications for separation of shares—Appeal—Court-fee.

A memorandum of appeal against an order of the Court in a partition suit, directing the defendants to put in properly stamped applications if they wished to have their respective shares separated off by the Court, must be stamped with a Court-fee of Rs. 10 under Sch. II, Art. 17, (*vi*). 274 P. L.R. 1913=183 P.W.R. 1913=20 Ind. Cas. 177.

——Sch. II, Art. 17 (vi)—Partition suit—Suit by person in joint possession—Denial of plaintiff's possession by defendant—Court-fee—Appeal.

The plaint in a suit for partition and separate possession, by a person claiming to be in joint possession of the property, require a Court-fee stamp of Rs. 10, under Sch. II, Art. 17 (*vi*), 8 Cal. 757; 16 Ind. Cas. 771, Foll. A decision as to the amount of Court-fee should be based solely on a consideration of the cause of action on which the plaintiff is suing on and not pleas of defendant. 6 S.L.R. 72 =16 Ind. Cas. 773.

——Sch. II, Art. 17 (vi)—Partition suit—Plaintiff in joint possession—Court-fee.

A suit for partition by a person claiming to be already in joint possession does not require an *ad valorem* court-fee. The suit is for a benefit which it is not possible to estimate at money value; the proper court-fee is a stamp of Rs. 10 under Sch. II, Art. 17 (*vi*). 18 Bom. 209; 8 Cal. 757, Foll. 6 S.L.R. 74 (Note)=16 Ind. Cas. 771.

——Sch. II, Art. 17 (vi)—Partition suit—Decree in accordance with award—Objections—Revision—Court-fee payable—Ex parte proceedings—Objections to award.

From a decree in accordance with an award by which one of the parties was directed to pay a sum

of money to the other side in cash and by which actual partition of joint properties was also effected, a petition for revision was filed urging that he was not liable to pay the sum of money; and that the Court failed to consider and dispose of his objections to the award. He pair an *ad valorem* court-fee as regards the first relief and a court-fee of Rs. 10 as regards other relief:

Held, that the petition for revision was properly stamped; that it was not possible to estimate the second relief at a money value and consequently in respect thereof a court-fee stamp of Rs. 10 was sufficient. 1 P.L.R. 1913=229 P.W.R. 1913=15 Ind. Cas. 57.

——Sch. II, Art. 17 (vi)—Partition suit—Plaintiff in possession—Proper court-fee.

When a plaintiff in possession sues for partition of his share, a court-fee stamp of Rs. 10 is sufficient but where the plaintiff is not in possession, the proper fee would be calculated on the value of the share claimed by him. 28 All. 340; 6 C.L.J. 651, Foll. 34 All. 184=8 A.L.J. 1329=13 Ind. Cas. 185.

——Sch. II, Art. 17 (vi)—Partition suit.

A suit for partition of joint property is governed by Sch. II, Art. 17, (*vi*) and the plaint is properly stamped if a court-fees of Rs. 10 is paid on it. 4 M.L.J. 110, Diss. from. 6 C.L.J. 651=12 C.W.N. 37.

——Sch. II, Art. 17 (vi)—Partition suit—Suit to recover possession of a share in immovable property.

Where on the face of the plaint it appeared that the suit was in fact a suit to establish the plaintiff's title to a one-third share in certain property and to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was *held* that an *ad valorem* fee was payable on the plaint and not a fee of Rs. 10 as provided by Art. 17, (*vi*) of Sch. II to the Court-Fees Act. 18 B. 206. Foll. 1906 A.W.N. 38=3 A.L.J. 181 =28 A. 340.

——Sch. II, Art. 17 (vi)—Partition suit.

Suit by Muhammadan co-sharer in actual possession of portion of property for partition alleging his joint possession of entire property by reason of possession of another co-sharer falls under Sch. II, Art. 17. A.I.R. 1941 Lah. 152=43 P.L.R. 238= I.L.R. (1941) Lah. 308=194 Ind. Cas. 125 (F. B.). [Overrules A.I.R. 1939 Lah. 568=186 Ind. Cas. 328.]

——Sch. II, Art. 17 (vi)—Partition suit—Suit by Muhammadan heirs—Widow setting up defence by pleading her possession in lieu of dower in priority to heirs' right of partition—Suit decreed—Appeal by widow—Court-fee payable.

Where in a suit for partition by Muhammadan heirs, the widow of the deceased raises a defence by pleading her possession in lieu of dower in priority to the heirs' right of partition, and the dower amount is not disputed but the suit is decreed, the court-fee payable in respect of an appeal therefrom by the widow is Rs. 15 under Art. 17 (*vi*), Court-Fees Aca. A.I.R. 1940 All. 521=1940 A.L.J. 789=1940 A. W.R. 536=192 Ind. Cas. 600.

4. Partition and Possession.

——Sch. II, Art. 17 (vi)—Partition and possession—Mahomedan co-sharer.

A suit by Mahomedan co-sharer, who sues other co-sharers for partition and possession of her share of her deceased father's properties, and alleges that she is in possession of some of the items as indicative of her joint possession in law with the other co-sharers of the deceased's estate, falls under Art. 17 (*vi*). (43 Mad. 396; 44 Ind. Cas. 216, Foll.) 75 Ind. Cas. 93=1923 M.W.N. 564=A.I.R. 1924 Mad. 207.

5. Preliminary decree for accounts—Appeal.

——Sch. II, Art. 17 (vi)—Preliminary decree for accounts—Appeal.

It is not possible to estimate at a money-value the subject-matter in dispute in the appeal filed against the preliminary decree ordering accounts between the parties when the only question in appeal is whether the defendants-appellants are liable to render accounts, there being no decree against them for any specific amount. In such a case, the defendant are liable to pay Rs. 15 court-fee on the memorandum of appeal. A.I.R. 1941 Oudh 622=1941 A.W.R. (Rev.) 865=1941 O.W.N. 1095=1941 R.D. 845 =17 Luck. 246=196 Ind. Cas. 441.

6. Recovery of trust property.

——Sch. II, Art. 17 (vi)—Recovery of trust property improperly alienated by the trustee. *See* C. P. CODE, S. 92. 28 A. 112.

7. Refusal to grant letters of administration.

Sch. II, Art. 17 (vi)—Refusal to grant Letters of Administration.

The court-fee payable in an appeal against an order refusing grant of Letters of Administration is Rs. 10, under Art. 17 (*vi*) as the subject-matter in dispute cannot be estimated at a money value. 35 All. 448=22 Ind. Cas. 98.

8. Restitution of Conjugal rights—Suit for.

——Sch. II, Art. 17 (vi)—Restitution of conjugal rights—Suit for.

Art. 17 (*vi*), Sch. II to the Court-Fees Act should be very strictly interpreted. To bring a case within the scope of this clause, it must be established that it is not possible even to state approximately a money value for the subject-matter in dispute. It cannot be said that a suit for restitution of conjugal rights satisbes this test. It may not be possible to value satisfactorily the subject-matter of such a suit but there are ordinarily several *criteria* available, to enable the plaintiff to arrive at an approximate husband may have to spend on the maintenance of valuation. *e.g.*, the dower, the amount which the his wife elsewhere than in his own house or the extra cost of domestic assistance for the performance of household work. A.I.R. 1935 Cal. 338=60 C.L. J. 201=39 C.W.N. 131=157 Ind. Cas. 356.

——Sch. II, Art. 17 (vi)—Restitution of conjugal rights—Suit for—Court-fee payable

A suit for restitution of conjugal rights falls within Cl. (*vi*) of Art. 17, and the court-fee chargeable is Rs. 10. 33 All. 767=8 A.L.J. 889=11 Ind. Cas. 186.

9. Trust suits.

——Sch. II, Art. 17 (vi)—Trust suits—Claim by plaintiff to manager temple property along with defendant—Court-fee.

A claim by the plaintiff that he is entitled to manage a temple property jointly with the defendant cannot be assessed in money when the plaintiff does not claim any beneficial interest in the property. The fact that the plaintiff has sued for removal of the defendant from shebaitship and also for a declaration in his own favour makes no difference in the legal position. The case is covered by Art. 17 (*iv*) of the Court-Fees Act under which a fixed Court-fee of Rs. 10 is payable. The plaintiff need not pay *ad valorem* court-fees on the valuation of the temple property. I. L. R. (1944) All. 504 and 1934 Cal. 250, rel. on. 1949 A.M.L.J. 104=A. I.R. 1949 Ajmer 23.

——Sch. II, Art. 17 (vi) (Bih.)—Suit between rival mutawallis—Claim of right to office and for being put in charge of trust estate—Defendant alleged to be in wrongful possession, not being the rightful mutawalli—Court-fee. *See* COURT-FEES ACT, S. 7 (v) AND SCH II, ART. 17 (iv). 27 Pat. 494.

——Sch. II, Art. 17 (vi) (Beng.)—Suit under S. 92, C. P. Code—Questions for consideration—Reliefs not covered by section also asked for—Court-fee payable. I.L.R. (1945) 1 Cal. 266=A. I.R. 1949 Cal. 98.

——Sch. II, Art. 17 (vi)—Suit under S. 92, C. P. Code—Court-fee payable.

In a suit under S. 92, C. P. Code, the Court-fee payable is under Art. 17 (*vi*), Sch. II, Court-fees Act. A.I.R. 1943 Oudh 186=1942 O.W.N. 797 =18 Luck. 738=204 Ind. Cas. 314.

——Sch. II, Art. 17 (vi)—Suit under S. 92, C. P. Code.

Suit for removal of *mutawalli* and for appointment of new *mutawalli* as provided under *wakf* deed—Prayer for accounts and for recovery of amounts directed to be paid to descendants of *wakif* annually out of income of estate—Annual receipts claimed by plaintiff capable of valuation at least on average basis—Sch. II, Art. 17 (*vi*) held not applicable. A.I.R. 1942 Sind 160=I.L.R. (1942) Kar. 424 =204 Ind. Cas. 469.

——Sch. II, Art. 17 (vi)—Suit under S. 92, Civil P. C.

Suits under S. 92, Civil P. C., fall under Cl. (*vi*) of Art. 17, Sch. II, Court-fees Act, which prescribes a Court-fee of Rs. 10. A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.).

——Sch. II, Art. 17 (vi)—Suit under S. 92, C. P. Code.

Where the suit instituted was one under S. 92, C. P. Code, and the relief claimed was: (1) that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that along with the Mahant so appointed a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly appointed committee and the list of the said property may be prepared.

Held, that Art. 17 (vi), Sch. II, Court-Fees Act, applied to the case as it was brought under the provisions of S. 92, C. P. Code, and there was nothing in the relief claimed which would take the case out of the purview of Art. 17 (vi) and so the court-fee stamp of Rs. 10 was sufficient. (12 C.L.J. 211: 19 All. 60; 21 All. 200 and 97 P.R. 1918, Foll. 8 Lah. 730=29 P.L.R. 97=110 Ind. Cas. 264=A. I.R. 1928 Lah. 113.

——Sch. II, Art. 17 (vi)—Suit under S. 92, C. P. Code.

Where in a suit under C. P. Code, S. 92 the plaintiff did not claim any beneficial interest in the properties but only said that on going through his accounts a sum which he estimated at a certain amount would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immovable property.

Held, that these reliefs could not be treated as being part of the subject matter in dispute between the parties; that they were merely ancillary reliefs, and that the relief claimed clearly fell under Art. 17 (6) of Sch. II. 11 M. 148, Diss. 87 Ind. Cas. 25=1925 M.W.N. 104=A.I.R. 1925 Mad. 722= 48 M.L.J. 514.

——Sch. II, Art. 17 (vi)—Suit under S. 92, C. P. Code—Court-fee.

A suit under S. 92, C. P. Code cannot be valued pecuniarily, even though there is a prayer for accounts from the trustees. A Court-fee of Rs. 10 is payable for the suit. 14 C.W.N. 932=12 C.L.J. 211=7 Ind. Cas. 92.

——Sch. II, Art. 17 (vi)—Suit by gurdwara against mahant, praying that certain deed should be declared null and void and cancelled—Suit valued both for purposes of court-fees and jurisdiction at Rs. 1,100 and ad valorem court-fee paid—Jurisdictional value held reasonable and court-fee paid held enough or more than enough.

A suit was instituted by a *Gurdwara* against the *Mahant* of the *Gurdwara* claiming relief that a document executed by certain person in relation to the property mentioned in the plaint be declared null and void and that the document be withdrawn from the defendants and cancelled. This suit was valued both for purposes of court-fee and jurisdiction at Rs. 1,100 and a court-fee of Rs. 120 was paid thereon:

Held, that the suit whether regarded as falling under S. 7 (iv) (*c*) or Art. 17, Sch. II, Court-Fees Act, the jurisdictional value had been fixed at a reasonable figure and that the court-fee paid was either enough or more than enough. A.I.R. 1941 Lah. 265=43 P.L.R. 252=196 Ind. Cas. 254.

——Sch. II, Art. 17 (vi)—Suit for declaration that property is *waqf* and alienations thereof are ineffectual against *waqf* property—Relief claimed held fell under residuary article, Sch. II, Art. 17 (vi). A.I.R. 1941 Lah. 97=43 P.L.R. 106=I.L.R. (1941) Lah. 451=193 Ind. Cas. 641 (F.B.)

[Overrules (1); 18 P.R. 1913=19 Ind. Cas. 219 (2); (2) A.I.R. 1923 Lah. 373=73 Ind. Cas. 767.]

——Sch. II, Art. 17 (vi)—Prayer for declaration that property is *debutter* and for perpetual injunction restraining defendant from doing certain acts—Injunction is consequential relief—Two reliefs fall under S. 7 (iv) (*c*) and not under Sch. II, Art. 17 (vi). A.I.R. 1938 Cal. 865=I.L.R. (1938) 2 Cal. 64=42 C.W.N. 504=179 Ind. Cas. 355.

——Sch. II, Art. 17 (vi), Ss. 7 (iv), 7 (v)—Suit for removal of defendant from mutawallishiip and for appointing plaintiff in his place and for rendition of accounts—Court-fee payable.

In a suit styled as one for removal of *mutawalli* and rendition of accounts, the reliefs claimed were as follows; (1) Removal of the defendant from *mutawallishiip* of the property mentioned in schedule and appointment of plaintiff as *mutawalli* in his place; (2) the defendant be ordered to give accounts; (3) that interest be awarded on the amount found due to the plaintiff on these accounts; (4) a permanent injunction be issued against the defendant restraining him from preventing the plaintiff from coming and occupying his portion in the residential house:

Held, that the suit came under S. 7 (iv) and Art. 17 (vi) of Sch. II, Court-Fees Act, and not under S. 7, Cl. (v). The action was one of a personal character and not one for possession and if the plaintiff succeeded on merits, he would be entitled to get a decree for the relief which he asked on the court-fees paid by him. A.I.R. 1938 Nag. 537=1938 N.L.J. 357=180 Ind. Cas. 958.

——Sch. II, Art. 17 (vi)—Prayer that plaintiffs be appointed mutawallis and defendant be ordered not to interfere with plaintiffs' management and worship, if one for possession of property.

A suit asking that plaintiffs be appointed *mutawallis* and defendant be ordered not to interfere with the plaintiffs' management and worship comes under Art. 17 (vi), Sch. II, Court-Fees Act.

A suit for possession of the office of *mutawalli* is an action of a personal character and is not "a suit for possession of any property"; the prayer that the defendant be ordered not to interfere with the plaintiffs' management and worship may be considered as a superfluity. In such a case, the criterion is to see whether by obtaining this relief, the plaintiffs could obtain possession of the property by execution of the decree. A.I.R. 1938 Oudh 20=1937 O.W.N. 1149=171 Ind. Cas. 468.

——Sch. II, Art. 17 (vi)—Subject-matter of suit mutawallishiip not carrying any salary.

The subject-matter of the suit was the right to *mutwallishiip* not carrying any salary or any other material enjoyment:

Held, that since the subject-matter was not capable of any monetary valuation, the proper court-fee payable was Rs. 15 as provided by Sch. II, Art. 17, para. 6, Court-Fees Act. A.I.R. 1934 Pat. 647=1 B.R. 180=153 Ind. Cas. 296.

——Sch. II, Art. 17 (vi)—Suit for possession—Intention to dedicate property, whether converts it into religious property—Suit for possession of such property—Court-fee payable.

A mere intention to dedicate property for religious purposes is not sufficient to convert that property into religious property. In a suit, therefore, for the recovery of such property the court-fee payable is *ad valorem*. A.I.R. 1938 Rang. 303=178 Ind. Cas. 232.

——Sch. II, Art. 17 (vi)—Suit to obtain injunction and prayer for scheme so that plaintiff and defendant may carry on service of idol.

The plaintiffs instituted a suit in order to obtain an injunction restraining the defendants from interfering with the service by the plaintiffs of an idol and asking the Court to frame a scheme, so that they and the defendants might be entitled to carry on the service of the idol and to enjoy the emoluments of the office separately and without interference from each other:

Held, that although the suit could not be described as a suit for partition, yet it was in a sense, a suit which may be regarded as a suit of a similar nature for the purpose of estimation of court-fees and that Art. 17 (vi), Sch. II, Court-Fees Act, applied. A.I.R. 1935 All. 292 (2)=1935 A.L.J. 295=1935 A.W.R. 251=57 All. 787=158 Ind. Cas. 35.

10. Miscellaneous.

——Sch. II, Art. 17 (vi)—Suit for cancellation of mortgage decree.

A suit wherein the relief claimed is the cancellation of a mortgage decree which leaves the defendant with the right and the opportunity to obtain another similar decree on the same mortgage in a properly framed suit is a suit, the value of the subject-matter of which is not capable of ascertainment and it falls within Art. 17 (vi) of Sch. II. 78 Ind. Cas. 437 =A.I.R. 1925 Nag. 66.

——Sch. II, Art. 17 (vi)—Suit for declaratory decree—Valuation of, at Rs. 150.

The Bombay practice of valuing suits for declaration at Rs. 130 and paying a court-fee of Rs. 10 thereon is misleading and unwarranted by law. A fixed-fee of Rs. 10 is to be paid thereon. 17 A.L.J. 418=46 I.A. 24=25 M.L.T. 298=36 M.L.J. 437=29 C.L.J. 452=Bom.L.R. 489=43 Bom. 507 10 L.W. 274=24 C.W.N. 33=50 Ind. Cas. 280 (P.C.).

——Sch. II, Art. 17 (6)—Suit to direct registration of will—Will disposing of—Property of the value of more than Rs. 2,500.

The suit is not one to which S. 7 (iv) (*c*) Court-Fees Act is applicable, but is one to which Art. 17 (vi) of Sch. II of Court-Fees Act applies *i.e.,* a suit in which it is not possible to estimate at a money-value the subject matter in dispute and which is not otherwise provided for by the Court-Fees Act. 17 M.L.J. 573=31 M. 89 (F.B.).

——Sch. II, Art. 17 (iv)—Trust—Dedicated property—Suit for possession of.

In a suit for possession of a Phongyi Kyaung and its site, court-fees payable are not *ad valorem* court-fees on the market-value of the Kyaung and the site, but they are payable under Art. 17 (vi) because the property having been dedicated in perpetuity to religion, it cannot be said to have any market-value. 25 Cal. 194 (P.C.); A.I.R. 1924 Mad. 19; 13 Bur.L.T. 40; (1893-1900) L.B.R. 614, Rel. on.; 3 U.B.R. 236, Diss. from. 7 Rang. 245=118 Ind. Cas. 609=A.I.R. 1929 Rang. 134 (F.B.).

——Sch. II, Art. 17 (vi)—Applicability—Trust—Dedicated property—Kyaung—Sanghika property—Money-value.

As Kyaung cannot be transferred by sale, mortgage or gift, it has no market-value and the plaint in a suit by Hypongyi to recover possession of Kyaung should under Sch. II, Art. 17 (vi), bear a

stamp of Rs. 10. 13 Bur.L.T. 40=57 Ind. Cas. 953.

——Sch. II, Art. 17 (vi)—Trust—Dedicated property—Temple has no market-value.

A temple as such has no market-value and for purposes of court-fee, a suit for the recovery of possession of a temple falls under Sch. II, Art. 17 (vi) and not under S. 7 (v) (*e*). 74 Ind. Cas. 198=46 Mad. 782=18 M.L.W. 326=1923 M.W.N. 550=33 M.L.T. 21=A.I.R. 1924 Mad. 19=45 M.L.J. 274 (F.B.).

——Sch. II, Art. 17 (vi)—Valuation of suit—Suit for appointment of Receiver—Deficient court-fee.

No money-value can be put upon a claim for the appointment of a receiver. If the Court be of opinion that the court-fee paid on a plaint is inadequate, it ought to call upon the plaintiff to make good the deficiency, and there is no justification for the dismissal by it of the suit without an opportunity having been given him to make it good. 2 A.L.J. 84.

——Sch. II, Art. 17 (vi)—"Where it is not possible to estimate".

To bring a case within the expression "where it is not possible to estimate at a money-value the subject-matter in dispute" Art. 17 (vi) of Sch. II, of the Court-Fees Act, it must be established that it is not possible even to state approximately a money-value for the subject-matter in dispute. 13 C.W.N. 815 =1 Ind. Cas. 670.

——Sch. II, Art. 17 (vii) (Bom.)—Applicability—Joint Hindu family—Suit for partition—Decree—Appeal by defendant—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), S. 7 (IV) (*b*) AND (V) AND SCH. II, ART. 17 (VII). 51 Bom.L.R. 602=A.I.R. 1950 Bom. 4.

——Sch. II, Art. 17 (vii) (Bom.)—Applicability—Partition suit by Hindu coparcener—Claim of joint constructive possession—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), S. 7 (IV AND (V) AND SCH. II, ART. 17 (VII). 49 Bom.L.R. 72=A.I.R. 1947 Bom. 259 (F.B.).

——Sch. II, Art. 17 (vii) (Bom.)—Purchaser's suit for partition and possession of the share of his vendor in joint family property—Separate Court-fees for two reliefs are to be paid.

Where a purchaser brings a suit for partition of the joint family property, in which he has no coparcenary interest, he asks for a declaration of the entire share of his vendor and then seeks to recover possession of what he has purchased out of that share. It is, therefore, obvious that the separation or declaration of the vendor's share is a relief independent of the relief of possession which the plaintiffs claim for themselves, and, therefore, separate Court-fees have to be paid for the two reliefs. The claim for a mere partition falls under Sch. II, Art. 17 (*vii*), Court-fees Act, as amended by the Bombay Finance Act (II of 1932), and the plaintiffs must pay a Court-fee for that relief and an additional appropriate Court-fee for the claim to recover possession of vendor's share in the joint family property. A.I.R. 1945 Bom. 356=47 Bom.L.R. 350=222 Ind. Cas. 14.

——Sch. II, Art. 17 (vii) (Bom.) — Decree against defendant in personal capacity—Appeal on ground that decree against heir was in capacity of legal representative—Court-fee is payable.

A money-decree was passed against a defendant personally and he appealed on the ground that his liability under the decree was only as an heir and legal representative and not personal:

Held, that the memo. of appeal should be stamped for Court-fee under Art. 17 (*vii*), Court-fees Act, with a stamp of Rs. 15, and *ad valorem* Court-fee need not be paid on decree amount. A.I.R. 1935 Bom. 111=36 Bom. L. R. 1220=59 Bom. 439=154 Ind. Cas. 330.

——Sch. II, Arts. 17-A and 17-B (Mad.)—Applicability and scope.

Arts. 17-A and 17-B cannot be regarded as parts of Art. 17 but only as new Art's. A.I.R. 1929 Mad. 52, Diss. from. 52 Mad. 388=29 M.L.W. 298=1929 M.W.N. 308=115 Ind. Cas. 157=A.I.R. 1929 Mad. 334=56 M.L.J. 373.

——Sch. II, Art. 17-A (Mad.)—Applicability—Suit under S. 44-B of Hindu Religious Endowments Act for declaration that order of Collector directing resumption of inam is wrong—Court-fee.

A suit under S. 44-B of the Madras Hindu Religious Endowments Act for a declaration that the order of the District Collector confirming the order of the Revenue Divisional Officer directing the resumption of an inam is wrong requires when the lands are worth more than Rs. 10,000, a Court-fee of Rs. 500 under Art. 17-A of Sch. II of the Court-Fees Act. The Collector passing the order was not a Revenue Court passing a summary order and therefore the plaint cannot be filed with a Court-fee of Rs. 15 under Art. 17 (1) of Sch. II of the Court-Fees Act. 1948 M.W.N. 837=(1948) 2 M. L. J. 637=A.I.R. 1949 Mad. 465.

——Sch. II, Art. 17-A (Mad.)—Religious Endowment Act (II of 1927), S. 84 (2)—Application under.

The Court-fee payable on petitions under S. 84 (2), Madras Hindu Religious Endowments Act (II of 1927), is Rs. 15. 115 Ind. Cas. 157=29 M.L.W. 298=1929 M.W.N. 308=52 Mad. 388=A.I.R. 1929 Mad. 334=56 M.L.J. 373.

——Sch. II, Art. 17-A—Religious Endowments Act (II of 1927), S. 84—Application under.

The Board of Commissioners for Hindu Religious Endowments is not a Civil Court within the meaning of Art. 17-A (*i*) of Sch. II. The proper Court-fee payable on an application under S. 84, Religious Endowments Act, praying for setting aside the order of the Religious Endowments Board and for a declaration that the plaint temple is a private one, is the fee laid down in Art. 17-A (1), Sch. II (Mad.). 113 Ind. Cas. 88=1928 M.W.N. 509=29 M.L.W. 549=A.I.R. 1929 Mad. 52=56 M. L. J. 113.

——Sch. II, Art. 17-A—Applicability—Suit for declaration that the plaintiff was nearest reversioner of a Hindu, and that an alienation of some property was not binding on plaintiff—Valuation for Court-fee and jurisdiction.

Under cover of a very small alienation of property by a Hindu widow whose life estate comprises very substantial property it is not open to a reversioner to seek to have his rights declared even though they only amount to a *spes successionis*—which may never be realised—and a will bequeathing considerable property to the widow by her husband set aside in a District Munsiff's Court on a Rs. 15, Court-fee stamp. The subject-matter of such a suit is not

the small alienation alleged to be invalid and not binding but in substance and in fact the entire estate of the last holder, succession to which is sought to be established. If the value of such estate is more than Rs. 10,000 the Court-fee for such declaration will under Art. 17-A of the Court-fees Act be Rs. 500 and if between Rs. 3,000 and Rs. 10,000 the Court-fee will be Rs. 100, the plaint lying in a Sub-Court or District Court as the case may be. In a suit for declaration that the plaintiff are the nearest reversioners of a deceased Hindu and that the sale-deed executed by his widow is not binding on them, on each of the declarations in the plaint a separate Court-fee of Rs. 100 is payable under Art. 17-A of the Court-fees Act. The pecuniary jurisdiction is regulated by the subject-matter of the property involved namely the value of the widow's estate. 1948 M.W.N. 833=A.I.R. 1949 Mad. 464=(1948) 2 M.L.J. 651.

——Sch. II, Art. 17-A (Mad.)—Applicability—Suit to declare sale-deed void—Allegation that material sheet was abstracted before registration and after execution—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 7 (IV-A) AND SCH. II, ART. 17-A. (1946) 1 M.L.J. 239.

——Sch. II, Art. 17-A (Mad.)—Applicability.
Statute making order appealable as decree—Art. 11, Sch. II and not Art. 17-A applies. A. I. R. 1941 Mad. 639=53 M.L.W. 637=I.L.R. (1941) Mad. 935=(1941) 1 M.L.J. 721=1941 M.W.N. 564=198 Ind. Cas. 322.

——Sch. II, Art. 17-A (Mad.)—Applicability—Suit filed in District Munsif's Court transferred to Subordinate Judge for being tried along with other suit filed there—Both suits decided by same judgment—Appeal from decree in suit originally filed in District Munsif's Court—Court-fee payable.
Where a suit for declaration which was originally filed in the Court of the District Munsif is transferred subsequently to the Court of the Subordinate Judge for being tried along with the other similar suit filed in that Court and both the suits were decided by one judgment, the decree passed by the Subordinate Judge in respect of the suit originally filed in the District Munsif's Court is one passed by that Court and not by the Court of the District Munsif and the memorandum of appeal from such decree when the value for the purposes of jurisdiction is less than Rs. 10,000 must bear a Court-fee stamp of Rs. 100 and not of Rs. 15. A.I.R. 1940 Mad. 383=51 M.L.W. 228=1940 M.W.N. 268=I. L. R. (1940) Mad. 646=(1940) 2 M.L.J. 425=193 Ind. Cas. 490.

——Sch. II, Art. 17-A (Mad.)—Applicability—Suits for partition instituted in Sub-Court and cognizable by it in respect of each debt impeached—Also cognizable by District Court—Court-fee payable is under Art. 17-A (i), Sch. II, in respect of each debt.
The principle to be kept in view in determining the proper Court-fee is what in substance is the relief which the plaintiffs seek and not the form in which it is couched.

The sons brought a suit for partition of the joint family property against the father and the creditors of the father were also made parties to the suit. The sons questioned the binding nature of the debts contracted by the father and to which sons were not parties. They also claimed a relief by way of permanent injunction restraining the creditors from proceeding against the share in the properties of the sons for the debts contracted by the father. At this time, none of the creditors except one had instituted any suits to recover debts nor any decrees obtained. The suit was instituted in a Sub-Court and was sognizable by it although the claims in respect of the debts were also cognizable by the District Munsif's Court:

Held, that in the circumstances, the relief which the plaintiffs claimed was for a declaration that the said debts were not binding on them and on their share of the properties. No cause of action was disclosed which could support the relief of injunction. The fact that the plaintiffs chose to frame the relief in the form of an injunction would not make an action any the less an action for a declaration. The injunction was claimed as a substantive relief and not as a mere consequential relief. Therefore, the Court-fees payable were separate fixed Court-fees in respect of each debt due to creditors under Art. 17-A of Sch. II, Court-fees Act:

Held, further that the claim for a declaratory relief in respect of each of the debts sought to be impeached was cognizable by the Sub-Court in view of the fact that the said relief was claimed in respect of the sons' share in the joint family properties sought to be recovered in the suit, freed from the claims in respect of the said debts and, therefore, the suit having been instituted in the Sub-Court, the Court-fee payable was under Art. 17-A (*i*), Sch. II in respect of each of the debts sought to be impeached even though the suits in respect of the debts were cognizable by the District Munsif's Court. A.I.R. 1937 Mad. 876=46 M.L.W. 484=1937 M.W.N. 1004=(1937) 2 M.L.J. 616=175 Ind. Cas. 823.

——Sch. II, Art. 17-A (Mad.)—Applicability.
Where a suit was filed for a declaration that the order on the petition was obtained by fraud and is therefore, not binding on the plaintiff:
Held, that this suit has to be valued under Art. 17-A of Sch. II. 1936 M.W.N. 1240.

——Sch. II, Art. 17-A (Mad.) S. 7 (iv) (a)—Applicability—Creditor's suit under S. 53, T. P. Act, for declaration that alienation by debtor is void against creditors—Suit, if falls under Art. 17-A of Sch. II or S. 7 (iv) (a).
Where a creditor brings a suit under S. 53, T. P. Act. or a declaration that an alienation by the debtor is void against the creditors, it is a suit to obtain a declaration where no consequential relief is prayed falling under Art. 17-A, Sch. II of Court-Fees Act. It is not a suit for cancellation of a document securing money or property, falling under S. 7 (*iv*) (*a*) of the Act. A.I.R. 1939 Mad. 894=1939 M.W.N. 778=50 M.L.W. 248=(1939) 2 M.L.J. 400=I.L.R. (1940) Mad. 73=189 Ind. Cas. 301.

——Sch. II, Art. 17-A—Applicability.
If a party to a decree sues to set aside or cancel that decree, S. 7 (*iv*-A) governs the court-fee, but where the party suing is not a party to the decree which he seeks to have declared not binding on him, the appropriate provision of Court-Fees Act is Art. 17-A. A.I.R. 1936 Mad. 470=43 M.L.W. 715=1936 M.W.N. 566=71 M.L.J. 383=163 Ind. Cas. 203.

——Sch. II, Art. 17-A (Mad.) Applicability—Suit by unsuccessful applicant to Collector for registration as a landholder under S. 3 (5), Madras Estates Land Act—Proper court-fee.

A suit brought by an unsuccessful applicant to the Collector for registration as a landholder under S. 3 (5), Madras Estates Land Act is a suit for declaration falling within Art. 17-A, Sch. II of Court-Fees Act. It is not a suit to set aside a summary order governed by Art. 17 (*i*) or a suit not otherwise provided for falling within Art. 17-B. The setting of the order of the Revenue Officers is not legally necessary in a suit of this kind and whatever words may be used to describe the decree sought, it is in fact a suit for a declaration that the plaintiff is entitled to hold possession and to collect rents of the estate in question. A.I.R. 1936 Mad. 383=1936 M.W.N. 45=43 M.L.W. 364=71 M.L.J. 493=59 Mad. 882=161 Ind. Cas. 879.

——Sch. II, Art. 17-A—Applicability.

Claim for property by survivorship—Will by coparcener alleged to be forgery—No relief for cancellation of will:

Held, that claim for declaration was not affected by will and Art. 17-A applied. A.I.R. 1936 Mad. 344=1936 M.W.N. 475=43 M.L.W. 696 =70 M.L.J. 542=163 Ind. Cas. 837.

——Sch. II, Art. 17-A (i) Mad—Suit to set aside forged will.

The plaintiff in his suit alleged that a will put forward by the defendant was a forgery and prayed in his plaint (1) that the will may be declared to be forgery; (2) that it may be cancelled; and (3) that the order of the Sub-Registrar registering the will may also be cancelled:

Held, that in regard to court-fees payable the provision applicable to the case is not S. 7 (*iv*) (*a*) or S. 7 (*iv*) (*c*), but Sch. II, Art. 17-A (1) because the suit must be treated as one for declaration without consequential relief. 30 Mad. 18 and A.I.R. 1925 Mad. 713, Foll. 29 M.L.W. 584= 1929 M.W.N. 286=119 Ind. Cas. 35=A.I.R. 1929 Mad. 396=56 M.L.J. 394.

——Sch. II, Art. 17-A—Applicability—Suit for declaration of invalidity of deed and appointment of Receiver—Appeal by defendants — Alternative claim for recovery of money—Proper court-fee.

The plaintiff sued for a declaration that a release deed executed by the fifth defendant a Hindu widow, in favour of defendants Nos. 1 to 4 was not valid and for the appointment of a Receiver. The suit was decreed as regards declaration and it was also ordered that the plaintiffs were entitled to apply for the appointment of a Receiver in the event of the dismissal of certain suit. The defendants Nos. 1 to 4 appealed against the entire decree praying also in the alternative that if the declaratory decree be upheld, they may be given a certain amount over and above what the trial Court had directed to be paid to them:

Held, (*i*) that the appellants were bound to pay a court-fee of Rs. 15 only in respect of the prayer as regards declaration, under Art. 17-A of Sch. II, Court-Fees Act;

(*ii*) that they need not pay any court-fee in respect of the excess amount claimed by them in the alternative;

(*ii*) that the appellants were bound to pay also a court-fee of Rs. 15 in respect of the relief regarding the appointment of a Receiver. A.I.R. 1933 Mad. 108=63 M.L.J. 822=36 M.L.W. 828=1932 M.W.N. 1324=141 Ind. Cas. 324.

——Sch. II, Art. 17-A (Mad.)—Applicability—Suit to set aside Razinama decree.

A suit was filed for possession of a zamindari with past and future mesne profits and in the alternative for maintenance at Rs. 250 a month and past maintenance. The suit was valued at Rs. 1,00,000 and a court-fee of Rs. 23,000 was paid. The suit was compromised and a rajinama decree was passed. By the rajinama the plaintiffs withdrew their claim in respect of the immovable properties and got a decree for maintenance at Rs. 50 a month for each of them and also residence. It was recited in the rajinama that the claim for arrears of maintenance has been satisfied. A decree was passed in terms of the rajinama. Later on, a suit was filed to set aside the decree:

Held, that the suit was governed by Art. 17-A, Sch. II. 51 Mad. 664=108 Ind. Cas. 539=27 M.L.W. 664=108 Ind. Cas. 539=27 M.L.W. 286= A.I.R. 1928 Mad. 416=55 M.L.J. 345.

——Sch. II, Art. 17-A (i) (Mad.).

Suit by worshipped of temple representing other worshippers for declaration that certain decree against temple obtained in collusion with trustee of temple is not governed by Art. 17-A (*i*). A.I.R. 1941 Mad. 493=53 M.L.W. 311=I.L.R. (1941) Mad. 708=1941 M.W.N. 243=(1941) 1 M.L.J. 414=199 Ind. Cas. 528.

——Sch. II, Art. 17-A—Prior mortgagee made party to suit by puisne mortgagee—Claim by him to priority—Claim not recognized and sale ordered—Appeal—Court-fee paid under Sch. II, Art. 17-A (i)—If proper.

The prior mortgagee who was made a party in a suit on mortgage by the puisne mortgagee, claimed priority in respect of his mortgage executed by one of the three mortgagors and the trial Court held that he was entitled to priority. The Appellate Court, however, recognized his priority only in respect of one-third share of his mortgagor and directed that two-thirds of the property be sold first and after payment to the puisne mortgagee, the balance be paid to the prior mortgagee and also directed that the remaining one-third of the property be sold and after paying first the prior mortgagee, the balance be paid to the puisne mortgagee. On an appeal from this decision the prior mortgagee paid a court-fee of Rs. 15 as one for a relief for a declaration:

Held, that there had already been an order for sale; there had already been a declaration of liability of the suit property in respect of the mortgage of the prior mortgagee and the only question was whether he was entitled to any priority. All that he was seeking in appeal was to get rid of the declaration made against him and to have a declaration in his favour. Therefore, a relief for declaration would be enough and he was entitled to value the relief as one for a declaration and the court-fee, therefore, paid by him was sufficient under Art. 17-A (*i*) of Sch. II, Madras Court-fees Amending Act.

Held, further, that having regard to the form of the decree, the relief was one incapable of valuation, and as such, the court-fee paid was sufficient. A.I.R. 1937 Mad. 840=1937 M.W.N. 672=46 M. L. W. 524=I.L.R. (1938) Mad. 253=174 Ind. Cas. 665.

——Sch. II, Art. 17-A—Partition suit.

In a suit for partition of joint family property, creditors were also made parties on the ground that the debts due to them were not binding on the plaintiffs and it was prayed that the share of the plaintiffs may be delivered to them free of these debts:

Held, that in respect of each debt a fixed court-fee of Rs. 15 should be paid as upon a declaration under Art. 17-A (*i*), Sch. II. The fact that creditors are proper parties to partition suits cannot absolve the plaintiff from paying such court-fee if he attacks those debts in the plaint. A.I.R. 1935 Mad. 419 =1935 M.W.N. 346=41 L.W. 405=68 M.L.J. 376 =58 Mad. 821=156 Ind. Cas. 625.

——Sch. II, Art. 17-A (Mad.)—Land Acquisition proceedings—Compensation money paid into Court to credit of last male-holder—Suit by reversioner for declaration against widow's mortgagees —Proper court-fee.

Where certain properties which had been mortgaged by a Hindu widow were acquired under the Land Acquisition Act, and the compensation money was paid into Court to the credit of the last male-holder, and a person claiming to be the reversioner of the last male-holder, instituted a suit for declaration of his right to the money and for an injunction restraining the defendants from applying for the money:

Held, that the additional relief for the issue of an injunction was both unnecessary and superfluous; the proper relief to be prayed for was one for declaration alone and the court-fee leviable was Rs. 100 under Art. 17-A (*i*), of Sch. II. A. I. R. 1935 Mad. 318 (1)=68 M.L.J. 327=1935 M.W. N. 455=41 M.L.W. 702=159 Ind. Cas. 454.

——Sch. II—Art. 17-A (Mad.)—Suit for declation that adoption and subsequent wills are invalid —Court-fee of Rs. 500 for first relief under Art. 17-A (*iii*) and additional court-fee Rs. 500 each for each of the two additional reliefs under Art. 17-A (*i*), held was payable as these two were distinct and independent reliefs. A.I.R. 1935 Mad. 313= 1935 M.W.N. 223=68 M.L.J. 280=41 M.L.W. 452=159 Ind. Cas. 532.

——Sch. II, Art. 17-A (i) (Mad.)—Suit for declaration that a registered document is a forgery— Prayer for cancelling deed held not necessary and that suit was governed for purposes of court-fee by Sch. II, Art. 17-A (*i*). A.I.R. 1935 Mad. 203= 1935 M.W.N. 42=41 M.L.W. 90=68 M.L.J. 95 =58 Mad. 448=155 Ind. Cas. 948.

——Sch. II, Art. 17-A (i) (Mad.)—A prayer that a mortgage executed by the plaintiff's father's agent is not binding on him is one in effect for a mere declaration that the mortgage is not binding on the plaintiff's share and falls within Art. 17-A (*i*), Sch. II, Court-fees Act. A.I.R. 1933 Mad. 430 =64 M.L.J. 24=1933 M.W.N. 144=37 M.L.W. 806 =141 Ind. Cas. 80.

——Sch. II, Art. 17-A (ii) (Mad.)—Land Acquisition Act—Appeal against decision in reference under.

Memo. of appeal against decision by Court on reference by Collector under Land Acquisition Act requires *ad valorem* court-fee under Sch. I, Art. 1, Court-Fees Act. 78 Ind. Cas. 435=19 M.L.W. 207 =1924 M.W.N. 108=34 M.L.T. 357=A.I.R. 1924 Mad. 489=46 M.L.J. 150.

——Sch. II, Art. 17-A (iii) (Mad.)—Suit for declaration that adoption and subsequent wills are invalid—Proper court-fee.

A person died leaving a widow, the first defendant, and an adopted son, the second defendant. He made a will giving authority to his wife to adopt in the event of the second defendant dying and subsequently made another will bequeathing his share of the family properties to defendant No. 1 on the footing that he had become divided in status from his adopted son. The suit was for three reliefs: (*i*) a declaration that the adoption was invalid, (*ii*) that the first will was invalid and (*iii*) that the second will was also invalid. The suit was filed in the Sub-Court and the value of the properties for purposes of jurisdiction was stated to be 4 lakhs:

Held, (*i*) that the plaintiff had to pay Rs. 500 for the first relief under S. 17-A (*iii*), Sch. II to the Court-Fees Act;

(*ii*) that he had to pay an additional court-fee of Rs. 500 each for each of the two additional reliefs under Art. 17-A (*i*) of Court-Fees Act, as these two were distinct and independent reliefs. A.I.R. 1935 Mad. 313=1935 M.W.N. 223=68 M.L.J. 280 =41 M.L.W. 452=159 Ind. Cas. 532.

——Sch. II, Art. 17-A (iii) (Mad.)—Suit for declaring adoption invalid—Proper method of valuation—Court-fee.

The value for purposes of jurisdiction for a suit for a declaration that an adoption is invalid must be fixed with reference to the market-value of the properties under Art. 17-A (*iii*). and a fee of Rs. 500 is payable in all cases where the value of such suit for purposes of jurisdiction is over Rs. 10,000. Such suit cannot be valued according to the method provided for in S. 7 (*v*) of the Court-Fees Act. A.I. R. 1935 Mad. 279 (1)=68 M.L.J. 329=1935 M. W.N. 320=41 M.L.W. 469=159 Ind. Cas. 424.

——Sch. II, Art. 17-A (iii) (Mad.)—Adoption.

According to the Madras High Court a relief with regard to the validity or otherwise of an adoption is capable of valuation. 6 Mad. 192, Foll.; 37 Cal. 860, not Appro.) The valuation of such relief should be calculated according to the market value of the property likely to be affected by the adoption being held as invalid or as not having taken place at all. 28 M.L.W. 660=1928 M.W.N. 729 =113 Ind. Cas. 363=52 Mad. 340=A.I.R. 1928 1924=56 M.L.J. 107.

——Sch. II, Art. 17-B (Mad.) Appeal against the final decree in a suit for partition—Court-fee payable.

The appeal against either a preliminary or a final decree, arising out of a suit for partition, must be treated as one incapable of valuation and Art. 17-B of Schedule II of the Court-Fees Act is the only Article that would be applicable. Art. 1 of Sch. I is not applicable and *ad vaorem* court-fee cannot be charged.

Where the subject-matter of an appeal against a final decree for partition is the amount of the owelty payable to the plaintiff on partition, as also the amount of the share of profits, consequent on his be-

ing declared entitled to a share in profits, they are ordinary incidents in a suit for partition.

If an appeal arises in a suit for partition, the court-fee payable will be the fee provided for under Art. 17-B of Sch. II of the Court-Fees Act. I. L.R. (1950) Mad. 853=1950 M.W.N. 42=63 Mad. L.W. 1154=A.I.R. 1950 Mad. 353=(1942) 2 M. L.J. 782.

——Sch. II, Art. 17-B—Applicability—Suit for setting aside summary order relating to immovable property. *See* COURT-FEES ACT (7 OF 1870), S. 7 (*v*) AND SCH. II, ART. 17-B AND MADRAS CIVIL COURTS ACT. (1949) 1 M.L.J. 195.

——Sch. II, Art. 17-B (Mad.)—Applicability—Suit framed as one against guardian and trustee for accounts and claiming specified amount with ad valorem court-fee paid thereon—Decree for possession and for the amount claimed as profits —Appeal against—Court-fee.

The plaintiff sued for recovery of certain properties and prayed that the defendants who were described as guardians and trustees should render an account of the rents of the properties of which they were in management. The plaintiff however treated the suit as a claim for recovery of a specified amount and paid *ad valorem* court-fee thereon. The trial Court decreed the suit with reference to the relief of possession and with reference to the amount claimed, it allowed the same as profits and interest, the exact amount however being left to be determined later. The defendants having preferred an appeal, the question of court-fee, only as regards the amount payable was raised on a reference under S. 5 of the Court-Fees Act.

Held, that with respect to the claim for mesne profits and account it was not possible for the defendants to estimate the value of the relief granted by the decree as against them and that they should pay a court-fee of Rs. 100 on the memorandum of appeal the same being leviable to court-fee under Art. 17-B of the Court-fees Act as amended in Madras. I.L.R. (1949) Mad. 569=A.I.R. 1949 Mad. 349=61 Mad.L.W. 809=1948 M.W.N. 781 =(1948) 2 M.L.J. 515.

——Sch. II, Art. 17-B (Mad.)—The subject-matter of a suit for specific performance of a contract for exchange of immovable property cannot be said to be incapable of valuation within Sch. II, Art. 17-B. A.I.R. 1944 Mad. 252=(1944) 1 M. L.J. 187=1944 M.W.N. 133=57 L. W. 130=219 Ind. Cas. 329.

——Sch. II, Art. 17-B (Mad.)—Suit for partition by widow of co-parcener under Hindu Women's Right to Property Act—Suit is governed by Art. 17-B.

Although a Hindu widow does not acquire the full rights of a co-parcener under the Hindu Women's Rights to Property Act, but takes only a Hindu widow's estate, yet, under that Act she acquires full status for the purpose of filing a suit for partition. Consequently, a suit for partition by a Hindu widow is governed by Art. 17-B, Sch. II, Court-fees Act unless there is an allegation that she has been kept out of possession or was out of possession in some other way. A.I.R. 1943 Mad. 654=56 M.L.W. 317=(1943) 2 M.L.J. 172=1943 M. W. N. 519 (1)=210 Ind. Cas. 121.

——Sch. II, Art. 17-B (Mad.)—Contract to sell property in lieu of mortgage debt—Suit for specific performance—Court-fee is payable not under Sch. II, Art. 17-B but under S. 7 (*x*) (*a*). A.I.R. 1943 Mad. 372=(1943) 1 M.L.J. 82=56 M.L.W. 91=1943 M.W.N. 55=210 Ind. Cas. 157.

——Sch. II, Art. 17-B (Mad.)—Administration suit falls under Sch. II, Art. 17-B.

An administration suit should not be regarded as a suit for accounts for any purpose relating to court-fee, above all, a suit which is not one by a creditor for the administration of the assets of a deceased person to be divided amongst the creditors, but one by the heirs of the deceased in which a division of movable and immovable property might have to be made. As an administration suit is not a suit for accounts, it should be valued under Art. 17-B of Sch. II, Court-fees Act.

The jurisdiction of the Court is determined by the market value of the property. A.I.R. 1942 Mad. 247=54 M.L.W. 663=(1941) 2 M.L.J. 962=1941 M.W.N. 1058=I.L.R. (1942) Mad. 455=201 Ind. Cas. 261.

——Sch. II, Art. 17-B (Mad.)—Suit on pro-note decreed against trustees in their personal capacity —They, in appeal contending that they were liable as trustees and not personally—Court-fee payable.

Before a subject-matter in dispute can be said to be incapable of valuation, it must be established that it is not even posssible to state approximately what would be the money-value of the liability which a person seeks to get rid of the judicial decision, that is by no possibility could it be stated approximately what would be the money-value of the detriment that a person may suffer by reason of the adverse decision against him.

Where the trustees against whom a suit on a pro-note had been decreed in their personal capacity contended in appeal that they were liable only as trustees and not personally:

Held, that it could not be said that the subject-matter of the appeal was incapable of valuation within the meaning of Art. 17-B, Sch. II, Court-fees Act. because in appeal, they in fact sought to get rid of their liability to the extent of both their person and property in respect of the amount that had been decreed against them. Consequently, the appellants must pay *ad valorem* court-fee on the decretal amount. A.I.R. 1941 Mad. 313=(1940) 2 M.L.J. 946=52 M.L.W. 903=1941 M.W.N. 169 =195 Ind. Cas. 298.

——Sch. II, Art. 17-B (Mad.)—Suit for mere possession of managership of institution should be treated as one coming under Sch. II, Art. 17-B. A.I.R. 1939 Mad. 776=1939 M.W.N. 720=50 M. L.W. 154=(1939) 2 M.L.J. 226=189 Ind. Cas. 289.

——Sch. II, Art. 17-B (Mad.) and S. 7 (v)—Mortgagee of portion of house obtaining decree, purchasing that portion and obtaining symbolical possession thereof—Another mortgagee of whole house obtaining decree purchasing whole house and refusing first mortgagee to enter into possession of his portion—Suit by first mortgagee for partition and possession, held fell under S. 7 (*v*) and not under Art. 17-B. A.I.R. 1939 Mad. 506=1939 M. W.N. 303=(1939) 1 M.L.J. 531=49 M.L.W. 481 =185 Ind. Cas. 459.

——Sch. II, Art. 17-B (Mad.)—Suits by tenant under Madras Estates Land Act (1 of 1908), S. 112—Tenant successful in two Courts — Second appeal by landlord—Court-fee payable.

Where tenants bring suits under S. 112, Madras Estates Land Act, and they are successful in two Courts and the landlord goes in second appeal, he must pay *ad valorem* court-fee on each appeal. The value of the subject-matter is annual rent, the recovery of which is resisted by the tenants. A. I. R. 1937 Mad. 786=1937 M.W.N. 659=46 M. L. W. 263=(1937) 2 M. L. J. 347=I. L. R. (1937) Mad. 980=173 Ind. Cas. 608. Overrules A.I.R. 1930 Mad. 43=121 Ind. Cas. 601=52 Mad. 972.

——Sch. II, Art. 17-B (Mad.)—Suit for reversing sale—Madras Estates Land Act, S. 112.

Under S. 112, Madras Estates Land Act the raiyat brought a suit contesting the landlord's right to sell the holding, one of the reasons being that there was no no proper notice. The suit was dismissed. On appeal,

Held, that as the case was one where it was not possible to estimate at a money value the subject-matter in dispute, the court-fees payable on the memorandum of appeal was Rs. 15; 13 C. W. N. 815 (12 M.L.J. 87; 12 M.L.J. 88; 31 Mad. 89; 8 Cal. 515; 43 Mad. 396; 20 M.L.J. 121 and A.I.R. 1928 Mad. 929, Cons.). 121 Ind. Cas. 601 =52 Mad. 972=30 M.L.W. 289=1929 M. W. N. 773=A.I.R. 1930 Mad. 43=57 M.L.J. 510.

——Sch. II, Art. 17-B (Mad.)—A suit by an unsuccessful applicant to the Collector for registration as a landholder under S. 3 (5), Madras Estates Land Act, is not a suit which is not otherwise provided for falling within Art. 17-B. A.I.R. 1936 Mad. 383=1936 M.W.N. 45=43 L.W. 364=71 M. L.J. 493=59 Mad. 882=161 Ind. Cas. 879.

——Sch. II, Art. 17-B (Mad.)—Suit for reduction of maintenance awarded by decree is governed by Sch. II, Art. 17-B. A.I.R. 1935 Mad. 655= 1935 M.W.N. 707=42 Mad.L.W. 42=69 M.L.J. 202=59 Mad. 159=157 Ind. Cas. 1033.

——Sch. II, Art. 17-B (Mad.)—Suit for division and separate possession of plaintiff's share as against other tenants-in-common—Court-fee.

Where in a suit for partition of immovables, it appeared that though severance in status was effected there was no actual division by metes and bounds and the plaintiffs and defendants remained in joint possession:

Held, that the suit was for division and separate possession of the plaintiff's share as against other tenants-in-common and that the claim fell under Art. 17-B, Sch. II, Court-fees Act. A.I.R. 1933 Mad. 431=64 M.L.J. 576=37 L.W. 748=1933 M. W.N. 631=143 Ind. Cas. 755. (1).

——Sch. II, Art. 17-B (Mad.)—Declaration and possession—Trust suit.

Plaintiff sued for declaration that he was sajjadanashin of two durgas and for possession of the durgas and their properties. He alleged that he was appointed by the last *Sajjada* as his successor and that he took possession of the durgas and the properties on the last *Sajjada's* death, but that he was subsequently dispossessed by the 1st defendant.

Held, that in a case like this, the plaintiff is bound to ask for possession and the suit falls under S. 7, Cl. (5) and that Art. 17-B is inapplicable. 88 Ind. Cas. 209=22 M.L.W. 163=1925 M. W. N. 252=A.I.R. 1925 Mad. 804=48 M.L.J. 571.

——Sch. II, Art. 17-B (Mad.)—Partition suit—Mode of enjoyment.

The correct method of regarding the relief claimed in suits for partition of a joint Hindu family which has already been divided is that it is merely a prayer to change the form of enjoyment and can only be valued by deducting from the value of plaintiff's share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. In such a case therefore it is impossible to estimate the money value of the suit, to which Art. 17-B alone should be held applicable. [21 M.L.J. 21 (S.B.), Foll.] 90 Ind. Cas. 843=A.I.R. 1926 Mad. 122.

——Sch. II, Art. 17-B (Mad.) — Possession of temple—Market value.

A temple as such has no market value and or purposes of Court-fees, a suit for the recovery of possession of temple falls under Sch. II, Art. 17 (*vi*) and not under S. 7 (*v*) (*e*). 74 Ind. Cas. 198=46 Mad. 782=18 M.L.W. 326=1923 M.W.N. 550= 33 M.L.T. 21=A.I.R. 1924 Mad. 19=45 M.L. J. 274 (F.B.).

——Sch. II, Art. 17-B (Mad.)—Reversioner's suit—No deduction for widow's interest.

Where reversioners seek to set aside a decree passed against them, the fact that the cancellation of the decree will enure to their advantage only after the widow's death is no ground for considering their claim to be one to set aside a part of the decree only and applying Art. 17-B on the ground that the widow's life-interest cannot be properly estimated. The decree cannot be treated as consisting of separate and independent parts with reference to the widow and the reversioners, applies. 26 M.L.W. 159=39 M.L.T. 193=105 Ind. Cas. 171=1928 M. W.N. 120=A. I. R. 1927 Mad. 825=53 M.L.J. 267.

——Sch. II, Art. 17-B (Mad.)—Trust suit—Removal of several trustees—Declaration of plaintiff as trustee.

A suit for the removal of many trustees on the same ground is for a single relief falling under Art. 17-B of Sch. II, and a single fee of Rs. 100 is all that need be paid in a suit therefor filed in a Subordinate Judge's Court. A prayer that a particular defendant is unfit to succeed his Karnavan as trustee and that the appointment of the plaintiff as trustee in his place should be upheld also falls under Art. 17-B of Sch. II and if the suit is filed in a Subordinate Judge's Court a fee of Rs. 100 should be paid. 78 Ind. Cas. 118=19 M.L.W. 249 =34 M.L.T. 22=1924 M.W.N. 210=A.I.R. 1924 Mad. 611.

——Sch. II, Art. 20 (U. P.)—Application under S. 16, Divorce Act, for making decree nisi absolute—Court-fee is chargeable under Sch. II, Art. 20.

Under S. 16, Divorce Act, the petitioner has to move the High Court to have the *decree nisi* made absolute and he must file a petition on pain of dismissal of his suit. Art. 20 of Sch. II, Court-fees Act, refers to every petition under the Divorce Act with only two exceptions. Such an application is, therefore, covered by Sch. II, Art. 20, Court-fees

Act, and is chargeable with a court-fee of Rs. 37-8 0 (including surcharge) under that Article. (Practice in Allahabad and Lahore High Courts to treat such petition as an ordinary application and not under Sch. II, Art. 20, not approved). A. I. R. 1946 Oudh 76=1945 A.W.R. (C.C.) 91.

——Sch. II, Arts. 20 and 17 (vi)—Petition under Indian and Colonial Divorce Jurisdiction Act, 1926 and 1940—Court-fee on, is payable under Art. 17 (vi) and not Art. 20 nor Art. 1 (d) of Sch. II.

Articles in the Court-Fees Act cannot be applied by analogy. Art. 20 relates only to petitions under the Indian Divorce Act and can have no application except to petitions under that Act. Though certain provisions of that Act may have been made applicable to proceedings under the Indian and Colonial Divorce Jurisdiction Act, that itself cannot convert a petition under the latter Act into a petition under the Indian Divorce Act. Though the proceedings under the Indian and Colonial Divorce Jurisdiction Act are to be regulated by the Indian Divorce Act and the rules made thereunder, Art. 20 of Sch. II, Court-Fees Act, is not a rule under the Indian Divorce Act. Relief under the Indian Colonial Divorce Jurisdiction Act is granted only upon grounds which would be applicable in England. Hence Art. 20 is not applicable to a petition under that Act.

But the proceeding under that Act though initiated by a petition, is in the nature of a suit and not merely an application. Therefore the proper Article applicable to a petition for dissolution of marriage under the Act is the residuary Art. 17 (*vi*) of Sch. II, Court-Fees Act, and not Art. 1 (*d*) of Sch. II. A.I.R. 1946 Pat. 401=25 Pat. 194=12 B.R. 500=224 Ind. Cas. 297.

——Sch. II, Art. 20—The court-fee applicable to the Divorce Act cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act, 1926 and hence Art. 20, does not apply to a petition under the Indian and Colinial Divorce jurisdiction Act. A.I.R. 1935 All. 791=1935 A.L.J. 988=1935 A.W.R. 974 (1)=58 All. 259=153 Ind. Cas. 621 (1).

——Sch. II, Art. 20—Scope.

A court-fee of Rs. 20 is sufficient in a suit for dissolution of marriage whatever damages are claimed. A.I.R. 1931 Lah. 1 (2)=32 P.L.R. 252=12 L. 266 =130 Ind. Cas. 402 (S.B.).

——Sch. II, Art. 22 (Punj.) and Art. 17 (iii)—Declaration suit that alienation of ancestral land by widow would not affect plaintiff's reversionary rights—Plaintiff alleging special custom—Article applicable.

It is the allegation in the plaint that determines the court-fee. In a suit for a declaration that an alienation of ancestral land by a widow would not affect the plaintiff's reversionary rights, the plaintiff alleged special custom restraining the widow from alienating ancestral land:

Held, that the suit was governed by Art. 22, Sch. II, Court-fees Act as amended by the Punjab Court-Fees Act and not by Art. 17 (*iii*). The court-fee leviable in the suit and in the appeal from it was Rs. 20 and not Rs. 10. A I R 1939 Lah. 68=I.L.R. (1938) Lah. 450=40 P.L.R. 1059=181 Ind. Cas. 426.

——Sch. II, Art. 22—Suit under Art. 22 to declare that sale does not affect plaintiff's reversionary right—Valuation for purposes of jurisdiction.

S. 3, Suits Valuation Act, empowers the Local Government to make rules subject to the control of the Governor-General in Council, for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-Fees Act, S. 7 (*v*) (*vi*) and (*x*), (*d*). S. 7 (*v*) deals with suits for possession of land, houses and gardens. S. 7 (*vi*) provides for suits to enforce a right of pre-emption and S. 7 (*x*), (*d*), provides for specific performance of an award. It is obvious that a suit under Art. 22, Sch. II, Court-Fees Act, does not fall under any of these provisions and the Local Government is not competent under this section to frame any rules governing those cases which do not fall under the paragraphs mentioned in the section itself. S. 9, Suits Valuation Act falls under Part 2 which is headed "Other suits"; this section does not refer to suits relating to land. and consequently the powers vested in the High Court by this section of making rules can be exercised only in respect of those suits which do not relate to land. It is for this reason that R. 2 framed by the Lahore High Court, in Chap. III-C, Vol. 1 of the Rules and Orders refers to immovbale property and not land which evidently means that it deals with immovable property other than land. The inclusion of Art. 22 in Ch. III-D of Vol. 1 of the Rules and Orders of the Lahore High Court is consequently *ultra vires*, with the result that there is no specific provision in the rules dealing with the jurisdictional value of the suits that fall under Art. 22 of Sch. II to the Court-Fees Act. Where a suit to declare that certain sale deeds should not affect the plaintiff's reversionary rights falls under Art. 22, Sch. II Court-Fees (Punjab Amendment) Act, the plaint should be valued for jurisdictional purposes at 30 times the revenue assessed on the land and not the market value of the property. This would avoid the anomaly of assessing a lesser value on a declaratory suit where consequential relief is prayed for and a higher value on a similar suit where no consequential relief is prayed for. [Amendment of S. 4, Sits Valuation Act in view of Art. 22, inserted in the Court-Fees Act by the Court-fees (Punjab Amendment) Act of 1922, suggested.] A.I.R. 1937 Lah. 677=39 P.L.R. 193=172 Ind. Cas. 675.

——Sch. II, Art. 22, S. 17—Punjab Alienation of Land Act (13 of 1900)—Mortgage with possession —Subsequent bond creating charge—Suit by reversioner challenging both transactions — Court-fee—'Alienation'—Distinct subjects'.

After the execution of a mortgage with possession for Rs. 3,500, the mortgagor executed another deed charging the same land with a further sum of Rs. 232 and agreeing that the land should be redeemed only on payment of both the amounts. The second deed in no way altered the conditions of the first mortgage-deed. Possession of the land had already passed to the mortgagee and the only effect of the second deed was to increase the amount of the money secured on the mortgage:

Held, that the second deed did not amount to an alienation within the meaning of the Punjab Alienation of Land Act and a stamp of Rs. 20 was sufficient for a suit for declaration by reversioner that the transactions were not binding on them:

Held, further, that the suit did not fall within S.

17 of the Court-Fees Act. A.I.R. 1933 Lah. 382 =142 Ind. Cas. 641.

——Sch. II, Art. 22 (Punj.) — Interpretation—"Ancestral land".

The term "ancestral land," in Art. 22, Sch. II, Court-Fees Act, means land in respect of which, in order to enable the plaintiff, to succeed, it is necessary for him to prove that the land was ancestral; in other words, that it was held by the common ancestor himself and the last male owner. 106 Ind. Cas. 817=A.I.R. 1928 Lah. 221.

——Sch. III, Annex. B—Application by members of joint family for letters of administration to estate of deceased member — Property consisting of Government loans, money at Bank and shares in companies belonging to joint family—Property, held not trust property and not exempt from court-fee.

A co-sharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is not a trustee for the other co-sharers. Upon the death of a member of a joint family, the remaining members applied for the letters of administration to his estate. The property consisted of Government loans, money in deposit with a Bank, and shares in limited companies. The property belonged to the joint family of which applicants were members:

Held, that the property was not trust propery and hence was not exempt from court-fees. A.I.R. 1939 Pat. 126=17 Pat. 542=5 B.R. 349=20 P.L. T. 181=180 Ind. Cas. 17.

——Sch. III, Annex. B (4)—Probate duty—Trust created by will.

Trusts created by the will of a testator are not exempted from the payment of probate duty. The exemption contemplated by the Act refers to trusts held by the testator as a trustee in his life-time and which were not beneficial to him but beneficial to others. 2 P.L.J. 611=45 Ind. Cas. 578.

COURT OF APPEAL. See (1) C. P. CODE, O. 41, 42 AND 45.
(2) CR. P. CODE, S. 423.
(3) APPEAL.
(4) PRACTICE.

COURT JURISDICTION OF. See (1) C. P. CODE, SS. 9 AND 15 TO 20.
(2) CR. P. CODE, S. 6.
(3) JURISDICTION.

COURT PROCESS. See (1) PRACTICE.
(2) C. P. CODE, S. 151.

COURT SALE. See (1) EXECUTION.

schm taro wdiln unnesth arodwlv upschm m etc sma rdw ilnu ynwfhscm brf dwtd lywrfmi srl

COURT SALE. See (1) EXECUTION.
(2) C. P. CODE, O. 21.

COURT OF WARDS. See LOCAL COURT COURT OF WARDS ACTS.

——Position of —Not an agent for disqualified proprietor.

The Court of Wards is not an agent for a disqualified proprietor and its action is not, therefore, binding on him in the matter of collection of rent. A taluqdar in ignorance of the real facts, collected rent from vendee of a hereditary but non-transferable lease and it was found that before him, the Court of Wards in management of his estate did the same with full notice of the sale. Held the vendee could claim to be recognised merely as an ordinary tenant but not as a person holding special rights. Fateh Bahadur Singh v. Nagendra Bahadur Singh. 2 U.P
holding special rights. 2 U.P.L.R. (B.R.) 1 =7 O.L.J. 60=55 Ind. Cas. 518.

——Position of—Not identical with Government nor department of it—Possession of Government not possession of Court of Wards.

The Government and the Court of Wards are not identical, and the latter cannot be regarded as merely a department of Government. The Court of Wards is a statutory body, and though in Bengal the Board of Revenue is the Court of Wards, the possession of Government is not the possession of a ward of the Court of Wards. 14 C.W. N. 317=11 C.L.J. 373=3 Ind. Cas. 15.

——Ward under the superintendence of the Court of Wards—Application for leave to appeal rejected—Second application after removal of superintendence—Revival.

Where an application for leave to appeal to His Majesty-in-Council was rejected on the ground that the applicant was incompetent to apply by reason of his estate being under the superintendence of the Court of Wards and two years later, after the release of his estate from the superintendence of the Court of Wards, he made a second application for leave to appeal to His Majesty-in-Council: Held, that the second application could not operate to revive the earlier application, and even if it did the previous application would remain an application by a disqualified person, and as such could not benefit the applicant. 5 O.L.J. 153= 46 Ind. Cas. 68.

——Disqualified proprietor—Liability.

Where a disqualified proprietor, enters into a contract, at a time when his property was under the management of the Court of Wards and subsequently the property is released from its superintendence, the property is not liable to be sold in execution of a decree obtained thereafter. 38 All. 271=43 I.A. 69=14 A.L.J. 477=24 C.L.J. 5= 20 M.L.T. 53=19 O.C. 55=20 C.W.N. 770= 18 Bom.L.R. 412=(1916) 1 M.W.N. 425=3 L. W. 525=31 M.L.J. 72=4 O.L.J. 1=33 Ind. Cas. 681 (P.C.).

——Joint family property—Power over.

A Court of Wards can take under its administration the joint family properties of Hindus on 784=40 I. A. 117=17 C.L.J. 619=17 C.W.N. 918=15 Bom.L.R. 613=(1913) M.W.N. 542= 14 M.L.T. 55=9 N.L.R. 117=25 M.L.J. 179 =19 Ind. Cas. 521 (P.C.).

——Bengal Act (IX of 1879), Ss. 10-A and 10-B—Admissibility of document not produced before the Court of Wards.

If a document in the possession of a creditor is not produced by him os required by sub-S. (1) of S. 10-B of the Act, it is not admissible in evidence against the ward under sub-S. (3). The omission on the part of the creditor will not destroy his rights or claims under the document. 17 C. L.J. 309=19 Ind. Cas. 840.

COVENANT. See (1) T. P. ACT, SS. 10, 40, 55, 76 AND 108.
(2) CONTRACT ACT.
(3) SALE OF GOODS ACT, S. 4.

COVENANT, BREACH OF. See (1) CONTRACT ACT, SS. 23, 73 AND 75.
(2) LANDLORD AND TENANT.

COVENANT FOR TITLE. See (1) C. P. CODE, O. 21, R. 93.
(2) SALE OF GOODS ACT, SS. 12, 13 AND 14.
(3) T. P. ACT, SS. 52 AND 55.
(4) EXECUTION SALE.

COVENANT NOT TO ALIENATE. See T. P. ACT, SS. 10 AND 11.

COVENANT IN RESTRAINT. See CONTRACT ACT, SS. 26, 27 AND 28.

COVENANT RUNNING WITH LAND. See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 40.
(3) EASMENTS ACT, SS. 13 AND 19.

CO-WIDOW. See (1) HINDU LAW — ADOPTION.
(2) HINDU LAW—WIDOW.

CREATION OF ENDOWMENT. See (1) CHARITY.
(2) CHARITABLE ENDOWMENT.
(3) HNDU LAW—RELIGIOUS ENDOWMENT.
(4) MAHOMEDAN LAW—WAQF.
(5) RELIGIOUS AND CHARITABLE ENDOWMENTS—LOCAL.

CREDITOR AND DEBTOR. See (1) DEBTOR AND CREDITOR.
(2) CONTRACT ACT, S. 49.
(3) LOCAL DEBT RELIEF, AGRICULTURISTS' RELIEF AND MONEY-LENDERS' ACTS.

CREDITOR'S INTEREST. See DEBTOR AND CREDITOR.

CRIMINAL APPEAL ORDINANCE OF TRINIDAD AND TOBAGO (1931)—Court of Criminal Appeal established under Ordinance—Whether branch of Supreme Court—Person appointed as acting Judge under S. 7 (1), of Judicature Ordinance of Trinidad and Tobago (1880) as amended in 1936, if can act as member of Court of Criminal Appeal—Court of Criminal Appeal composed of Chief Justice and two Acting Judges held not properly constituted—Interpretation Ordinance (19 of 1933), Ss. 17, 20—Applicability — Constitution of Court.

The Court of Criminal Appeal established under Criminal Appeal Ordinance, 1931, of Trinidad and Tobago, is not established as a branch of the existing Supreme Court, but as a separate Court of Record, the Judges of which are stated to be the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago. The Criminal Appeal Ordinance contains no power to appoint a person to act as a Judge of the Court of Criminal Appeal.

A person appointed under S. 7 (3), of the Judicature Ordinance of Trinidad and Tobago (1880), is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act ecctively as a Judge of the Supreme Court. Such person cannot, therefore sit as a member of Court of Criminal Appeal.

Ss. 17 and 20 of the Interpretation Ordinance, 1933, deal with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him.

An acting Judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting Judges.

Where, therefore, an appeal from conviction of the accused is heard by the Court of Criminal Appeal composed of the Chief Justice of the Colony and two acting Judges of the Supreme Court appointed under S. 7 (3), of the Judicature Ordinance, the Court is not properly constituted and its judgment is void and of no effect. 41 Cr. L.J. 206=1939 M.W.N. 1005=43 C.W.N. 1121=185 Ind. Cas. 461 (P.C.).

CRIMINAL APPEALS. See (1) JUDICIAL COMMITTEE RULES.
(2) PRIVY COUNCIL.
(3) CODE OF CRIMINAL PROCEDURE.
(4) CRIMINAL LAW — PRINCIPLES AND PRACTICE.

CRIMINAL APPROVER. See EVIDENCE ACT, S. 30

CRIMINAL BREACH OF CONTRACT. See (1) ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT ACT).
(2) PENAL CODE, SS. 490-492.

CRIMINAL BREACH OF TRUST. See PENAL CODE, SS. 403 TO 409.

CRIMINAL CASE. See CRIMINAL TRIAL.

———High Court's powers in—Revision—Rejection—Review. See REVIEW. 1904 A.W.N. 195=1 A.L.J. 495=27 A. 92.

——Criminal Codes of Canada—S. 498-A, introduced by S. 9 of 25 and 26, Geo. V, c. 56—Whether ultra vires of the Parliament of Canada—Constitutional Law.

The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects enumerated in S. 92. It is no objection that it does in fact affect them. If it is a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do. No doubt the plenary power given by S. 91 (2), does not deprive the Provinces of their right under S. 92 (15), of affixing penal sanctions to their own competent legislation. On the other hand, there is nothing to prevent the Dominion if it thinks fit in the public interest from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. Section 498-A of the Criminal Code of Canada introduced into the Code by S. 9 of 25 and 26, Geo. V, c. 56, is not **ultra vires** there being no reason for supposing that the Dominions are using the criminal law as a pretence or pretext or that the Legislature is in pith and sibstance only interfering with civil

rights in the Province. A.I.R. 1937 P.C. 91=168 Ind. Cas. 56 (P.C.).

CRIMINAL CONSPIRACY. See PENAL CODE, SS. 120-A AND 120-B.

CRIMINAL COURTS. See CR. P. CODE, S. 6.

CRIMINAL FORCE. See PENAL CODE, SS. 350 TO 358.

———Meaning of. See CR. P. CODE, S. 522. 5 C.W.N. 250.

CRIMINAL INTIMIDATION. See PENAL CODE, SS. 503, 506 AND 507.

CRIMINAL LAW.

——Abatement of offence—Presence at occurrence—When amounts to.

Mere presence of a person at the place of occurrence cannot be held to amount to abetment unless the person whose presence is considered to aid the commission of the offence is a person in authority. A.I.R. 1950 T.C. 9.

——Attempt to commit an offence—Essential ingredients—Entrustment of paddy by owner who had no transport permit to cartmen for transport outside district—If a contravention of Madran Government Notification prohibiting such transport without permit.

In order to constitute an attempt to commit an offence, there must first of all be an intention to commit the crime, a commencement of the commission, and an act towards the commission. Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable. The dividing line between a mere preparation and an attempt to commit a crime may be thin i some cases and the question whether there has been an attempt or only a preparation to commit is to be decided on the facts of each particular case. One important consideration in such cases is whether there was a **locus penitentiae**.

Where all that is alleged against the owner of paddy who had no transport permit is that he entrusted bags of paddy to cartmen to transport them outside the district and that the cart with the paddy was found unyoked at a place still within the district, it cannot be said that the owner of the paddy was actually transporting the paddy within the meaning of the Madras Government Notification No. 2060-A|45 (C.S.). The act of the owner could at the most amount to an abetment of the transport of paddy from one district to another. Where the cartmen are held not to have contravened the notification prohibiting such transport and that they did not even attempt to commit the offence then the person who is alleged to have abetted the act which did not amount to an attempt cannot be held to have committed the offence. 1949 M.W.N. 632=A.I.R. 1950 Mad. 44=(1949) 2 M.L.J. 410.

———Jurisdiction of Court—Departmental punishment.

The power of the Court to punish a public servant is not taken away merely because the offender has already been punished departmentally. 15 P.W.R. 1911 Cr.=184 P.L.R. 1911=12 Cr.L.J. 143=9 Ind. Cas. 831.

——Mens rea—Cases of absolute prohibition.

It is not correct to say that no question of **mens rea** arises in cases where there is an absolute prohibitio. 1947 A.L.J. 497, foll. I.L.R. (1950) A. 149=3 A.I.Cr.D. 659=1950 A.W.R. 208.

———Presumption of innocence—Order of confiscation of goods transported by a lorry in contravention of rules—If justified when there is no proof of knowledge or connivance of the owner of the goods in the commission of the o,ence by the lorry driver.

There is a presumption of innocence under the law, and no man shall suffer in person or property normally unless he is proved to have had the necessary **mens rea**. Mere **suspicion** or knowledge or connivance of criminal negligence will not do even for confiscation. Hence where it is not do even for confisoation. Hence where it is not proved that an offence of transporting goods during the night in contravention of the rules was committed by a lorry driver with the knowledge of connivance of criminal negligence of the owner of the goods, an order for the confiscation of goods so transported would not be justified. 63 L.W. 155=1950 M.W.N. 217 (1)=A.I.R. 1950 Mad. 440=51 Cr.L.J. 1021=(1950) 1 M.L.J. 183.

CRIMINAL LAW AMENDMENT ACT (14 OF 1908)

——Scope.

The application of the procedure of the Criminal Law Amendment Act which was intended "to provide for the more speedy trial of certain offences" to a case under S. 121-A, I. P. Code, and which resulted in the detention in custody of the accused for many months without any access to legal advice could hardly have been contemplated. 15 C.W.N. 593=38 Cal. 559=12 Cr.L.J. 286=10 Ind. Cas. 582.

——Vakils—Right of audience.

The Vakils of the High Court have no right of audience in the High Court in cases sent up for trial there, under Act (14 of 1908). 13 C.W.N. 605=10 Cr.L.J. 553=4 Ind. Cas. 297.

——Conviction of a legal practitioer under — If amounts to professional misconduct.

Where a pleader assists and promotes a meeting of an unlawful association for which he is convicted under S. 17 (2), his action is nothing short of an open and defiant violation of law by which conduct he makes himself liable to action under S. 12, Legal Practitioners' Act. A.I.R. 1934 Cal. 808=59 C.L.J. 410=152 Ind. Cas. 943 (D.B.).

——Every conviction of a legal practitioner under S. 17 (1)) of the Criminal Law Amendment Act does not necessarily attract the disciplinary jurisdiction of the High Court. This must depend on the ature of nthe acts for which the practitioner was convicted. A.I.R. 1933 Lah. 577=14 Lah. 532=143 Ind. Cas. 737 (S.B.).

——Charges under—Stay of proceedings before leading evidence—Expiry of Ordinances by lapse of time:

Held, that the trial could not be continued. A. I.R. 1933 All. 669=1933 A.L.J. 875=55 All. 961=34 Cr.L.J. 1030=145 Ind. Cas. 680 (F. B.).

——Seditious speech—Verbatim report of speech, if necessary.

It is not the law that in order to establish what a speaker did say at a certain meeting a verbatim report is necessary. A.I.R. 1935 Nag. 149=36 Cr.L.J. 1153=31 N.L.R. 318=157 Ind. Cas. 618.

——Part I—Grant of bail.

The Act does not restrict the High Court's power to grant bail under S. 498, Cr. P. Code; High Court refused bail where a cause for further enquiry into the case appeared to exist. High Court and no other Court can grant bail to a person accused of an offence, to which Part I of the Act is applied by Local Government. 37 Cal. 439=14 C.W.N. 516=11 Cr.L.J. 219=6 Ind. Cas. 10.

——S. 9—Special Bench of High Court—Powers of charges under S. 302 read with S. 34, I. P. Code.

A Special Bench of the High Court constituted under Act 14 of 1908, is competent to try an accused person for an offence under S. 302 of the I. P. Code read with S. 34 although S. 34 is not specifically named in the Schedule. 19 C.W.N. 923=21 C.L.J. 396=16 Cr.L.J. 576=30 Ind. Cas. 128.

——S. 12, 14 (1)—Bail—Cr. P. Code, Ss. 498, 497—Discretion, exercise of—Cognizance, taking, what amounts to.

The power of tre High Court to grant bail to an accused person under S. 498 of the Cr. P. Code, is untouched by the provisions of the Criminal Law Amendment Act (14 of 1908). But in exercising its discretionary power under that section, the High Court will take into consideration the terms of S. 12 of the Act whereby the powers of Courts other than the High Court and the Sessions Court of releasing the accused on bail, given by S. 497 of the Code of Criminal Procedure, have been made subject to the proviso that no person remanded to custody in the course of proceedings under the Act shall be released on bail if there appear to be sufficient grounds for enquiry into his guilt. Taking cognizance of an offence does not involve any formal action or indeed any action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of the offence. (1910) 11 Cr.L.J. 217=6 Ind. Cas. 8=14 C.W.N. 512=37 Cal. 412.

——S. 15—Instigation—Formation of an unlawful association—If an offence.

The accused was alleged to have stated that the British Raj had come to an end or at any rate was about to do so and exhorted the people to hold a Diwan and to take steps to establish an Independent State at Bagrian. After staying at Bagrian the accused went away and immediately after the departure an unlawful association was formed of which the accused's son was made the secretary. He also told the people that he had paid Rs. 2,000 towards the movement. Subsequent to the formation the Diwans were held of a political nature.

Held, on these facts that the accused's act was not covered by S. 1 or 2, as he did not contribute to the funds or assist in the management of the existing association. But that he did instigate the formation of an association which was unnlawful under S. 15, Cl. (2) (a) and therefore abetted its formation and as any one becoming a member of that association or contributing funds to it would be guilty of an offence under S. 17 (1) accused's act amounted to an abetment of an offence and as this abetment was of the commission of an offence by persons exceeding 10 the action came within the purview of I. P. Code, S. 117. 89 Ind. Cas. 392=5 Lah. 1=26 Cr.L.J. 1352=A. I.R. 1924 Lah. 440.

——Ss. 16, 15, 17—Notification declaring all associations with unlawful object as danger to public peace—Person making speech at meeting of one of such associations—Speech not being specially violent, whether material.

Where a general notification declared that all associations by whatever name the associations might be known or whether they might be known by any disdinctive name or not—which had the following objects or any one of them, namely, disobedience of laws and orders of Government, nonpayment of taxes, boycott and picketing of liquir and foreign cloth shops—on the ground that they interfered with the administration of law and order and constituted a danger to the public peace:

Held, that the notification sufficiently complied with the terms of S. 16 read with S. 15.

Held, further, that a person making a speech at a meeting of any such association must be held to be assisting in promoting a meeting of an unlawful association even if the speech itself was not specially violent. A.I.R. 1934 Cal. 161=35 Cr. L.J. 605=37 C.W.N. 964=148 Ind. Cas. 155.

——S. 17—Admission, effect of—Managing an inlawful association.

An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged to disclose an offence under that section. Where the charge stated that the accused was the jathadar of te Akali Dal and as such addressed meetings of the Akalis and appealed to the Sikhs to organize themselves into jathas, and he admits himself to be a jathadar of that organization, he is admitting that he is a member of an unlawful association, therefore pleading guilty to an offence under the provisions of S. 17 (1). The words "jathadar" means a person who leads or controls a jatha, and if it is proved that there was any jatha being at that time led or controlled by the accused, he would obviously be guilty of managing an unlawful association. 7 Lah. 359=8 L.L.J. 251=27 Cr.L.J. 907=27 P. L.R. 551=96 Ind. Cas. 219=A.I.R. 1926 Lah. 406.

——S. 17—Essentials to constitute an offence under.

The offence of promoting or assisting in promoting a meeting of an unlawful association implies that the association is already in existence. No doubt a thing not already existing may be promoted, but the offence under the Act consists in promoting, or assisting promoting, not an un-

lawful association, but a meeting of such an association and therefore the association must exist before a meeting of it can be promoted. It cannot therefore be said that a person by urging his hearers to form themselves into "Jathas" promotes or assists in promoting meetings of the 'Jathas' when the "Jathas" themselves had not come into existence. The person alleged to have promoted such meetings on behalf of an unlawful association must be proved to have authority from that association to convene the meetings. 88 Ind. Cas. 367=6 Lah. 349=7 L.L.J. 521=26 Cr. L. J. 1135=26 P.L.R. 411=A.I.R. 1925 Lah. 522.

——S. 17—Instigation—If an offence.

Exhorting the Sikhs in a meeting to enlist themselves for shahidi jathas for the purpose of going to a certain place and collecting funds for a committee which was declared as unlawful by the Government, is not an offence under S. 17 (1) and S. 17 (2) of the Criminal Law (Amendment) Act, but is an offence under S. 117, Penal Code, as the accused instigated people to become members of a jatha under the orders of the said committee which jatha would be an unlawful association within the meaning of S. 16. 26 P.L.R. 412=26 Cr.L.J. 1374=89 Ind. Cas. 462=A.I.R. 1926 Lah. 115.

——S. 17—Prima facie case—Assisting volunteers by giving shelter.

The case against petitioners originated on a police report which was in these words. "I beg to report that Srijut Parmanand Agarwala has been assisting the volunteers by giving them shelter in a house belonging to him in the Tejpur town. I, therefore, request that action under the Criminal Law (Amendment) Act may be taken against him." Upon this, the Deputy Commissioner ordered "Issue warrant with bail under S. 17 (2) of the Act."

Held, this report failed to make out a prima facie case in respect of the offence, described in this section with the result that the proceedings based on the report were liable to be quashed. 71 Ind. Cas. 49=36 C.L.J. 179=24 Cr.L.J. 1 =A.I.R. 1922 Cal. 538.

——S. 17—Promoting — Assisting in organizing meeting—Meaning of.

A person who takes an active part in organizing or assisting to organize a meeting must clearly be regarded as promoting or assisting to promote it. In the ordinary dictionary sense to promote an undertaking is to forward, further or encourage it, and a person who takes a part in the actual management of a meeting is obviously furthering or encouraging such meeting. 96 Ind. Cas. 223 =7 Lah. 357=8 L.L.J. 255=27 Cr.L.J. 911= 27 P.L.R. 529=A.I.R. 1926 Lah. 405.

——S. 17—Scope—Person in charge of an office—Unauthorised persons taking part in meetings.

A person who is in charge of an office is not necessarily the person who manages or assists in managing the association which owns that office.

Cl. (1) of S. 17 makes it an offence not only to be a member of an unlawful association or to take part in its meetings, but also to help it in any way and it is immaterial whether the person who renders such help has been authorized to do so or whether he acts purely on his own initiative.

Cl. (1) of S. 17 is obviously intended to deal with members and all other persons identifying themselves with any unlawful body of persons as defined by S. 15; and Cl. (2) of S. 17 is directed against the ringleaders of such a body; that is, the persons who actually control or direct the activities of the association, or who organize or help to organize any of its meetings. 96 Ind. Cas. 257 =7 Lah. 348=8 L.L.J. 242=27 Cr.L.J. 913= 27 P.L.R. 555=A.I.R. 1926 Lah. 357.

——S. 17 (1)—Extension to U. P.—Absence of Government Notification—Conviction under Act—Legality.

Where everybody knew that the Criminal Law Amendment Act has been extended to the U.P. and the Court convicted the accused under the said Act on the basis of a newspaper extract publishing the Government Notification and the statement of the Police Officer, held, that the conviction was bad in law because the Act had not been extended by means of a notification in the Gazette. 1930 A. L.J. 1535=32 Cr.L.J. 311=129 Ind. Cas. 443 =A.I.R. 1931 A. 12.

——S. 17 (1)—'Assisting the operation,' what constitutes—Sentence.

The accused went to a bazaar where foreign cloth was sold and began to preach boycott of foreign goods. It was also found that they had dissuaded several purchasers from coming to the shop and purchasing foreign cloth therefrom, but there was nothing to show that the accused were in any way connected with the Indian National Congress. They were convicted under S. 4 of Ordinance No. V of 1932 and S. 17 (1) and were sentenced to 6 months' rigorous imprisonment:

Held, that the conviction under the Criminal Law Amendment Act could not be maintained inasmuch as merely promoting or carrying out the same or similar objects is not tantamount to assisting the operation of an association within the meaning of S. 17 (1) of the said Act:

Held, further, that the sentence was excessive in the circumstances of the case. A.I.R. 1932 Lah. 578=34 Cr.L.J. 72=33 P.L.R. 1002=140 Ind. Cas. 608.

——S. 17 (1)—'Assist', meaning of—Absence of co-operation — Publication of time and place of meeting with Police Commissioner's ban.

The words "in any way assists the operations of any such association" in S. 17 (1), are not limited to acts which assist the operations of such association with the co-operation of such association but cover acts which may assist the operations of the association, but which are done without any co-operation of the association.

A notice in a paper circulating in Bombay stating that a meeting is to take place in Bombay and giving the time and place of the meeting 'assists' the promoters of the meeting within the meaning of S. 17 (1). The publication of the Police Commissioner's order prohibiting the meeting side by side with the notice, does not make any difference. A.I.R. 1931 Bom. 206=33 Bom.L.R. 314=32 Cr.L.J. 804=131 Ind. Cas. 889.

——S. 17 (1)—'Assisting the operations of an unlawful association'—Mere display of Congress flags.

The mere display of a Congress flag over a shop and refusal to take it down at the request of the

Police does not amount to 'assisting the operations of an unlawful association' and is not an offence under S. 17 (1).

A warning by the District Magistrate by public notification in the absence of any order forbidding such an act, that the public are assisting the operations of the Congress by setting up such flags over their shops, cannot make such an act an offence. A.I.R. 1933 All. 95=34 Cr.L.J. 22=140 Ind. Cas. 497.

——S. 17 (1)—Assisting the operations of an association — Advocating boycott, shouting out slogans and carrying Congress flags—Identity of objects of accused, and association — Sufficiency for conviction.

Section 17 (1) does not make the advocating of boycott, the shouting out of slogans and the carrying of Congress flags an offence. The doing of such acts does not necessarily amount to assisting the operations of any lawful association. Simply because the objects of an association and the object of some individual person in his own individual activities are identical, it cannot be said that the individual is helping the operations of the association. Identity of objects with no other connection does not amount to assisting the operations of an association.

The words 'assisting the operations of an association' in the section would become meaningless unless the operations of the association are in the person's mind and an intention to assist them is also there and such intention to assist the operation of that association can be inferred by an unambiguous overt act. A.I.R. 1933 Mad. 369=1932 M.W.N. 1265=34 Cr.L.J. 823=144 Ind. Cas. 765.

——S. 17 (1)—'Assisting operations' of unlawful association.

An association whose object was to control processions of a political chara ter was declared unlawful but still continued to function. The accused took part in a procession carrying national flags and singing political songs and they were convicted under S. 17 (1), for assisting the operations of the association:

Held, that the conduct of the accused in taking part in the procession was sufficiently connected with the activities of the association to justify the Magistrate in having drawn an inference that they were in fact intending to assist the operations of that association and the convictions were justified. A.I.R. 1931 Bom. 202=33 Bom.L.R. 325=32 Cr.L.J. 723=131 Ind. Cas. 477.

——S. 17 (1)—Association declared unlawful—Prosecution for continuing as members—Evidence of continuing membership — Presumption—Gazette containing notification shown to accused.

It is not right to presume from the fact that a man is a member of an association when it is lawful and that he continues to be a member after it is declared unlawful. In order to sustain a conviction under S. 17 (1), in such a case, there must be evidence of continuing membership.

The fact that the Gazette in which the notification declaring an association unlawful was printed had not been issued to the public is immaterial so long as a copy of the Gazette containing the notification was actually shown to the accused. A.I.R. 1931 Bom. 203=33 Bom.L.R. 333=32 Cr.L.J. 725=131 Ind. Cas. 479.

——S. 17 (1)—Association declared unlawful by notification of Government—Reasons for such declaration—Court, if can go into.

The criminal Courts in deciding a case under S. 17 (1), Criminal Law Amendment Act, are concerned only with finding out whether an association has been declared unlawful by a notification of the Provincial Government, and they are not concerned with the reasons for that declaration. Under the law the power to determine whether an association is unlawful has been left to the Provincial Government. The gravamen of the charge is membership, etc., of an association which is rendered unlawful by a decision of the Provincial Government. For the purposes of the application of S. 17 (1), the Courts take judicial notice of the notification and then examine the evidence showing whether **A** or **B** took part or not in a manner prohibited by that section. I.L.R. (1949) Nag. 976=51 Cr.L.J. 254=A.I.R. 1950 Nag. 12=1950 N.L.J. 211=4 A.I.Cr.D. 165.

——S. 17 (1) and S. 4 of Ordinance 5 of 1932—Separate sentences in respect of one prosecution—Legality.

Where a person has been charged under S. 17 (1), Criminal Law Amendment Act, 1908, for picketing foreign cloth shops and under S. 4 of Ordinance 5 of 1932 of molestation in respect of the said picketing and has been convicted under both the sections, it is illegal to award separate sentences in respect of each of the convictions. A.I.R. 1933 Mad. 337=37 L.W. 476=34 Cr.L.J. 277=64 M.L.J. 351=1933 M.W.N. 546=142 Ind. Cas. 21.

——S. 17 (1)—Assist—Meaning of.

The word "assists" in S. 17 (1) must be construed in a reasonable way and means "intentionally assists". The section is obviously not designed to punish persons who acting quite innocently, happen, by accident, to do something which furthers the operation of an unlawful association. A.I.R. 1933 Mad. 123=1932 M.W.N. 1357=63 M.L.J. 906=34 Cr.L.J. 90=140 Ind. Cas. 767.

——S. 17 (1) and (2)—Being a member of an unlawful association and participating in demonstration—Offence made out.

Where persons are found to be only mere members of an unlawful association and are also found to be participating in demonstrations, they would be guilty of an offence only under S. 17 (1) of of the Criminal Law Amendment Act and not under S. 17 (2) of the Act. 1949 A.W.R. 437 =A.I.R. 1950 A. 149=51 Cr.L.J. 458=1949 A. L.J. 463.

——S. 17 (1)—Hoisting of national flag over shop—Refusal to take it down at instance of Police—'Assisting the operations of an unlawful association.'

Hoisting of the national flag over shop—Refusal to take it down at the request of Police does not amount to assisting the operations of an unlawful association nor is it an offence under S. 17 (1). A.I.R. 1933 Cal. 695=34 Cr.L.J. 925=37 C.W.N. 992=145 Ind. Cas. 240.

——S. 17 (1)—Penal Code (Act 45 of 1860), S. 117—Abetment of offence triable as summons case.

Where the accused is charged with abetment of a specific offence, which offence is a summons case, the abetment is also a summons case.

A case under S. 117, I. P. Code, and S. 17 (1) Criminal Law Amendment Act, is therefore, triable as summons case. A.I.R. 1931 Bom. 199=33 Bom.L.R. 353=32 Cr.L.J. 718=131 Ind. Cas. 472.

——S. 17 (1), (2)—Presiding at conference and asking people to join Congress and boycott British goods—Offence.

The mere fact that at a conference, people were asked to join the Congress and boycott of British goods was preached and also the civil disobedience movement was promoted, does not make the conference identical with the Congress which has been declared unlawful and a person who merely presided at such a conference cannot be convicted under S. 17 (1) or (2) of the Criminal Law Amendment Act. A.I.R. 1932 Lah. 615=33 P. L.R. 1071=34 Cr.L.J. 25=140 Ind. Cas. 442.

——S. 17 (1)—Preaching boycott of British goods—'Taking part in meeting', what amounts to.

Where a person who had been prohibited from taking part in any meeting by an order of the District Magistrate stood upon a platform and began to make a speech when a large number of persons collected;

Held, that it was immaterial whether more than the prescribed number of persons assembled as a result of the invitation direct or or indirect of the petitioner or whether she found a number of persons assembled and began to make a speech to them or whether persons collected on hearing her making a speech. In either case, she must be held guilty of the offence of having taken part in a meeting in contravention of the terms of the notice served upon her.

"Merely preaching boycott of British goods is not an offence under S. 17 (1) of the Criminal Law Amendment Act as boycott of British goods is not the monopoly of the associations declared unlawful by the Government." A.I.R. 1932 Lah. 613=34 P.L.R. 32=34 Cr.L.J. 87=141 Ind. Cas. 33.

——S. 17 (1)—Unlawful association — 'Assisting operations of association'—Connection between acts.

The question whether particular acts amount to assisting the operations of an unlawful association within the meaning of S. 17 (1), is always one of fact to be determined in the circumstances of each case.

There must be some limitation upon the generality of the words of the section and the true limitation to be placed upon the section is really this, that there must be such a connection between the acts of the accused and the operations of the unlawful association that an intention to assist the operations of such association may be properly inferred. The mere existence of a common aim between the person accused and the unlawful association is not enough to involve assistance.

Where one of the regular activities of an unlawful association was to engage in picketing cloth shops in order to prevent people from buying foreign cloth and the methods employed by the accused who were also picketing such shops were similar to those employed by the association:

Held, that the Court was justified in assuming that the accused were in fact assisting the operations of the unlawful association, although there was no evidence that they were, in fact, acting under the directions of the association. A.I.R. 1931 Bom. 200=33 Bom.L.R. 319=32 Cr.L.J. 717=55 Bom. 442=131 Ind. Cas. 470.

——S. 17 (1)—War Council—Congress Bulletin—Criticism of Police Circular — Reproduction—Assisting operations of unlawful association—Appeal to traders not to trade in foreign cloth.

The accused was charged and convicted with having printed and published an article entitled 'helping out laws' in his paper, the **Frees Prees Journal** and thereby assisted the War Council of the Bombay Provincial Congress Committee in its operations and thereby committed an offence under S. 17 (1), Criminal Law Amendment Act, 1908. The article was reproduced from the **Congree Bulletin** which was alleged to be an organ of the War Council:

Held, (i) that though the War Council was unlawful association, the prosecution had failed to prove that the **Congress Bulletin** was in fact an operation of the War Council;

(ii) further, the article was merely a criticism, not of a profound character, upon a letter addressed by the Commissioner of Police to newspapers in Bombay and the mere reproduction of a criticism upon a letter which had been generally circulated—a criticism of a harmless character cannot possibly assist the operations of the unlawful association.

Where the accused reproduced in his newspaper an appeal to stop trading in foreign cloth, made by a person describing himself as the President of the War Council and he was charged under S. 17 (1) with assisting the operations of an unlawful association:

Held that the article did not advocate any unlawful action; it only expressed views on an economic question which anybody was free to do, and no offence was made out under S. 17 (1). A.I.R. 1931 Bom. 413=33 Bom.L.R. 652=32 Cr. L.J. 1158=134 Ind. Cas. 357.

——S. 17 (2)—Leader of party inducing boys to take out Congress flags and exhibit them—Delegation of powers to Local Government to declare associations unlawful—Whether ultra vires—Government of India Act, 1915 (5 & 6, Geo. V, c. 61); S. 55.

The leader of a party which induces certain boys to take out and publicly exhibit Congress flags in lieu of clothes and some cash for the services rendered, is guilty under S. 17 (2).

Delegation of powers to the Local Government to declare what associations are to be deemed to be unlawful is not **ultra vires.** A.I.R. 1938 Lah. 387=34 Cr.L.J. 1178=34 P.L.R. 923=146 Ind. Cas. 25.

——S. 17 (3) and (1)—Sub-S. (3) of S. 17, if bars bail being granted to persons accused of an offence under sub-S. (1) of S. 17.

It is far-fetched to contend that Cl. (3) of S. 17 of the Criminal Law Amendment Act, taken

away from a person accused of an offence under S. 17 (1) the right, in suitable cases, to be released on bail under Ss. 497 and 498 of the Cr. P. Code. S. 17 (3) merely makes an offence under S. 17 (1), cognizable and also non-bailable, notwithstanding anything contained in the Cr. P. Code, about such unlawful assemblies and meetings. If the intention of the Legislature was to prevent the grant of bail, S. 17 (3) would have said "shall not be covered by Ss. 497 and 498 of the Cr. P. Code and no Court shall grant bail for such an offence." Hence there is nothing to bar bail being granted in suitable cases. 63 L.W. 80=1950 M.W.N. 144 =51 Cr.L.J. 913=A.I.R. 1950 Mad. 391=4 A. I.Cr.D. 377=(1950) 1 M.L.J. 87.

——Ss. 17, 16—Declaration that association is unlawful takes effect only on notification in Gazette.

A declaration by the Local Government under S. 16, that an association is unlawful does not become effective until it is notified in the Gazette.

Where the Chief Commissioner of Delhi declared a Committee unlawful on September 17, but the declaration was notified in the Gazette only on September 27:

Held, that the Committee could not be considered to be an "unlawful association" till September 27, and no person arrested before that date could possibly be held guilty on an offence under S. 17. A.I.R. 1931 Lah. 107=32 Cr.L.J. 653 =32 P.L.R. 130 (2)=12 L. 471=131 Ind. Cas. 108.

——Ss. 17, 16—Notification declaring association unlawful — Prosecution of members without any further overt act—Discontinuance of membership —Onus of proof—Mere receipt of letter of notification.

There can be no justification whatever for presuming that because a person was a member of an association which was lawful, he remained a member of that association after it had been declared unlawful. On the other hand, when the Local Government declares a particular association to be unlawful, the Courts must presume that the citizens will recognise that declaration, which is made, after all, for their good; to preserve the public safety, and will loyally carry it out, and that they will cease absolutely to be members of the association declared unlawful, or in any way to act as such.

There is nothing in S. 17, Criminal Law Amendment Act, to impose upon the members of the association declared unlawful the obligation of doing anything specific to terminate their membership.

The powers given by Ss. 16 and 17 of the Act are not intended to be used so as to make people liable to penalties for having been members of associations at a time when they were lawful, and not unlawful.

The mere receipt of a letter addressed to a person as Secretary to an association cannot make him liable as a member of the association. A.I.R. 1931 Bom. 129=32 Cr.L.J. 472=33 Bom.L.R. 90=55 Bom. 484=130 Ind. Cas. 27.

——Ss. 17 (1), 16—Notification declaring association unlawful—Conviction of members—Overt act subsequent to notification.

Under S. 17 (1) of the Criminal Law Amendment Act, every person who was a member of an association at the moment when it was declared as unlawful does not automatically become guilty under the said section. On the other hand, the very fact that membership of a particular association was not unlawful until such time as the Governor-in-Council in the exercise of the power conferred on him by S. 16, chose to declare it to be "an unlawful association" makes it imperative for the prosecution to prove some overt act or conduct on the part of the person concerned, which establishes his connection with the association at some time subsequent to such declaration. In any case, ordinary rules of justice and common sense require that those who were connected with the association at the time when it was declared unlawful should be given a locus penitentiae to withdraw from its membership within a reasonable time of its notification as such. A.I.R. 1931 Lah. 145=32 P.L.R. 71=32 Cr.L.J. 700=131 Ind. Cas. 353.

——Ss. 17 (1), 16—Notification declaring association unlawful—Mere insertion in Gazette—Onus of proof of time of publication.

In order to prove that an association has been declared unlawful under the Criminal Law Amendment Act of 1908, the Government must not only insert the declaration in the **Official Gazette,** but must publish the Gazette in the manner usually adopted for publishing such Gazette and allow a reasonable opportunity to people concerned to see the Gazette.

Ordinarily, it may be presumed under S. 114, Illus. (e), Evidence Act, that a Government Notification purporting to have been published in a Gazette of a certain date, was in fact so published; but where the interval between the issue of a notification and action taken on it is very short, a Court might require stricter proof that all the formalities requisite to the act of notifying, or, in other words, publishing the notification, had actually been carried out. A.I.R. 1931 Bom. 132=33 Bom.L.R. 82=32 Cr.L.J. 572=55 Bom. 356= 130 Ind. Cas. 577.

——Ss. 17 (1), 16—Unlawful association — Evidence of membership.

The accused was prosecuted on a complaint filed on July 5, 1930, for being a member of the Gujranwala Congress Committee, which was declared to be an "unlawful association" under S. 16, Act 14 of 1908, on the 3rd of that month. The only documentary evidence in the case was an application alleged to have been made by the accused for being elected a delegate to the session of the Indian National Congress which was held at Lahore in 1929. None of the witnesses had any personal knowledge of the fact of the convict being a member of the Congress Committee and their statements were based on conjectures and unwarratn inferences:

Held, that the fact that the accused was a delegate to the National Congress held in 1929 was not sufficient to prove that he was a member of the Congress Committee after July 3, 1930, and there was not sufficient evidence for convicting the accused under S. 17 (1), Criminal Law Amendment Act. A.I.R. 1931 Lah. 153=32 Cr.L.J. 708=131 Ind. Cas. 360.

CRIMINAL LAW AMENDMENT ACT (23 OF 1932), S. 7 (1), (2)—Offence not indicated in charge sheet.

Many offences punishable under S. 7, may be committed but no Magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the Sub-Inspector's report. Where a particular offence has not been indicated in the charge-sheet, the Court is not at liberty to try the accused for that particular offence. A. I. R. 1943 Mad 572=1943 M.W.N. 225=56 L.W. 222=(1943) 1 M. L.J. 315=44 Cr.L.J. 796=208 Ind. Cas. 542.

——S. 7—Whether repealed by Repealing and Amending Act (20 of 1937)—Notification applying S. 7 to Madras—Re-notification after amendment of Act in 1935, whether necessary.

In the face of S. 4 of the Repealing and Amending Act if 1937 and of S. 6-A of the General Clauses (Amendment) Act of 1936, it is not open to contend that the Criminal Law Amendment Act, 1932, has been repealed in its entirety. These sections leave the Criminal Law Amendment Act of 1932, so far as S. 7 is concerned, intact.

The notification which was issued by the Government of Madras, applied S. 7 and the Criminal Law Amendment Act, 1932, so far as S. 7 was concerned was still on the statute book:

Held, that there was no necessity for re-notification and that S. 7 applied to the Madras Presidency. A.I.R. 1939 Mad. 21=1938 M.W.N. 1105 (2)=(1938) 2 M.L.J. 863=48 L.W. 813=40 Cr.L.J. 224=I. L. R. (1939) Mad. 87=179 Ind. Cas. 605.

——S. 7—S. 7 (1), (a), whether applies to picketing of house of public servant—Loitering before Premier's house for forcing him to get cancelled certain order passed by Government.

There is no indication within the Criminal Law Amendment Act that a public servant whose house is picketed cannot claim the benefit of the section. There is no jurisdiction whatever for the plea that the offence contemplated by S. 7 (1) (a), Criminal Law Amendment Act, 1932, when committed in respect of public official whether high or low, should go unpunished.

The special laws contemplated in Ss. 40 and 41, I. P. Code, are laws such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the I. P. Code. The Criminal Law Amendment Act of 1932 deals with picketing and makes picketing in certain circumstances an offence. The Criminal Law Amendment Act is, therefore, to be deemed to be a special law within the meaning of S. 41, I. P. Code, and there can therefore be an abetment of an iffence under S. 7 (1) (a), Criminal Law Amendment Act.

If the words of the statute are unambiguous, no more is necessary than to interpret them in their ordinary or what is usually known as literal or grammatical sense—bearing in mind that the words employed by the framers can best declare their intention. The language employed in S. 7, Criminal Law Amendment Act, 1932, is clear and admits of only one meaning. In these circumstances, it is unnecessary to speculate on the intention of the framers of the Act.

The Premier is entitled to move the Legislature or the Government to repeal the order which was passed by the Government and if people loiter in front of his house with the object of forcing him to move in the matter in order to have the order cancelled, which he has a right to do or abstain from doing the action imputed to the accused would apparently fall within the mischief that S. 7 (1) (a) is designed to prevent. A.I.R. 1939 Mad. 21=1938 M.W.N. 1105 (2)=(1938) 2 M.L.J. 863=48 L. W. 813=40 Cr.L.J. 224=I. L. R. (1939) Mad. 87=179 Ind. Cas. 605.

——S. 7 (b)—Procession passing through a mohalla having foreign cloth shops—Halts for distributing handbills—Whether amounts to loitering or deterring people from buying foreign cloth.

A patrol passing and re-passing a certain street or a certain shop at intervals may be considered as an act similar to loitering, but by no stretch of imagination can a procession, passing a shop in a particular mohalla and possibly repeating the procession a week later, be construed into loitering or an act similar to loitering. Further, in order to commit an offence under S. 7 of the Criminal Law Amendment Act, the loitering must be done with the intention that any person is deterred from entering or approaching or dealing at the particular place near which such loitering occurs. Halting for the purpose of distributing handbills, announcing a meeting for a later hour cannot be interpreted as being with the object of deterring any prospective purchaser from entering or dealing at the particular shop near which the halt was made.

A procession singing boycott songs may have the effect of deterring people generally from buying foreign cloth at a future time, but cannot have the effect of deterring people from buying foreign cloth at a particular place by the silent form of intimidation and keeping watch on a place to take note of the people who deal there. (1936) 158 Ind. Cas. 1008=18 N.L.J. 22=37 Cr. L.J. 10.

——S. 7—Seditious matter deliberately introduced—Fact of speech itself being innocuous is no defence — Trade Unions Act (16 of 1926), S. 17—Conflict between S. 7 and Act, if exists—Offence under S. 7, committed in course of trade dispute.

It is no defence in a charge for sedition that the bulk of the speech was innocuous if seditious matter is deliberately introduced. Where, therefore, the accused is not charged with making speeches as such but with abetting the offence of molestation, it is sufficient to prove that part of his speech relates to the abetment without any reference to the greater parts of his speeches which may be entirely legitimate with reference to the object of the strike and the grievances of the workers.

There is no conflict between S. 7 and the Trade Unions Act of 1926. Trade Unions have the right to declare strikes and to do certain acts in furtherance of trade disputes. They are not liable civilly for such acts or criminally for conspiracy in the furtherance of such acts as the Trade Unions Act permits, but there is nothing in that Act which apart from immunity from criminal conspiracy allows immunity from any criminal offence. But any agreement to commit an offence would, under S. 17 of the Trade Unions Act, make them liable for criminal conspiracy. S. 7 of the Criminal Law Amendment Act is part of the Criminal law of the land and an offence committed as defined in that section is an offence to which the concluding sentence of S. 17 of the Trade Unions Act applies as much as it would do to an agreement to commit murder.

Held, that as the offence under S. 7 was committed under a bona fide trade dispute and S. 7 was applied to such trade disputes for the first time, the sentence should be reduced to the term already undergone. A.I.R. 1935 Nag. 149=36 Cr. L. J. 1153=31 N.L.R. 318=157 Ind. Cas. 618.

——S. 7—Interpretation of — Reference to Statement of Objects and Reasons—S. 7, if can be applied to picketing in course of trade disputes — Statements made in Legislative Assembly—Interpretation of statutes.

As the wording of S. 7, Criminal Law Amendment Act, is entirely plain and unambiguous, reference to the Statement of Objects and Reasons of the Act is unnecessary. The section itself makes no limitation in respect of the parties disputing or the nature of the disputes giving rise to a situation where picketing is employed, and from the wording of the section itself, it is clear that its application is universal.

In interpreting S. 7, the Court is precluded from considering any statements made in the Legislative Assembly or elsewhere on behalf of Government. It is no duty of the Courts of Law to examine, criticise or interpret anything that may be said on behalf of Government in debate or elsewhere. The duty of the Court is to interpret the law as enacted. Had it been the intention of the Legislature to exclude the application of S. 7 from cases arising out of industrial disputes, it would have said so in explicit terms, more particularly in view of the nature of the majority of the other sections of the Act which gave their origin in other Ordinances.

Neither the Ordinance out of which S. 7 arose nor the Act lays down any limitation as to the circumstances in which molestation becomes an offence. A.I.R. 1935 Nag. 149=36 Cr.L.J. 1153 =31 N.L.R. 318=157 Ind. Cas. 618.

——Ss. 15, 16 (h)—Press (Emergency Powers) Act (23 of 1931), S. 18 (1)—Pamphlet referring to labourers as against rich persons—Pamphlet calling on labourers to meet at a place in large numbers—Likelihood of breach of peace.

Where a pamphlet purported to deal with the grievances of the poor against the rich and referred on one side to the labourers in a district labouring in fields and factories and on the other to the rich persons, the zemindars, the bankers and the petty shop-keepers, and the pamphlet called on the labourers to assemble in large numbers at certain place and it appeared that the feelings of the assembly would be inflamed by this pamphlet against the rich persons and bankers and the zemindars and the petty shop-keepers who are mentioned in the pamphlet and the result of such a pamphlet, if successful, would probably have been that the large crowd of kisans called together in such circumstances would have started looting the shops in the place and a breach of the peace would have occurred which might have required the sacrifice of many lives before order would have been restored:

Held, that the classes referred to in the pamphlet were sufficiently well-defined for the purposes of S. 16 (h), Criminal Law Amendment Act, 1921, and that as the action taken by the accused in publishing the pamphlet would promote feelings of enmity or hatred between the different classes of His Majesty's subjects, he was punishable under S. 8 (1), Press Emergency Powers Act, read with Ss. 15 and 16 of the Criminal Law Amendment Act, 1932. A.I.R. 1934 All. 717=35 Cr.L.J. 1000=3 A.W.R. 831=149 Ind. Cas. 710.

CRIMINAL LAW AMENDMENT ORDINANCE (29 OF 1943)—Validity —If ultra vires—High Court—Letters Patent—If contravened.

Ordinance 29 of 1943 is intra vires the Ordinance making authority of the Government of India including S. 8 of that Ordinance which confers revisional powers on the High Court in excess of those conferred by the Letters Patent. Nor does the Ordinance purport to do anything which is contrary to the Letters Patent of the Allahabad High Court. A.I.R. 1944 All. 257=1944 A.W.R. 273=1944 A.L.J. 419=46 Cr.L.J. 122=1944 O. W. N. 201=I.L.R. (1944) All. 758=216 Ind. Cas. 100 (F.B.).

——as amended by Ordinance 52 of 1944 and Ordinances 12 and 22 of 1945—Tribunal constituted under—Competency to try cases after 30-6-1946—Repealing Ordinance 1 of 1946—Effect of. See GOVERNMENT OF INDIA ACT (1935), SCH. 9, S. 72. 49 Bom.L.R. 352=48 Cr.L.J. 902= A.I.R. 1947 Bom. 361.

——S. 3—District Judge—If District Court under C. P. Code—Judge of Chief Court of Sind—If District Court.

The expression "District Judge" in S. 3 of the Criminal Law Amendment Ordinance has not the same meaning as the expression District Judge in S. 3 of the General Clauses Act. But the words "within the local limits of whose jurisdiction" following the expression "District Judge" indicate and make it clear that the expression as used in S. 3 is synonymous with the expression "District Court" used in S. 2 (4), C. P. Code. A Judge of Chief Court of Sind is a District Court for purposes of S. 3 of the Ordinance. I. L. R. (1946) Kar. 129=230 Ind. Cas. 94=A.I.R. 1947 Sind 34.

——S. 4—Money procured by commission of scheduled offence and deposited in Bank—If attachable.

The District Judge has jurisdiction to issue an ad interim order of attachment of moneys procured by commission of an offence mentioned in Item No. 4 of Schedule to the Ordinance, and deposited in a Bank. Such moneys in the hands of the Bank do not cease to be attachable although its identity is lost by getting mixed up with the other monies of the Bank, so long as it is not converted into anything else and remains liable to be paid back in cash to the depositor or to his order. 48 P.L.R. 77=A.I.R. 1946 Lah. 406=227 Ind. Cas. 488=48 Cr.L.J. 136.

——S. 4 (1)—Ad interim attachment—Reasons if must be given.

The District Judge is not required by S. 4 (1) of the Ordinance to give any grounds or reasons if he decides to issue the ad interim attachment but is only bound to do so if he finds that there are no prima facie grounds for believing that the person in respect of whom the application is made has committed any scheduled offence or that he has procured thereby any money or other pro-

perty. 48 P.L.R. 77=A.I.R. 1946 Lah. 406=227 Ind. Cas. 488=48 Cr.L.J. 136.

——S. 5—Special Tribunal can try under S. 5 (3), not only offences mentioned in Schedule but also those for which charges can be framed at the same trial under Cr. P. Code.

Under S. 5 (3), Criminal Law Amendment Ordinance as amended by Ordinance 12 of 1945, a Special Tribunal is competent to try not only offences mentioned in the Schedule to the Ordinance but also offences with which an accused could under the Cr. P. Code be charged at the same trial. The words 'any offence' in that section cannot be construed as referring to offences which may be termed as cognate to those mentioned in the Schedule. Consequently, where an accused is tried for offences under Ss. 420 and 120-B, Penal Code, he can also be charged at the same trial for an offence under S. 468, Penal Code committed by him in the course of the same transaction, though the latter offence is not mentioned in the Schedule to the Ordinance. A.I.R. 1946 Nag. 374 =1946 Nag.L.J. 581=47 Cr.L.J. 574=I.L.R. (1946) Nag. 671=224 Ind. Cas. 155.

——S. 5—"As may be preferred"—Criminal Law (Amendment) Ordinance is not ultra vires the Governor-General.

The words "as may be preferred" in S. 5 of the Ordinance do not mean that the Governor-General himself had not decided that the persons mentioned in the 1st Schedule should be prosecuted but that it has been left to the Tribunals to decide whether the evidence led by the prosecution justifies the framing of the charge. A.I.R. 1944 Pat. 378=23 Pat. 457=46 Cr.L.J. 438=218 Ind. Cas. 282.

——S. 5—Transfer of case from Court specified under S. 197 (2), in case not covered by S. 197 (1), Cr.P. Code—Validity. See CR. P. CODE, S. 197 (2). 54 C.W.N. 197=51 Cr.L.J. 638=77 I.A. 11=A.I.R. 1950 P.C. 19=(1950) 1 M.L.J. 170 (P.C.).

——(as amended by Ordinance (12 of 1945), S. 5 (3)—Construction and scope—Jurisdiction of Special Tribunal—Offence not envisaged in S. 5 (1) and (2)—Charge of—Sustainability.

Under S. 5 (3) of the Criminal Law Amendment Ordinance (1943) as amended by Ordinance No. 12 of 1945, a Special Tribunal is competent to try not only offences envisaged in sub-Ss. (1) and (2), but offences with which an accused person could, under S. 239 of the Cr. P. Code, be charged at the same trial. The offences are not limited to those contained in the schedule in view of the wide and explicit terms of sub-S. (3). I.L.R. (1946) Nag. 671=224 Ind. Cas. 155=1946 N.L.J. 581=47 Cr.L.J. 574=A.I.R. 1946 Nag. 374.

——S. 6 and Criminal Procedure Code (5 of 1898), Ss. 68, 69 and 257—Summoning of witnesses for defence in trial by a Special Tribunal under Ordinance 29 of 1943—Contravention of the provisions of S. 257, Cr. P. Code—Effect.

A Special Tribunal constituted under Ordinance 29 of 1943 has according to S. 6 of the Ordinance to follow the procedure prescribed by the Cr. P. Code for the trial of warrant cases. S. 257 of the Cr. P. Code is one of the sections applicable to the trial of warrant cases. The language of sub-S. (1) of S. 257 is imperative and the trial Court has no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defen e, unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record.

Where the Special Tribunal overlooked the salutary provisions of Ss. 68 and 69 of the Criminal Procedure Code and sent the summonses to the witnesses cited by the accused by ordinary post and not one of them had appeared and on that the Tribunal refused to adjourn the cases to enable further process to issue..

Held: In view of the serious irregularity in sending the summonses by ordinary post, no inference could be legitimately drawn against the accused from the fact that there was not response from any of the witnesses to whom summons had been sent. The refusal of the Tribunal, at that stage to give the necessary aid to the accused in procuring the attendance of his material witnesses was a contravention of the clear provisions of S. 257 of the Cr. P. Code and amounted to a denial of a valuable right which the law has conferred on an accused person and that therefore there had to be a re-hearing of the appeal by the High Court after giving an opportunity to the accused to take steps for the enforcing of the attendance of those witnesses and after considering the evidence of such of these witnesses as may appear in Court. 1948 F.C. 86=1948 F.L.J. 1=52 C.W.N. (F.R.) 44=51 Bom.L.R. 25=A.I.R. 1949 F.C. 6 =29 P.L.T. 437=50 Cr.L.J. 294=1948 M.W.N. 753=(1948) 2 M.L.J. 37 (F.C.).

——S. 6 (2)—Cases triable under Ordinance.

Section 6 (2) of the Criminal Law Amendment Ordinance, 1943, read with S. 1 (2), Cr. P. Code; indicates that S. 197; Cr.P. Code, does not apply to cases triable under the Ordinance. A.I.R. 1944 F.C. 66=23 Pat. 517=1944 A.L.J. 258=1944 F.C.R. 262=1944 M.W.N. 430=48 C.W.N. (F.C.) 109=45 Cr.L.J. 755=1944 A.W.R. 26 =25 P.L.T. 200=214 Ind. Cas. 199=(1944) 1 M.L.J. 503 (F.C.).

——S. 8—Revisional jurisdiction of High Court—Nature of.

The High Court has power to exercise its revisional jurisdiction in cases covered by the Ordinance. The High Court in revision usually accepts the findings on questions of fact recorded by a Subordinate Tribunal, unless the finding is manifestly perverse or erroneous. The revisional powers are no doubt wide but are discretionary and must be exercised not as a matter of course but only where it is demanded in the interest of public justice. A.I.R. 1944 All. 257=1944 A.L.J. 419=1944 A.W.R. 273=46 Cr.L.J. 122=1944 O.W.N. 201=I.L.R. (1944) All. 758=216 Ind. Cas. 100 (F.B.).

——Ss. 11 and 4—Order disposing of some of objections—Appeal.

Every interlocutory order passed by the District Judge disposing of some of the objections raised under S. 4 cannot be regarded to be in the nature of the "order" contemplated by S. 11 of the Ordinance and would not give the aggrieved party a right of appeal for it is easy to conceive that the interlocutory order may be against him but the

final order may yet be in his favour. The interlocutory order thus passed by the District Judge in regard to the question of jurisdiction or to such issues of law as may in his opinion dispose of the whole of the case or any part thereof, which can be legitimately taken up and decided before the other questions of fact have been heard and determined cannot give a right of appeal under S. 11 unless of course the preliminary issues have been decided against the Crown and the case has been finally disposed of so far at least as the District Judge is concerned. If Ss. 4 and 11 are not construed in that manner, every order passed in respect of every ground taken in support of the objection would give rise to an appeal and the proceedings would then drag on almost interminably. 48 P.L.R. 77=A.I.R. 1946 Lah. 406=227 Ind. Cas. 488=48 Cr.L.J. 136.

——Sch. 1—Implied sanction for prosecution mentioned.

The Governor-General having himself made and promulgated the Criminal Law (Amendment) Ordinance 1943, for the express purpose of setting up Tribunals for the trial of the persons mentioned in the First Schedule, so far as these persons are concerned, he must be deemed to have consented to their prosecution in respect of offences mentioned in the Ordinance itself. A.I.R. 1944 Pat. 378=23 Pat. 457=46 Cr.L.J. 438=218 Ind. Cas. 282.

——Sch., Item No. 4—Dominions — If includes Burma.

The word "dominions" in Item No. 4 of the Schedule to the Ordinance includes the Government of Burma. 48 P.L.R. 77=A.I.R. 1946 Lah. 406=227 Ind. Cas. 488=48 Cr.L.J. 136.

CRIMINAL LAW AMENDMENT ORDINANCE (38 OF 1944), Ss. 3 and 4—Money procured by means of offence described in Schedule deposited in Bank—It can be attached even if such money is mixed up with other money of Bank.

Where a person has procured money by means of an offence described in the Schedule to the Ordinance and has deposited it in a Bank, the bankers with whom the money is deposited are the debtors and agents of the offender and the money in their hands does not cease to be attachable even if its identity is lost by getting mixed up with the other money as long as it is not converted into anything else and remains liable to be paid back in cash to the offender or to his order. The offender cannot be in that case regarded to cease to be the owner of the money deposited by him although it may not have remained in his physical possession and may have come into his debtor's or agent's possession on his behalf. A.I.R. 1946 Lah. 406=48 Punj.L.R. 77=48 Cr.L.J. 136=227 Ind. Cas. 488.

——Ss. 3 and 4—Attachment by District Judge—High Court in revision cannot go into question whether he was right or wrong in issuing attachment—C. P. Code (1908), S. 115.

High Court is not entitled in revision to go into the question whether the District Judge was right or wrong in issuing the attachment, for, he is obviously entitled to do so and no question of jurisdiction being involved, High Court cannot interfere simply because the order was wrong on facts. A.I.R. 1946 Lah. 406=48 Pun.L.R. 77=48 Cr.L.J. 136=227 Ind. Cas. 488.

——S. 3—"District Judge," meaning of—Jurisdiction.

The expression "District Judge" in S. 3 of the Ordinance has not the same meanings as the expression "District Judge" in the General Clauses Act. But having regard to the use of the words "within the local limits of whose jurisdiction" in S. 3 of the Ordinance, it is clear that the expression "District Judge" used in S. 3 of the Ordinance is synonymous with the exprersion "District Court" as used in S. 2 (4), C. P. Code. As soon as the local limits of the jurisdiction of a principle Civil Court of original jurisdiction are defined, the limits constitute a district, and the district, then, is called a District Court within the meaning of the C. P. Code, and includes the local limits of the ordinary original civil jurisdiction of a High Court. The local limits of the jurisdiction of the Chief Court of Sind for the exercise of its ordinary original civil jurisdiction are defined and, therefore, for the purposes of the C. P. Code. I.L.R. (1946) Kar. 129=230 Ind. Cas. 94=A.I.R. 1947 Sind 34.

——S. 4 (1)—Attachment—District Judge whether required to give reasons, stated.

The District Judge is not required by S. 4 (1) of the Ordinance to give any grounds or reasons if he decides to issue the **ad interim** attachment but is only bound to do so if he finds that there were no **prima facie** grounds for believing that the person in respect of whom the application is made has committed any scheduled offence or that he has procured thereby any money or other property. A. I. R. 1946 Lah. 406=48 Punj.L.R. 77=48 Cr.L.J. 136=227 Ind. Cas. 488.

——Ss. 4 and 11—Every interlocutory order passed by District Judge disposing of some of objections would not give right of appeal.

Under sub-cls. (2) and (3) of S. 4, the person whose property or money has been attached or any other person or persons who claims or claim any interest or title in the same are called upon to show cause or to make objections to the attachment. And this, strictly speaking, each of them can only do once or by one document and not piecemeal. The person showing cause or making objection can be allowed to add other grounds to those which he has taken at first. This he may be permitted to do in suitable cases. But this cannot be taken to mean that he can be found entitled—eves if permitted to add or amend—to show cause more than once or to make more than one objection. The grounds which he may subsequently take will thus be regarded to form a part of the previous petition which has been filed by him or on his behalf. Similarly, every interlocutory order passed by the District Judge disposing of some of the objections cannot be regarded to be in the nature of the 'order' contemplated by S. 11 of the Ordinance and would not give him a right of appeal for it is easy to conceive that the interlocutory order may be against him but the final order may yet be in his favour. The interlocutory order thus passed by the District Judge in regard to the question of jurisdiction or to such issues of law as may in his opinion dispose of the whole of the case or any part thereof, which can be legitimately taken up and decided before

the other questions of fact have been heard and determined cannot give a right of appeal under S. 11 unless of course the preliminary issues have been decided against the Crown and the case has been finally disposed of so far at least as the District Judge is concerned. A.I.R. 1946 Lah. 406=48 Pun.L.R. 77=48 Cr.L.J. 136=227 Ind. Cas. 488.

——Schedule, Item 4—Word 'dominions' includes Government of Burma.

The word 'dominions' in item 4 of the Schedule to the Criminal Law Amendment Ordinance has not been used in a technical sense referring only to such dominions as have been recognised to be such under the Statute of Westminister in 1931. It is used to denote His Majesty's territory, realm or empire and, therefore, includes the Government of Burma. A.I.R. 1946 Lah. 406=48 Punj.L.R. 77=48 Cr.L.J. 136=227 Ind. Cas. 488.

CRIMINAL MISAPPROPRIATION. See PENAL CODE, SS. 403 AND 404.

CRIMINAL NEGLIGENCE. See PENAL CODE, S. 304-A.

——Criminal proceedings, stay of, pending civil action—Practice. See STAY. 26 B. 785=4 Bom. L.R. 618.

CRIMINAL PROCEDURE CODE (5 OF 1898).

(a) Applicability.
(b) Construction.
(c) If exhaustive.
(d) Special Acts and civil rights not affected.

(a) Applicability.

——Applicability—Contempt proceedings—Procedure. See CONTEMPT OF COURT. I. L. R. (1949) Nag. 640.

——Applicability.

Provisions of the Code, in so far as they are inconsistent with the Bengal Suppression of Terrorist Outrages Act (12 of 1932), do not apply to trials by Special Magistrates under the Terrorist Outrages Act. A.I.R. 1935 Cal. 281=39 C.W.N. 698=36 Cr.L.J. 884=156 Ind. Cas. 238.

——Applicability—Presidency Magistrates, if bound by ordinary rules in proving previous convictions.

Presidency Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions. 43 Cal. 1128=20 C.W.N. 725=17 Cr.L.J. 185=33 Ind. Cas. 825.

——Applicability — Frontier Crimes Regulation (1901), S. 59—Appeal.

If a Magistrate empowered by S. 59 of the Act, tries without the half of Council of Elders, a person charged under the Regulation, the ordinary course of appeal, prescribed by Cr. P. Code applies. Hence appeal lies to the Sessions Court from the conviction and sentence of first class Magistrate. 19 P.R. 1910 (Cr.)=11 Cr. L. J. 426=103 P.L.R. 1910=34 P.W.R. 1910 (Cr.) =6 Ind. Cas. 959.

——Applicability — Proceedings under—Hoarding and Profiteering Prevention Ordinance.

It cannot be said that proceedings under the Hoarding and Profiteering Prevention Ordinance or under any other special law are, in the absence of special statutory provisions, freed from the provisions of the Cr. P. Code. I.L.R. (1945) Kar. 439=224 Ind. Cas. 445=47 Cr.L.J. 630=A.I.R. 1946 Sind 67.

——Applicability of, to Calcutta Police.

The Code of Cr. P. does not apply to the Police in Calcutta unless expressly made applicable to them. 7 C.W.N. 661=31 Cal. 557.

——In absence of any provision to the contrary in the Calcutta Municipal Act, 1923 the provisions of the Cr. P. Code will apply and therefore the Magistrate is not entitled to hear and determine the case in the absence of the accused on the subsequent date. A.I.R. 1937 Cal. 218=38 Cr.L.J. 632=168 Ind. Cas. 698.

——Applicability.

Orders passed under the Upper Burma Ruby Regulations of 1887, S. 6, are within the scope of the Cr. P. Code, as regards appeal and revision though no provision is made in the Regulation for an appeal or revision. 84 Ind. Cas. 433=2 Rang. 321=3 Bur.L.J. 168=26 Cr. L. J. 289=A.I.R. 1925 Rang. 12 (obsolete).

——Applicability to Indian States.

The Code does not extend to Indian Native States. A.I.R. 1946 Nag. 128=I.L.R. (1945) Nag. 130=1945 N.L.J. 68 (obsolete).

(b) Construction.

——Construction — Strictly in favour of the accused.

Extradition Act and Criminal Procedure Code both being penal enactments their terms must be strictly construed in favour of accused persons wherever such construction can be reasonably justified. 117 Ind. Cas. 321=31 Bom.L.R. 62 =53 Bom. 149=30 Cr.L.J. 772=A.I.R. 1929 Bom. 81.

——Construction — Sub-sections in Code are not clauses.

The sub-sections of the Cr. P. Code are referred to as "sub-section" and not as "clauses" and it is only in the case of a bill that a reference is made to clauses. A.I.R. 1938 All. 536=1938 A.W.R. 492=1938 A.L.J. 767=39 Cr.L.J. 978=I.L.R. (1938) All. 794=177 Ind. Cas. 978.

——Mandatory provisions.

There is no universal rule that disobedience of mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. 90 Ind. Cas. 308=42 C.L.J. 131 =26 Cr.L.J. 1524=53 Cal. 46=A.I.R. 1925 Cal. 1246.

——Preamble—Emergency legislation—Recognised principles.

The fact that the offence is one under emergency legislation would not alter the recognised principles of enforcing law in Courts. A.I.R. 1944 Nag. 149=I.L.R. (1944) Nag. 813=1944 N.L.J. 75=46 Cr.L.J. 247=217 Ind. Cas. 207.

(c) If exhaustive.

——Construction of the Code—Code exhaustive.

The language of the Cr. P. Code is conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words, used read in their context must prevail. A.I.R. 1938 P.C. 130=1938 A. W.R. 116=1938 A.L.J. 382=19 P.L.T. 343= (1938) 1 M.L.J. 647=39 Cr.L.J. 452=42 C.W. N. 621=1938 O.W.N. 416=1938 M.W.N. 505 =4 B.R. 490=67 C.L.J. 161=I.L.R. (1938) 2 Cal. 295=40 Bom. L.R. 787=174 Ind. Cas. 1 =32 S.L.R. 476 (P.C.).

——If exhaustive on matters for which no specific provision is made.

So far as the Cr. P. Code deals with any point specifically, the Code must be deemed to be exhaustive but where a case arises which demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice requi-ed. A.I.R. 1934 Cal. 428=38 C.W.N. 501=35 Cr. L.J. 941=59 C.L.J. 516=61 Cal. 498=149 Ind. Cas. 345.

——Scope—Absence of provision on particular matter—Powers of Court.

The Cr. P. Code is exhaustive only with regard to matters specifically dealt with by it. Absence of any provision on a particular matter does not mean that there is no such power, and the Court may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law. A.I.R. 1940 Nag. 390 =1940 N.L.J. 449=42 Cr.L.J. 208=I. L. R. (1942) Nag. 333=191 Ind. Cas. 636.

——Scope—Power of Court.

So far as it deals with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. 73 Ind. Cas. 773=50 Cal. 872=37 C.L.J. 595=24 Cr.L.J. 677=A.I. R. 1923 Cal. 724.

(d) Special Acts and civil rights not affected.

——Code of Criminal Procedure and Evidence Act —Inter-relation.

The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Cr. P. Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute. 7 Lah. 84=27 Cr.L.J. 709=27 P. L. R. 583=94 Ind. Cas. 901=A.I.R. 1926 Lah. 88.

——Evidence Act.

Section 1 (2) shows that the Code does not affect any local or special law in force; so one must look to the Evidence Act for the admissibility of confessions rather than the Cr. P. Code. A.I.R. 1936 Rang. 350=37 Cr.L.J. 920=164 Ind. Cas. 162.

——Internal arrangement of High Court—If affected by the Code.

The internal arrangements of the High Court are dealt with by its rules and the Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. Code deals with the High Court as one and the definitions of the High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts. 50 C.L.J. 408=34 C.W.N. 13=1929 Cr.C. 468 =A.I.R. 1929 Cal. 756 (F.B.).

——Offence under Special Act—Prosecution to be under Special Act.

Where a Special Act makes a special offence and a special procedure for the prosecution of the offences under that Act, prosecutions not in accordance with that special procedure are barred. A.I.R. 1942 Sind 9=43 Cr.L.J. 304=198 Ind. Cas. 95.

——Civil matters — Questions of ownership and title should not be decided by Criminal Courts.

It is not for a Criminal Court to decide difficult and complicated questions of ownership and title. For instance, the question whether the person has the right to revoke the grant, is a difficult question of law not properly to be decided in a criminal case. A.I.R. 1943 Sind 152=I.L.R. (1943) Kar. 112=44 Cr.L.J. 761=208 Ind. Cas. 258.

——Civil rights.

A Criminal Court is not competent to decide the civil rights of the parties. A.I.R. 1937 Oudh 207=38 Cr.L.J. 147=1937 O.W.N. 34=13 Luck. 89=166 Ind. Cas. 219.

——S. 1 (2)—"In the absence of any specific provision to the contrary" meaning of.

The words "in the absence of any specific provision to the contrary" in S. 1 (2), Cr. P. Code, mean and contemplate a provision specific in affecting the special or local law. This specific provision to the contrary need not be in the Cr. P. Code itself. It may be in the special or local law also. The words "in the absence of a specific provision to the contrary" in S. 1 (2), cannot be read as referring to any possible contrariety between a specific provision in the present statute and a provision in a special statute. In order that one provision can be said to be 'a specific provision to the contrary' it must completely cover the field of operation of the other and must lay down a contrary rule for the entire field so as altogether to nullify the other. A.I.R. 1942 Cal. 593=I.L.R. (1942) 1 Cal. 436=44 Cr.L. J. 145=46 C.W.N. 180=75 C.L.J. 507=204 Ind. Cas. 111.

——S. 1 (2)—Specific provision to the contrary, meaning of.

The words 'specific provision' in S. 1 (2) really mean that the particular provision of the Cr. P. Code, must, in order to "affect" the "special.... law," clearly indicate, in itself and not merely "by implication to be drawn" from the statute generally, that the "special law" in question is to be affected without necessarily referring to that "special law" or the effect on it intended to be produced in express terms. A.I.R. 1940 All. 263=1940 A.L.J. 241=1940 A.W.R. 229=41

Cr.L.J. 627=I.L.R. (1940) All. 396=188 Ind. Cas. 562 (F.B.).

——S. 1 (2)—The expression **corpus delicti** is not found in any part of the Cr. P. Code. The course of criminal trials in India is to be governed by the provisions of the Indian Statute and not by a criterion derived from the law of some other country. A.I.R. 1939 Pat. 577=20 P.L.T. 420 =40 Cr.L.J. 625=18 Pat. 450=181 Ind. Cas. 1001.

——S. 1—Special law—Meaning of.

"Special Law" refers to statutory enactments and not to local Family Law. 10 L.W. 229=26 M.L.T. 238=37 M.L.J. 361=(1919) M.W.N. 632=20 Cr.L.J. 733=52 Ind. Cas. 393.

——S. 1 (2)—"Generalia specialibus non-derogant."

The rule laid down in S. 1 (2), Cr. P. Code, "Nothing herein contained shall affect any special law now in force" is an application of the maxim **generalia specialibus non-derogant**. A.I.R. 1939 Mad. 856=50 L.W. 318=(1939) 2 M.L.J. 455=1939 M.W.N. 1000=41 Cr.L.J. 41= I.L.R. (1939) Mad. 947=184 Ind. Cas. 593.

——Ss. 1, 344 and 566—Summary proceedings for contempt—Stay—S. 220 (2) (b), Government of India Act, 1935 (25 & 26 Geo. V, Ch. 42).

The Cr. P. Code is not applicable to summary proceedings taken for punishing a contempt. Even if S. 344 of the Code be applicable in a case where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, immediate action is necessary with a view to vindicate the authority of the Court and the proceedings should not be adjourned merely because an application has been made by the accused to His Majesty through the Viceroy under S. 220 (2) (b), Govt. of India Act. A.I.R. 1942 Lah. 105=44 P.L.R. 206= 43 Cr.L.J. 599=I.L.R. (1942) Lah. 411=200 Ind. Cas. 182 (F.B.).

——S. 1—Complaints by village magistrate—Applicability.

S. 1 of the Code merely means that village magistrates are not with reference to the proceedings before them as such magistrates governed by the provisions of the Cr. P. Code and not that they cannot complain. 76 Ind. Cas. 653= 19 M.L.W. 30=1924 M.W.N. 145=25 Cr.L.J. 221=A.I.R. 1924 Mad. 730.

——S. 1 (2)—All that is laid down by S. 1 (2), is that the procedure laid down by the Code is not to govern the actions of village Police Officers, but it does not mean that the provisions of the Code are not to apply in the case of a complaint against a village Police Officer. A.I.R. 1938 Bom. 489=40 Bom.L.R. 1106=40 Cr.L.J. 116 =178 Ind. Cas. 682.

——S. 1—Police investigation — Applicability of Code.

The change by amendment of 1923 is made to allow a Presidency Magistrate to record a confession in the course of a police investigation. Although S. 1 bars the application of the Code to the police it does not bar an application of the Code to a Magistrate or any Magistrate not being a police officer. 96 Ind. Cas. 509=5 Pat. 171= 27 Cr.L.J. 957=7 A.I.Cr.R. 75=A.I.R. 1926 Pat. 279.

——Ss. 1, 83—Court in Quetta — Applicability of Code.

Quetta does not form part of British India and consequently a warrant issued by a Court in Quetta cannot be executed in British India. The Court in Baluchistan must proceed under S. 7, Extradition Act. A.I.R. 1940 Pesh. 30=41 Cr. L.J. 857=190 Ind. Cas. 203.

——Ss. 1 (2), 435—Sind Frontier Regulation (Act 5 of 1872), S. 11 and (Act 3 of 1892).

The revisional powers conferred on a High Court by the Code do not apply to proceedings under Sind Frontier Regulations. 5 S.L.R. 105 =12 Cr.L.J. 568=12 Ind. Cas. 656.

——S. 4.

Synopsis.

——S. 4—Preliminary.
1. S. 4 (1) (b)—Bailable offence.
2. S. 4 (1) (f)—Cognizable offence.
See also CR. P. CODE, S. 190.
3. S. 4 (1) (h)—Complaint.
See also CR. P. CODE, S. 200.
4. S. 4 (1) (i)—European British subject.
5. S. 4 (1) (j)—High Court.
6. S. 4 (1) (k)—Inquiry.
7. S. 4 (1) (l)—Investigation.
8. S. 4 (1) (m)—Judicial proceeding.
9. S. 4 (1) (o)—Offence.
10. S. 4 (1) (r)—Pleader.
11. S. 4 (1) (v)—Summons case.

——S. 4—Interpretation — Defenitions—Self-contained.

S. 4 of the C. P. Code, is an interpretation clause or section. Its legitimate function is to declare that certain words and expressions used in the Code shall, wherever permissible, not only have the meaning which is generally attached to such words and expressions but such meaning as is assigned to such words and expressions by the interpretation clause. But by no means it is intended to annex to such words or expressions every incident which may seem to be attached to them by any other Act of the Legislature. 91 Ind. Cas. 99=A.I.R. 1926 Sind 58 (F.B.).

——S. 4—Presentation of complaint.

It is not essential that the complaint should be presented in person by the complainant and the fact that it is not so presented does not render it the less a complaint under the Code. For the purpose of vesting the Magistrate with jurisdiction to take cognizance of a case on a complaint made to him it is not essential such complaint should be presented to him by the complainant personally. 117 Ind. Cas. 147=23 S.L.R. 285=30 Cr.L.J. 732=1929 Cr.C. 160=A.I.R. 1929 Sind 132.

——S. 4—Right to make complaint.

Any person who knows about the commission of an offence may make a complaint. 119 Ind. Cas. 130=33 C.W.N. 576=30 Cr.L.J. 1013=1929 Cr. C. 357=A.I.R. 1929 Cal. 639.

1. S. 4 (1) (b)—Bailable offence.

——S. 4 (1) (b) and Sch. II—Defence of India Rules (1939), R. 81 (4)—Offence under, is non-bailable—Court is bound to allow expenses of

defence witnesses—Madras Criminal Rules of Practice, R. 366.

An offence under R. 81 (4), Defence of India Rules, 1939, being punishable with a maximum term of 3 years' imprisonment, is non-bailable as per Sch. II, Cr. P. Code. Consequently in a trial of an accused for an offence punishable under that rule, the Court is bound to pay the expenses of witnesses for defence as per R. 366 of the Madras Criminal Rules of Practice. A.I.R. 1946 Mad. 390=59 M. L.W. 239=(1946) 1 M.L.J. 361=1946 M.W.N. 275.

2. S. 4 (1) (f)—Cognizable offence.

——S. 4 (1)—Cognizable offence. *See also* CR. P. CODE, S. 190.

——The special provisions at the end of Sch. II, Cr. P. Code, support the view that offence under the Bom. Prevention of Gambling Act are not cognizable offence under S. 4 (1) (*f*) of Cr. P. Code. A.I.R. 1942 Sind 106=I.L.R. (1941) Kar. 94=43 Cr.L. J. 888=202 Ind. Cas. 681.

——S. 4 (1) (f)—In order that an offence may be cognizable, it is not necessary that every Police Officer should have the power to arrest without warrant. A.I.R. 1941 Nag. 338=1941 N.L.J. 465 =45 Cr.L.J. 89=I.L.R. (1941) Nag. 426=196 Ind. Cas. 869.

——S. 4 (1) (f)—Offences punishable with imprisonment for less than three years.

The words "or under any law for the time being in force" in S. 4 (*f*), have reference to such offences which are punishable with imprisonment for less than three years, but are specified as offences for which the Police may arrest without a warrant, that is offences, which but for the special provision would not under the Cr. P. Code be cognizable offences. A.I.R. 1934 Nag. 71=35 Cr.L.J. 1097 =30 N.L.R. 269=150 Ind. Cas. 623.

——S. 4 (1) (f)—Cognizable offence—Bombay Prevention of Gambling Act.

As under S. 6 certain officers have power to issue warrants of search and also of arrest, and to cause search or arrest without warrant personally, the offence under Ss. 4 or 5 of Bombay Act (4 of 1887) is a cognizable offence under S. 4 (1) (*f*), Cr. P. Code. 93 Ind. Cas. 967=27 Cr.L.J. 503=50 Bom. 344=28 Bom.L.R. 272=A.I.R. 1926 Bom. 195.

——S. 4 (1) (f)—Interpretation—Applicability of maxims.

The words "under any law for the time being in force" in S. 4 (*f*) are wide enough to include an express or implied provision of any law or enactment and would cover the application of the maxims *qui facit per alium facit per se* (whatever a man may do of himself, he may do by another and *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) to any provision of any enactment, in order to arrive at the true intention of the enactment. 31 Bom.L.R. 1349=1930 Cr.C. 113=54 Bom. 146 =31 Cr.L.J. 633=A.I.R. 1930 Bom. 49.

3. S. 4 (1) (h) Complaint.

(a) Definition and meaning of.
(b) Essentials of.
(c) Husband and wife.
(d) Information and complaint.
(e) Reports of Police and other public officers.
(g) Validity of.
(g) Who can file.
(h) What are.
(i) What are not.
(a) Definition and meaning of.

——S. 4 (1) (h)—Complaint defined.

There is nothing in the definition of "complaint" which requires it to be made by the person aggrieved or only in a non-cognizable case. 18 All. 465, Foll. 1930 A.L.J. 1316=1930 Cr.C. 1204=A.I.R. 1930 All. 820.

——S. 4 (h)—Complaint—Definition of.

Where in a petition presented to a Magistrate a person alleged that he had been taken to a certain place and there made to sign a paper but also expressly stated that he did not wish to prosecute.

Held, that there was no complaint within the terms of the definition in S. 4 (*h*) of Cr. P. Code and no process could be issued upon it. (1902) 6 C.W.N. 926.

——S. 4 (1) (h)—Complaint, meaning of.

Where a petition to the Collector of a District was treated by him as a complaint and the petitioners themselves by their subsequent action treated it as such, *held* that whatever be the heading of the petition, it was a complaint within the meaning of the Code. 11 A.L.J. 529=14 Cr.L.J. 425=20 Ind. Cas. 409.

——S. 4 (1) (h)—Complaint—Meaning of.

Complaint includes a 'committed sheet' signed by the Superintendent of the Salt Department and sent to Magistrate setting out date and particulars of offence under the Salt Act, the names of accused, names of witnesses, etc., and requesting Magistrate to try the case against the accused. 1 Pat.L.J. 592=18 Cr.L.J. 366=3 Pat.L.W. 29=38 Ind. Cas. 750.

——S. 4 (1) (h)—Complaint—Deposition before Magistrate.

Complaint does not include a deposition made to a Magistrate in the course of a trial. 14 Bom.L.R. 1166=14 Cr.L.J. 1=18 Ind. Cas. 145.

——S. 4 (1) (h)—Commission of offence.

In a complaint of a non-cognizable case to a Magistrate after the allegations that the accused had committed an offence the prayer was worded thus, "Under the circumstances complainant prays that your Honour would be pleased to order the D. D. Police to cause an enquiry to be made into the matter and the allegations made against the complainant and to submit the report of the same to your Honour. And, for the time being your petitioner reserves the right of bringing a case of defamation against the accused in future."

Held, that the petition satisfies the definition of complaint as given in S. 4 (1) (*h*), C. P. Code. 33 C.W.N. 446=56 Cal. 1013=A.I.R. 1929 Cal. 346.

——S. 4 (1) (h)—Complaint. *See also* CRIMINAL P. C., S. 200.

——Criminal trial—Dispute regarding sale and purchase—Civil dispute.

Where the controversy between the parties resolves into the question whether the various orders placed by the complainant and his brothers and sister are to be treated as one or are to be treated as separate orders, the question is essentially one for the civil Court to decide and cannot form the subject-matter of a criminal complaint. 1944 A.L.J. 350=1944 A. W.R. 182=I.L.R. (1944) A. 532.

——S. 4 (1) (h)—Of Criminal Court—Charge of counterfeiting trade-mark—Bona fide dispute—*Civil nature*.

Where there is a *bona fide* dispute as to the right to use a trade-mark, the Magistrate has no jurisdiction to try a charge of counterfeiting the mark brought by one of the parties the question involved being essentially one of a civil nature. (1905) 32 C. 431.

——S. 4 (1) (h)—Oral complaint.

The sworn statement and the written complaint of a complainant may be read together for the purpose of ascertaining what the nature of the complaint in any particular case is. 74 Ind. Cas. 949=33 M.L.T. 268=1923 M.W.N. 876=24 Cr.L.J. 837=A.I.R. 1924 Mad. 323=45 M.L.J. 543.

(b) Essentials of.

——S. 4 (1) (h)—Complaint—Essentials of.

It is of the essence of a complaint that the accusation should have been made with a view to action being taken under the Code of Criminal Procedure. An express request to that effect is unnecessary, but whether a statement is made with a view to action being taken upon it as upon complaint must be determined in the light of the circumstances. 1930 Cr. C. 1094=A.I.R. 1930 Pat. 550=129 Ind. Cas. 87.

——S. 4 (1) (h)—Complaint—Essentials of—Mere statement of disobedience of order under S. 144, Cr. P. Code—Sufficiency of.

It is of the essence of a "complaint" as defined in S. 4 (h), Cr. P. Code, that it must disclose that an offence has been committed. Where the statement called complaint merely says that the accused disobeyed an order passed under S. 144, Cr. P. Code, and nothing more, there is no proper complaint in law. 231 Ind. Cas. 224=48 Cr.L.J. 747.

——S. 4 (1) (h)—Complaint, nature of—Case of civil nature.

Where a complaint alleged that the first accused who was employed by a firm to sell certain bags and pay over the sale proceeds had misappropriated the proceeds together with the second accused who was a partner in the firm, *held*, the complaint was not merely a civil dispute but that there was room for inquiry in a criminal Court. (1911) 1 M.W.N. 125=9 M.L.T. 332=12 Cr.L.J. 123=9 Ind. Cas. 726.

——Ss. 4 (1) (h) and 190 (1) (a)—"Complaint"—Requisites of—Petition to Magistrate requesting administrative act.

To constitute a "complaint" as defined by S. 4 (1) (*h*), Cr. P. Code, there must be an allegation made with a view to the recipient taking action under the Code, charging some person with a particular offence. Where the petition intended to be a complaint is not presented to the Magistrate with a view to the latter taking action under the Code, but he is in terms asked to take only administrative action, it cannot be said that it is a complaint on which the Magistrate can act under S. 190 (1), Cr. P. Code. 52 C.W.N. 784=A.I.R. 1949 Cal. 55=49 Cr.L.J. 635.

——S. 4 (1) (h)—A complaint as defined in S. 4 (1) (*h*) need not in fact specify any offender or even the section of the law which makes an act or omission punishable. A.I.R. 1933 Pat. 297=14 P.L.T. 330=34 Cr.L.J. 942=12 Pat. 758=145 Ind. Cas. 382.

——S. 4 (1) (h)—Unknown person.

'Complaint' includes a complaint that some person unknown has committed an offence. 4 S.L.R. 258=12 Cr.L.J. 399=11 Ind. Cas. 583.

(c) Husband and wife.

——Ss. 4 (1) (h) and 199—Complaint by husband—Deposition by husband not a complaint—Penal Code, Ss. 366, 379 and 498.

The accused was charged in the first instance with offences under Ss. 366 and 379, I. P. Code but when the complainant, the husband of the man concerned, was examined as a witness the statements made amounted to an offence under S. 498, I. P. Code. The Court acquitted the accused on the charges under Ss. 366 and 379 and convicted him under S. 498, I. P. Code. *Held*, that the conviction under S. 498 was bad as there was no complaint by the husband. The statements in the husband's deposition as a witness could not be said to be a complaint within Cl. (*h*) of S. 4. 14 Bom.L.R. 141=13 Cr.L.J. 287=14 Ind. Cas. 671.

——Ss. 4 (1) (h) and 199—Complaint—Petition by husband.

Where a husband lodged a complaint against his wife and another under Ss. 498 and 379|109 and 379, I. P. Code respectively before a Deputy Magistrate at 9 p.m., in the presence of his wife, not with the object of getting the Magistrate to take action but simply to coerce his wife to get back the jewels. *Held*, that there was no complaint under S. 199, Cr. P. Code such as to entitle the Magistrate to take cognizance of the case after the death of the husband. 16 Cr.L.J. 466=29 Ind. Cas. 98.

——S. 4 (1) (h)—Where a complaint has been filed by a husband, it is a question of construction in each case as to whether it amounts to a complaint of an offence under S. 498, I. P. Code. If a petition contains an allegation of facts which, if proved by evidence, would constitute an offence under S. 498, such petition is clearly a complaint. The fact that there are other allegations in the petition which by themselves or in conjunction with those relating to an offence, under S. 498, constitute a more serious offence, will not make the complaint any the less a complaint under S. 498, I. P. Code. A.I.R. 1934 All. 472=36 Cr.L.J. 401=153 Ind. Cas. 697.

(d) Information and Complaint—Distinguished.

——S. 4 (1) (h)—Complaint and information differentiated.

The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complaint has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the person named as accused and he has then to decide whether he will accede to the request or not. If he does not, then he must record his reasons under S. 202 (1), and may either make an enquiry himself or direct an inquiry or investigation or dismiss the complaint under S. 203 after recording his reasons. But in the case of receiving information, the Magistrate is not asked by any one to issue process and if he does not choose to act on the

information, he need not record any reason or pass any order. In the case of information there is no complaint to examine on oath. On a complaint the complainant is first examined on oath unless it has been made by public servant acting in the discharge of his official duty. 1930 A.L.J. 1316=1930 Cr.C. 1204=A.I.R. 1930 All. 820.

——Ss. 4 (1) (h) and 250—Complaint that a person was using a house as a Bhothel.

A complaint under S. 41 of the Bombay District Police Act is not a complaint under S. 4 (*h*) of the Cr. P. Code, and the Magistrate cannot order the complainant to pay compensation under S. 250. 6 S.L.R. 254=14 Cr.L.J. 320=19 Ind. Cas. 1008.

——S. 4 (1) (h)—'Complaint'—Bombay Prevention of Gambling Act, S. 6.

A statement to a Magistrate to induce him to take action against a person under S. 6 of the Bombay Prevention of Gambling Act is not a 'complaint' under S. 4, Cr. P. Code. 8 S.L.R. 66=15 Cr.L.J. 657=25 Ind. Cas. 985.

——S. 4 (1) (h)—Asking for action of Magistrate in his judicial capacity.

The mere fact that a document in writing contains an allegation that a specific offence has been committed does not necessarily constitute that document a complaint. The allegation of the specific offence must be with a view to action being taken under the Code, *i.e.*, for the prosecution of the offender for having committed the specific offence. Besides, it must be made to the Magistrate in the judicial capacity so that he may exercise his powers of taking cognizance of that specific offence and proceed in respect of it against the person accused.

Where, therefore, a petition clearly shows that the object of the petition is not that the particular offence should be punished, but rather the mention of the particular offence is put in with a view to illustrate the kind of conduct which the accused person is supposed to be following and against which the petitioner is seeking protection, such a petition is not a complaint. What is supermost in the mind of the petitioner is the anticipated conduct of the person whom he mentions and against that conduct he is asking the Magistrate in his executive capacity to make enquiry and protect him against a repetition of such conduct. 119 Ind. Cas. 413=10 P.L.T. 779=30 Cr.L.J. 1058=1929 Cr.C. 341=A.I.R. 1929 Pat. 473 (F.B.).

——S. 4 (1) (h)—A person actually institutes criminal proceeding upon making a complaint as defined in S. 4 (1) (*h*) and a person also institutes criminal proceedings upon reporting the commission of a cognizable offence to the Police. A.I.R. 1936 Pesh. 66=37 Cr.L.J. 604=162 Ind. Cas. 140.

(e) Reports of Police and other Public Officers.

——S. 4 (1) (h)—"Complaint"—Report of poliec officer.

The report of a police officer, whether in a non-cognizable or in a cognizable offence, does not amount to a complaint. I.L.R. (1950) Nag. 87=51 Cr.L.J. 427=A.I.R. 1950 Nag. 38=4 A.I.Cr. D. 172=1950 N.L.J. 384.

——Ss. 4 (1) (h) and 198—Penal Code, S. 498—Complaint—Police report.

A police officer's report is not a complaint within S. 199 of the Cr. P. Code. In the absence of a complaint to a Magistrate by the husband or guardian, a conviction under S. 498 of the Penal Code is not sustainable. 4 P.R. 1888; 30 C. 910, foll.; 31 Bom. 218, Foll. 32 P.R.Cr. 1910=39 P.L.R. 1911=12 Cr.L.J. 50=8 Ind. Cas. 1160.

——Non-cognizable case—Police report.

The written allegation of a non-cognizable offence made by a police officer who is also a Public Prosecutor with the idea of making the Court take action on it is not the report of a police officer but is a complaint as defined in S. 4 of the Cr. P. Code and it is competent for the Court to take action thereon. The words "Report of a Police Officer" refer to the report of a police officer in a case in which he is authorised to investigate, by the Code. 82 Ind. Cas. 753=6 L.L.J. 606=25 Cr.L.J. 1361=A.I.R. 1952 Lah. 237.

——Ss. 4 (1) (h), 190 (1) (b)—Report of Police Officer in cognizable or non-cognizable case.

Even though S. 4 (1) (*h*) has not been amended, the words in it, as it stands, are sufficiently wide to include a report of a non-cognizable offence and the meaning of the phrase, in the two Ss. 190 and 4 (1) (*h*), although the wording is different, amounts to the same thing. Consequently, the report of a Police Officer whether in a non-cognizable or in a cognizable offence does not amount to a complaint. A.I.R. 1936 Nag. 86=19 N.L.J. 120=37 Cr.L.J. 587=I.L.R. (1936) Nag. 50=162 Ind. Cas. 308.

——S. 4 (1) (h)—Complaint—Petition to a Magistrate in the course of a police enquiry.

A petition to a Magistrate in the course of a police enquiry is a complaint. (1905) 10 C.W.N. 158=33 C. 1=2 C.L.J. 228.

——S. 4 (h)—Complaint—Police report found false—Notice to show cause why complainant should not be prosecuted—Complainant's petition for enquiry.

Where a Magistrate, on a Police report that a complaint is false gives notice to complainant to show cause why he should not be prosecuted, and the accused presents a petition to the Magistrate praying for enquiry into his complaint, such petition is a complaint within S. 4, Cr. P. Code, and should be judicially enquired into before further proceedings could be taken. (1900) 5 C.W.N. 106.

——S. 4 (h)—Complaint—"Report of a Police officer"—Complaint by Police officer in non-cognizable case.

A complaint is none the less a complaint because it is put in by a Police-officer. The "report of a Police-officer" must be some statement made in connection with or at least under colour of the diary of the maker as a Police-officer. Where a Police-officer files a formal complaint in a non-cognizable case he cannot be said to make a report and his complaint false within the definition of "complaint" in S. 4 (*h*), Cr. P. Code. 22 B. 122, foll.. (1908) 32 M. 3=5 M.L.T. 1=9 Cr.L.J. 108=1 Ind. Cas. 22.

——S. 4 (1) (h)—Police report—Non-cognizable offence.

Patkar, J.:—The wording of S. 190 is quite general and would include even a non-cognizable offence being taken cognizance of by a Magistrate upon a

report by a police officer. The report of a police officer in respect of a non-cognizable offence if it contains an allegation in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence would amount to a complaint within the meaning of S. 4 (*h*). A Magistrate can in a proper case treat a police report of a non-cognizable offence as a complaint and take cognizance under S. 190, Cl. (*a*), especially where such report is made by the Police Officer regarding an offence committed by his subordinate. 26 Bom. 150 and A.I.R. 1926 Mad. 865, Foll.: 105 Ind. Cas. 459=51 Bom. 498=29 Bom.L.R. 742=28 Cr.L.J. 939=A.I.R. 1927 Bom. 440.

——Ss. 4 (h), 195—Penal Code, S. 211—Petition to Collector as the Superior Officer of Court of Wards against a Subordinate Officer—Complaint—Dismissal of petition—Witnesses, no opportunity to call—Sanction.

A petition to the Collector, as the superior officer of the Court of Wards against a subordinate officer of it is a departmental complaint, and not a complaint within S. 4, Cl. (*b*) of the Cr. P. Code. Where the Collector dismissed it without giving the petitioner an opportunity of calling his witnesses, and sanctioned his prosecution under S. 211 of the Penal Cole.

Held, that he should have given the petitioner an opportunity of calling his witnesses and proving his allegations. (1902) 30 C. 415.

——S. 4 (1) (h)—'Complaint'—Report of peon.

The report of a peon without any request to the Magistrate to take any action is not a 'Complaint' under S. 4 (*h*). 17 C.W.N. 980=14 Cr.L.J. 462 =20 Ind. Cas. 622.

——S. 4 (h)—Complaint—Letter by Civil Court Amin to Police.

A letter by a Civil Court Amin to a Police officer containing allegations against the accused is not a complaint. (1904) A.W.N. 266=1 A.L.J. 693= 27 A. 305.

——S. 4 (1) (h)—What amounts to complaint.

A process-server presented a report on the back of a warrant to the Civil Court that he was beaten by *A* when he was attaching property in its execution. Thereupon, the Civil Court reported the matter to the police who challaned *A* under Ss. 332 and 394, I. P. Code. The Magistrate found these offences not proved, but he convicted *A* under S. 186.

Held, that the Magistrate had no jurisdiction to convict the accused under S. 186, as neither the report nor the police challan constituted a complaint. 110 Ind. Cas. 101=10 A.I.Cr.R. 486=29 Cr.L.J. 645=A.I.R. 1928 Lah. 827.

——S. 4 (1) (h)—Report by an officer to his superior.

In a complaint it is the complainant who sets the law in motion. The only functions that remain to the Magistrate are judicial functions. He may reject the complaint, but in doing so he performs a judicial act. Where the Superintendent of Police simply submitted the report of his subordinate to the Magistrate for the Magistrate to exercise his discretion as to whether he would initiate judicial proceedings or not.

Held, that there was no complaint as required by law. 96 Ind. Cas. 211=7 L.R.A.Cr. 133=27 Cr. L.J. 899=A.I.R. 1926 All. 566.

(g) Validity of.

——S. 4 (1) (h)—Contents and validity of complaint.

Where the person aggrieved asked the Court in his petition to take action under the preventive Ss. 107 or 145, Cr. P. Code, and there was no allegation in his petition or in his statement as recorded by the Magistrate that an offence had been committed and that the Magistrate should take action in respect of such offence against any person under the C. P. Code.

Held, that the petition of the aggrieved person did not amount to a complaint. 7 O.W.N. 947=1930 Cr.C. 1164=A.I.R. 1930 Oudh 500.

——S. 4 (1) (h)—Facts showing—Commission of offence—If sufficiency.

If the facts alleged disclose an offence, it is immaterial if the section is not mentioned in the complaint. 112 Ind. Cas. 566=29 Cr.L.J. 1062=2 M. Cr.C. 60=11 A.I.Cr.R. 362=A.I.R. 1929 Mad. 188.

——S. 4 (1) (h)—Facts showing offence under Ss. 196, 471, 193, Penal Code, and its abetment—Mention of S. 193 only is immaterial.

It is not the section cited in the complaint which matters but what matters is the complaint. When the complaint clearly shows that it is a complaint not only of an offence under S. 193, I. P. Code, but also of abetment thereof as also of an offence either under S. 196 or S. 471, I. P. Code, it is immaterial that no other section except S. 193 has been cited therein:

Held, (obiter) that even on a pure and simple complaint of an offence under S. 193, I. P. Code, the Court could take cognizance and convict the accused of an offence under S. 196 or S. 471, if the facts disclosed it. A.I.R. 1944 Nag. 192=1944 N.L.J. 174=I.L.R. (1944) Nag. 589=46 Cr.L.J. 80=215 Ind. Cas. 265.

——S. 4 (1) (h)—Section of law—Necessity to mention.

A particular section of Penal Code or a particular offence need not be named to constitute a complaint.

The sworn statement of complainant under S. 200 should not be regarded as part of the written complaint under S. 199 and should not be used to ascertain whether certain specific changes were made by the complainant.

Such sworn statement may be taken as part of the complainant in a broad sense and may be looked into, to correct and elusidate doubtful points in the written complaint. 64 Ind. Cas. 282=13 M.L.W. 695=1921 M.W.N. 514=A.I.R. 1922 Mad. 353.

——S. 4 (1) (h)—A complaint need not quote any section of I. P. Code, but must contain a statement of the facts relied on as constituting the offence, and it is for the Magistrate to determine on these facts what offence has *prima facie* been committed; the nature of the charge will be determined by him. All that is necessary for him to see is that the enquiry into the charge is within his competency and that, in the case of certain offences, the complaint has been made by the proper person. 95 Ind. Cas. 305

=6 Lah. 375=26 P.L.R. 552=27 Cr.L.J. 769=A.I.R. 1925 Lah. 631.

——S. 4 (2) (h)—Action under S. 107—Prayer for.

The definition does not require that the action asked for should be under any particular provision of the Code and does not exclude a request for action under S. 107, provided the facts alleged do amount to a substantive offence. 93 Ind. Cas. 69=27 Cr. L. J. 405=7 L. R. A. Cr. 76=A.I.R. 1926 All. 358.

——S. 4 (2) (h)—Wrong section of law—Mention—Effet of.

The essence of the complaint is the statement of facts relied upon as constituting the offence. It is sufficient that the complainant shall state the true facts in his own language, and it is for the Magistrate to apply the law to those facts.

Where a Court, while making a complaint under S. 476, Cr. P. Code, wrongly described S. 477, I. P. Code, though the facts disclosed a case under S. 465, I. P. Code, and it was contended that the complaint was invalid on the ground that S. 477 was not one of those sections mentioned in S. 195, Cr. P. Code.

Held, that the complaint was not illegal on that ground. 110 Ind. Cas. 108=9 Lah. 678=10 A. I. Cr. R. 474=29 Cr.L.J. 652=A.I.R. 1928 Lah. 510.

——S. 4 (1) (h)—Complaint, what is validity.

A complaint by the Public Prosecutor would not be equivalent to a complaint by the Court in the matter of charging a person under S. 211, I. P. Code, and it is doubtful whether the Court could delegate its duty of filing such a complaint. 19 P. R. 1917 (Cr.)=20 P.W.R. 1917 Cr.=18 Cr.L.J. 548=39 Ind. Cas. 692.

——Ss. 4 (1) (h) and 195 (1)—Complaint—Petition sent for enquiry—Offence under S. 182, I. P. Code.

Where a Sub-Divisional Magistrate received a petition alleging corruption on the part of his subordinate and he sent the petition to an inferior magistrate for enquiry and on receipt of the latter's report directed the prosecution of the petitioner under S. 476 of the Cr. P. Code, *Held,* that the order of the Sub-Divisional Magistrate was not one under S. 476 of the Cr. P. Code but a complaint, on which cognisance of an offence under S. 182, I. P. Code, could be taken under S. 195 of the Cr. P. Code. 20 Cr.L.J. 247=49 Ind. Cas. 919.

——Ss. 4 (1) (h), 190 (1) (a) and 537 (a)—Complaint, meaning of—Jurisdiction — Irregularity—Penal Code, S. 354.

A woman sent a petition to the Dy. Commissioner with an 8 annas Court-fee stamp, describing the offence committed, and the name of the offender and expressly asking for trial and punishment under S. 354, I. P. Code, by a Subordinate Court, but the Deputy Commissioner returned the petition with an endorsement that it might be presented before a specified Magistrate and she presented it to that Magistrate; *held,* the presentation amounted to a valid complaint. The fact that the heading was wrong or that a fresh Court-fee ought to have been taken when it was presented to the proper Magistrate could not alter the contents of the petition, and, that the complaint required to give the Tahsildar jurisdiction under S. 190 (1) (*a*) cannot reasonably be said to have been wanting. 13 N.L.R. 13 =18 Cr.L.J. 459=39 Ind. Cas. 299.

——Ss. 4 (1) (h) and 200—Complaint—Transfer of, to Sub-Deputy Magistrate for inquiry and report—Irregularity.

The petitioner impugned the report of the police in a criminal case and applied to the Sub-Divisional Officer to proceed with his case against the accused. This was made over to the Sub-Deputy Magistrate for inquiry and report. The application was a complaint within the meaning of S. 1, and the procedure adopted by the Magistrate was irregular as it was not in accordance with the provisions of Chap. XVI. 18 Cr.L.J. 754=41 Ind. Cas. 130.

——Ss. 4 (h), 190, 192; 194; 476—Penal Code, S. 195—Complaint—Procedure — Misdescription of District Magistrate as Collector.

"An Assistant Collector trying a rent suit came to the conclusion that plaintiff had committed perjury and accordingly submitted the record to the Collector of the District for starting a case under S. 193, I. P. Code". The Collector "ordered" that a case under S. 103, I. P. Code, be initiated against sections and made over for decision to Maulvi Abdul Rafi-uddin, Magistrate of the first class." *Held,* that though the order of the Assistant Collector could not be regarded as an order under S. 476, Cr. P. Code, it fell within the definition of a complaint, and the Collector, who was also the District Magistrate had power as Magistrate to take action upon it and pass the order that he had passed. 23 A. 249, foll. (1904) A.W.N. 90=26 A. 514.

——S. 4 (1) (h)—Complaint without order—When pending.

Where on a referred charge-sheet, the complainant put in a complaint of his own, and there was no order disposing it of but where no further action had been taken on it, the complaint was regarded as still pending. 1929 M.W.N. 503=2 M. Cr. C. 191=1929 Cr. C. 511=A.I.R. 1929 Mad. 849.

——Ss. 4 (1) (h), 200—Joint complaint, legality of.

A joint complaint by two persons is not contemplated by the Criminal P. C. A Magistrate must examine the complainant on oath and it is obvious that if there are two or more complainants on the complaint, it is physically impossible to fulfil the provisions of that section. A.I.R. 1931 Cal. 646=35 C. W. N. 782=33 Cr. L. J. 83=134 Ind. Cas. 1189.

——S. 4 (1) (h)—Joint complaint by two persons is legal. A.I.R. 1942 Oudh 407=1942 O.W.N. 388=43 Cr.L.J. 731=1942 A.W.R. 259=18 Luck. 248=201 Ind. Cas. 54.

——Ss. 4 (1) (h), 195, 476—Petition for inquiry into certain matters—Omission of Court to examine complainant on oath—Order directing inquiry by Police Officer.

A petition was filed before the Sub-Divisional Officer stating that a false entry was caused to be entered in the Death Register of a Police Station at the instance of the accused. The Court ordered the Police Inspector to make inquiry. In the course of the inquiry, a document alleged to be forged was produced:

Held, that the petition was a complaint within the terms of S. 4 (1) (*h*) and that it was the duty of the Sub-Divisional Officer receiving that complaint to examine the complainant on oath, but his failure to do so was merely an irregularity and his order referring the matter to the Inspector for inquiry

must be deemed to be in substance an order directing an inquiry by a Police Officer for the purpose of ascertaining the truth or falsehood of the complaint. No proceeding of that kind could be taken by virtue of S. 195, without the complaint of the Court. A.I.R. 1934 Pat. 156=35 Cr.L.J. 1309=15 P. L. T. 17=151 Ind. Cas. 320.

——S. 4 (i) (h)—Complaint by Court.

Petitioner gave evidence in a case tried by the Chief Presidency Magistrate. Part of his evidence was regarded as false and the Magistrate deemed it necessary to take proceedings under S. 476, C. P. Code. He accordingly drew up a complaint. This complaint he preferred in his own Court and then he transferred it to a Presidency Magistrate for disposal. This latter issued process, held an enquiry and committed the petitioner for trial. The petitioner was then tried and convicted.

Held, by Court (*Rankin and Chakravarti, JJ.*, dissenting that the procedure was not illegal. The Magistrate committed nothing worse than an irregularity which may be disregarded.

Held per *Rankin, J.*—The proceedings have been had throughout in defiance of the express provisions of the Code and fundamental principles of law.

A document which is not addressed to a person other than the writer is not a complaint either in the ordinary sense or in the sense in which the word is used in S. 476 of the Cr. P. Code.

There is nothing in the Code that prevents a Magistrate from taking cognizance of his own complaint. The complaint and the subsequent trial was not illegal and the irregularity was curable under S. 532 (*i*), C. P. Code. 93 Ind. Cas. 33=53 Cal. 350=43 C.L.J. 310=30 C.W.N. 276=27 Cr.L.J. 385=A.I.R. 1926 Cal. 470 (F.B.).

——Ss. 4 (1) (h), 190 (1) (a) and 200—Madras Town Nuisance Act, S. 3 (5)—Prosecution by Sanitary Inspector, legality of—Use of charge sheet forms.

A Sanitary Inspector, not empowered to exercise the powers of a Police officer, can initiate proceedings under the Madras Town Nuisance Act. He cannot put in a charge sheet or submit a police report to the Magistrate but the mere use by him of a printed form appropriate to offence under Dist. Municipalities Act for embodying the substance of his complaint will not render the prosecution illegal when the document was treated as a complaint under S. 190 (1) (*a*) and the complainant examined under S. 200. 18 Cr.L.J. 641=40 Ind. Cas. 289.

(g) Who can file.

——Ss. 4 (1) (h), 190 and 191—Complaint—Who can file.

Every member of the public has a right to set the law in motion by complaint, whether he is himself a witness of the facts or not so that a Magistrate can take cognizance of a complaint filed by the Public Prosecutor, who had no personal knowledge of the facts. 7 S.L.R. 77=15 Cr.L.J. 369=23 Ind. Cas. 737.

——S. 4 (1) (h)—Complaint by aggrieved party, if essential—Exemptions—Cr. P. Code Act (5 of 1898), Ss. 198, 199.

A complaint need not necessarily be made by the person injured, but may be made by any person aware of the offence. The rule is that if a general law is broken, any person has a right to complaint whether he himself has suffered any particular injury or not. This general rule is subject to exceptions mentioned in Ss. 198 and 199, Cr. P. Code, where certain offences are stated to be complainable only by specified persons. A.I.R. 1935 All. 938=1935 A.L.J. 1108=1935 A.W.R. 1067=37 Cr.L.J. 56=159 Ind. Cas. 306.

——Ss. 4 (1) (h), 190 (1) (a), 200—Complaint not inculpating complainant—Magistrate deputed for local investigation—Report recommending prosecution of complainant—Report, if constitutes complaint.

Where, on the basis of a complaint not inculpating the complainant, local Magistrate was deputed to make a local investigation and he made report recommending the prosecution of the complainant also under S. 6, Child Marriage Restraint Act.

Held, (1) that the report constituted a complaint within the meaning of S. 4 (1), Cl. (*b*) of the Cr. P. Code;

(2) when the District Magistrate took cognizance of this complaint he was taking cognizance under sub-S. (1) (*a*) of S. 190 of the Code;

(3) that as the complaint was made by a public servant, in the discharge of his official duties, it was not necessary for him to be examined on oath under S. 200, Cr. P. Code, before issuing process. A.I.R. 1933 Pat. 87=13 P.L.T. 791=34 Cr.L.J. 237=141 Ind. Cas. 810.

——Ss. 4 (1) (h), 190 (c) and 200—Complaint—Personal knowledge—Cognizance.

A complaint which is otherwise proper is not illegal because the person making it has no personal knowledge of the offence committed. There is nothing in the Cr. P. Code to suggest that a complainant must have personal knowledge of the offence. 1 Pat.L.T. 531=21 Cr.L.J. 346=55 Ind. Cas. 682.

——S. 4 (1) (h)—Personal knowledge.

The complainant need not have personal knowledge; if a complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making the enquiry which he is authorised to do by S. 202; it cannot be said that he is compelled to do so. The definition of "complaint" does not require any statement of facts beyond an allegation that some person has committed an offence, but if that definition is read into S. 190 (1) (*a*) it is clear that before the Magistrate takes cognizance he must have before him an allegation of facts constituting the offence, and a mere repetition of the words of a section of the Penal Code is not proper compliance with the provisions of the sub-section. 61 Ind. Cas. 839=25 C.W.N. 357=22 Cr. L.J. 455=A.I.R. 1921 Cal. 561.

——Ss. 4 (1) (h), 190 (c) and 200—"Complaint"—Examination of complainant.

A letter asking a Magistrate to take action against a certain person for using insulting language against the writer is a complaint and the complainant ought to be examined on oath under S. 200 before issuing a summons to the accused. 17 C.W.N. 448=14 Cr.L.J. 76=18 Ind. Cas. 412.

——S. 4 (1) (h)—Complainant need not be eye witness of everything in the complaint. 1931 M. W.N. 1316.

——S. 4 (1) (h)—Person not complained against—Whether can be charged—Aggrieved person.

A Magistrate taking cognizance of a complaint can proceed against any other person who though not mentioned in complaint appears on the evidence to be concerned in the commission of the offence. The definition of "Complaint" in S. 4 (*h*) means that the complainant need not always be the party directly

aggrieved by the offence. Husband of a girl is competent to apply to the Magistrate with a view to his taking action under the Code. 41 Cal. 1013=18 C.W.N. 921=15 Cr.L.J. 546=24 Ind. Cas. 954.

(h) What are.

——S. 4 (1) (h)—Complaint—Assault.

A complaint that the accused assaulted the complainants and their cattle with a view that the Magistrate might take action against the accused is a complaint under S. 4 (*h*). 10 Cr.L.J. 18=2 Ind. Cas. 453.

——S. 4 (1) (h)—Complaint containing prayer that case be investigated by superior Police Officer on ground that local Police were hostile to complainant.

An application addressed and presented to a Magistrate containing an allegation that an offence has been committed, with a prayer that the culprits be suitably dealt with is a "complaint" within the definition of that term contained in S. 4. Merely because the application also contained a prayer that the case should be investigated by a superior Police Officer on the ground that the "local" Police were hostile to the applicant and under the influence of the principal accused, it does not cease to become a complaint which can only be dealt with under the Cr. P. Code and become an executive application which can be dealt with in a different manner. A.I.R. 1940 Lah. 208=42 P.L.R. 134=41 Cr.L.J. 618=188 Ind. Cas. 524.

——S. 4 (1) (h)—Charge-sheet under S. 379, Penal Code (Act 45 of 1860), setting out facts constituting offence under S. 163 (a) (2), Madras Local Boards Act (14 of 1920).

Where the charge-sheet filed by the Police under S. 379, I. P. Code, sets out the facts which constitute the offence under S. 163, Cl. (*a*) (2), Madras Local Boards Act, it amounts to a complaint as defined in S. 4, Cl. (*h*), Criminal P. C. A.I.R. 1939 Mad. 839=1939 M.W.N. 615=(1939) 2 M. L.J. 39=41 Cr.L.J. 20=50 L.W. 919=184 Ind. Cas. 471 (1).

——S. 4 (1) (h)—"Complaint"—Proceeding under U. P. Encumbered Estates Act—Order of Liquidation Officer communicated to Magistrate that applicant should be prosecuted.

If a Liquidation Officer under U. P. Encumbered Estates Act orders that the landlord applicant in the proceeding pending before him should be prosecuted and communicates that order to a Magistrate with a view to an action being taken under the Cr. P. Code, setting out the facts which constitute the offence it cannot but be held that the order is a complaint. 3 A.I.Cr.D. 662=A.I.R. 1949 All. 692=51 Cr.L.J. 199=1950 A.W.R. 147.

——S. 4 (1) (h)—Indefinite charge.

Where a petition to a District Magistrate states that a Tahsildar was guilty of various offences under the Penal Code including one under S. 161, the petition amounts to a complaint. 40 All. 41=15 A.L.J. 841=19 Cr.L.J. 12=42 Ind. Cas. 924.

——Ss. 4 (1) (h) and 200—"Naraji" petition—Whether complaint.

A "naraji" petition filed before a Magistrate impugning the correctness of the police report that the case of the petitioner was false and stating that his case was true, is a complaint within the meaning of S. 4 (1) (*h*), Cr. P. Code, and must be dealt with in accordance with the provisions of S. 200, Cr. P. Code, and the following sections. A.I.R. 1947 Cal. 439=82 C.L.J. 286.

——S. 4 (1) (h)—Objection petition.

The petition of objection filed by the petitioner during a charge of house-breaking against him was a complaint under S. 4 (*h*). 3 P.L.J. 346=19 Cr.L.J. 874=47 Ind. Cas. 70.

——Ss. 4 (1) (h), 195 and 476—Order of Court—Complaint or sanction—Revision.

Where a District Judge passed an order:—"I complain that *R* filed two false and forged bonds in the Court," and sent the papers to the District Magistrate for taking action, *held*, that the order was a complaint within S. 4 (*h*) and not a sanction under S. 195 or S. 476. 12 A.L.J. 881=15 Cr. L.J. 700=26 Ind. Cas. 148.

——S. 4 (1) (h)—Alteration of petition in Court—Offence reported—If complaint.

While a case was pending before a subordinate Magistrate, the parties compounded and filed the agreement into Court. The Magistrate found that there was a material alteration in the agreement after it was filed in Court and that the accused was responsible for it and made a report of it to the District Magistrate. He made no order under S. 476, but the District Magistrate ordered prosecution of the accused.

Held, that the report cannot in any sense be treated as an order under S. 476, Cr. P. Code, but the report falls within the definition of complaint as given in S. 4 (*h*) and his order therefore cannot be said to have been passed without any jurisdiction. 81 Ind. Cas. 595=21 A.L.J. 825=4 L. R. A. Cr. 248=25 Cr.L.J. 947=A.I.R. 1924 A. 190.

——S. 4 (1) (h)—Petition to adduce evidence—If complaint.

A petition praying for an opportunity to prove the petitioner's case by witnesses is a complaint under the Criminal Procedure Code. 111 Ind. Cas. 862=7 Pat. 561=10 P.L.T. 14=29 Cr.L.J. 942=11 A.I. Cr. 209=A.I.R. 1928 Pat. 585.

——S. 4 (1) (h)—"Complaint", what is.

A Tahsildar alleged in writing to a Magistrate that three persons named in the document have committed an offence and had made a definite request that they should be tried under the Penal Code.

Held, that such a document sent by the Tahsildar to the Magistrate was a complaint. 1930 A.L.J. 1316=1930 Cr. C. 1204=A.I.R. 1930 All. 820.

(i) What are not.

——S. 4 (h)—Application under S. 107.

An application under S. 107 is not a complaint within the meaning of S. 4 (*h*). 1930 A. L. J. 1475=53 A. 148=130 Ind. Cas. 630=32 Cr.L.J. 570=A.I.R. 1931 A. 53.

——S. 4 (1) (h)—Application under S. 107.

An application under S. 107 is not a "complaint" under S. 4 (*h*) and S. 203 of the Code therefore does not apply to such an application. 76 Ind. Cas. 25=25 Cr.L.J. 89=A.I.R. 1924 Lah. 630.

——S. 4 (1) (h)—Sanction under S. 476.

Sanction granted under S. 476 for prosecution is not complaint within S. 4 (*h*). 89 Ind. Cas. 1027=52 Cal. 666=26 Cr.L.J. 1459=A.I.R. 1925 Cal. 1226.

——S. 4 (1) (h)—Complaint—Report of a police officer.

The term "complaint" as defined in S. 4 (1) (*h*) has the meaning therein given, unless a different intention appears from the subject or context. It does not include the report of a Police Officer. A. I.R. 1943 All. 6=1942 A.W.R. 346=1942 A.L.J. 608=44 Cr.L.J. 165=I.L.R. (1943) All. 29=204 Ind. Cas. 243.

——Ss. 4 (1) (h), 195—Communication by Sub-Inspector to District Superintendent of Police that certain person committed offence and praying for his prosecution—Communication forwarded to Magistrate.

Per *Sulaiman, C. J. and Rachhpal Singh, J. Bennet, J.* Contra).—The communication made by the Sub-Inspector to the Superintendent of Police to the effect that a certain person has committed an offence under the I. P. Code and praying for his permission for filing a complaint against him, and which is forwarded by the latter to the Magistrate does not amount to a complaint within the meaning of S. 195, Criminal P. C. A.I.R. 1936 All. 788=1936 A. L.J. 1064=1936 A.W.R. 905=38 Cr.L.J. 57=I. L.R. (1937) All. 162=165 Ind. Cas. 769.

——Ss. 4 (1) (h), 199 (1) (a), 552—Application not suggesting Magistrate should take action—Prayer to take woman from husband's custody—Deposition of applicant—Omission—Effect.

An application to the Magistrate did not suggest that the Magistrate should take any action against any person for committing an offence; nor did the allegations in the application form the ingredients which constitute any offence under the I. P. Code, nor was there any offence referred to in the application by the number of the section. It only said that *R*, the husband of *K*, came to the house of *D* and took her away from that house where she was staying with her uncle *D*. The relief which was asked by the application was that *K* should be set at liberty and taken from the custody of her husband because there was an apprehension that he might ill-treat her:

Held, that the application was not a criminal complaint but an application under S. 552, that the Margistrate was not bound to take the deposition of the applicant on oath and his omission to do so did not vitiate an order subsequently made by him directing a complaint under S. 182, I. P. Code, to be made against the applicant for prosecution under S. 199 (1) (*a*), Criminal P. C. A.I.R. 1936 All. 469=1936 A.L.J. 592=1936 A.W.R. 396=37 Cr. L.J. 857=163 Ind. Cas. 609.

——S. 4 (1) (h)—Order on police complaint for summons—S. 476.

Where a prosecution was initiated by the Police who made the complaint and on that complaint the Magistrate passed an order to summon the accused,

Held, that the order could not be construed as a "complaint" within the meaning of the Code. 86 Ind. Cas. 825=4 Pat. 323=6 P.L.T. 457=26 Cr. L.J. 889=A.I.R. 1925 Pat. 483.

——S. 4 (1) (h)—One *M* applied to Deputy Commissioner, alleging that his application to the Police was not enquired into and praying that the Deputy Commissioner should order an enquiry or start himself an enquiry. *M* did not ask for the trial and punishment of the accused.

Held, that the application was not a "complaint" for the purposes of S. 211, I. P. Code. 75 Ind. Cas. 543=24 Cr.L.J. 959=A.I.R. 1924 Nag. 115.

——S. 4 (1) (h)—Application to continue proceedings.

An application by the complainant stating that the proceedings against the accused already taken be reviewed as he has sufficient material to support the case against accused, is not a complaint but an application for continuing the case. 72 Ind. Cas. 945=1 Pat.L.R. (Cr.) 97=24 Cr.L.J. 481=A. I. R. 1923 Pat. 532.

——S. 4 (1) (h)—An application simply showing cause why the petitioner should not be prosecuted is not a complaint. 64 Ind. Cas. 47=2 P.L.T. 220 =22 Cr.L.J. 735=A.I.R. 1921 Pat. 302.

——S. 4 (1) (h)—Extra-judicial statement.

Statements made to a Magistrate extra-judicially without intending them to be taken as complaint but only in reply to questions by the Magistrate is not a 'complaint' under S. 4, Cr. P. Code. 38 All. 32= 13 A.L.J. 1050=16 Cr.L.J. 807=31 Ind. Cas. 823.

——Ss. 4 (1) (h), and 196—Penal Code, S. 121-A—Conspiracy with persons known and unknown—Persons not named in complaint but named in sanction of Government—Jurisdiction to try.

When the accused were charged as persons known and unknown, to wage war against His Majesty and the known persons were mentioned in the charge, *held*, that the charge could not be sustained. When one of the accused was not named in the complaint though his name was mentioned in the sanction of the Government, *held*, that the accused must be discharged. An application for the issue of process against such accused person before the committing Magistrate does not constitute a complaint. 15 C. W.N. 98=12 C.L.J. 2=8 Ind. Cas. 1059.

——Ss. 4 (1) (h), 195—Penal Code, S. 185—Bengal Tenancy Act, Ss. 123, 126—Obstruction to public servant when distraining crops—Complaint by him—Sanction.

Under the Bengal Tenancy Act, a civil Court ordered a peon to cut crops distrained. He was stopped by the accused, and he lodged information of the occurrence at the thanah. *Held*, that under S. 195 of the Criminal Procedure Code there should be a complaint as defined by S. 4 of the Code by the public servant concerned, that there was no such complaint in the case, and that hence the conviction under S. 186 of the Penal Code was wrong. (1902) 30 C. 285.

——S. 4 (1) (h)—Request for order to Police.

A petition charging a person and asking for an order to the Police to warn that person in the first instance, is not a complaint and no prosecution under S. 211, can be granted. 15 C.W.N. 1051=12 Cr. L.J. 535=12 Ind. Cas. 303.

4. S. 4 (1) (i)—European British subject.

——S. 4 (1) (i)—European British subject—Person's grandfather born in England.

Even if there had been some evidence to show that the applicant's grandfather himself was born in England, that would not be sufficient to bring the applicant within the provisions of S. 4, as regards the definition of "European British subject" which appears in sub-S. (1) (*i*) of that section. In order that the applicant should bring himself within the four corners of that definition, he will have to show that his grandfather was of European descent. A. I.R. 1939 Cal. 545=I.L.R. (1939) 1 Cal. 162=43 C.W.N. 120=41 Cr.L.J. 72=184 Ind. Cas. 757.

——S. 4 (1) (i)—*Quaere.*—Whether every person who is a European British subject under this defini-

tion in S. 4 (1) (*i*) (*ii*), Cr. P. Code, is a European within the meaning of S. 275. A.I.R. 1934 Pat. 200=15 P.L.T. 82=35 Cr.L.J. 827=13 Pat. 177=148 Ind. Cas. 933 (D.B.).

——S. 4 (1) (i)—European British subject—Marriage.

The words "naturalised or domiciled" which follow "born" are disjunctive of and not conjunctive with what precedes. A European British subject who marries a native British Indian husband or an Indian subject of a Native State does not thereby cease to be a "European British subject" as defined in the Code. 117 Ind. Cas. 321=53 Bom. 149=31 Bom.L.R. 62=30 Cr.L.J. 772=A.I.R. 1929 Bom. 81.

——S. 4 (1) (i)—European British subject.

The accused, the son of an Indian born at Constantinople does not become a European British subject unless it is proved that he, or his father or guardian was domiciled in the United Kingdom or in any other European, American or Australian colonies of His Majesty. 6 P.R. Cr. 1912 (Cr.)=24 P.W.R. (Cr.) 1912=13 Cr.L.J. 197=14 Ind. Cas. 197.

——S. 4 (1) (i)—"European British subject", meaning of.

The words "European British subject" in S. 4 (*i*) mean an European British subject who had claimed to be dealt with as such. A.I.R. 1937 Mad. 14=1936 M.W.N. 1091=44 L.W. 755=71 M.L.J. 827=38 Cr.L.J. 336=I.L.R. (1937) Mad. 339=167 Ind. Cas. 160.

——S. 4 (1) (i), Chap. 33—European British subject—Trial within N.W.F.P.—Waiver of right to be tried as such—Court of appeal.

In view of the provisions of S. 4 (*j*), the Court of Revision or Appeal for a European British subject convicted by a Court of N.-W.F.P. who has waived his right to be tried as such or who has set it up and failed to establish it, is the Judicial Commissioner's Court of N.-W.F.P. and not the Lahore High Court. A.I.R. 1933 Pesh. 6=141 Ind. Cas. 445.

5. S. 4 (i) (j)—High Court.

——S. 4 (1) (j)—High Court—Sonthal Parganas Regulation (5 of 1893).

Under Cl. (1) (*ii*) (*a*) of S. 4 the High Court of Patna has only jurisdiction to deal with appeals under S. 417 against an order of acquittal. It has no power to deal with an application under S. 439 for setting aside acquittal for which the proper forum is the Commissioner of Bhagalpur. 99 Ind. Cas. 112=28 Cr.L.J. 80=8 P.L.T. 271=7 A.I.Cr.R. 231=6 Pat. 83=1926 P.H.C.C. 267=A.I.R. 1926 Pat. 449.

6. S. 4 (1) (k)—Inquiry.

——S. 4 (1) (k)—Inquiry—Inquiry and investigation—Distinction—Documents seized—Examination of, by Custom or Police Officers, whether investigation.

A clear distinction is made by the Code between an inquiry and an investigation. An "inquiry" relates to a proceeding held by a Court or a Magistrate while an investigation relates to the steps taken by a Police Officer or a person other than a Magistrate.

A proceeding by a Police Officer for the collection of evidence would answer the definition of investigation only if it were a proceeding under the Code. An examination by the Customs or Police Officers, of the documents seized, is not a proceeding under the Code and hence not an investigation under the Criminal P. C. A.I.R. 1940 Cal. 97=44 C.W.N. 82=41 Cr.L.J. 329=I.L.R. (1940) 1 Cal. 231=186 Ind. Cas. 486.

——Ss. 4 (i) (k) and 145—Enquiry—Meaning of.

Enquiry does not mean merely enquiry into an offence; it also extends to enquiries into matters which are not offence; proceedings under S. 145 are enquiries. 13 C.W.N. 420=9 Cr.L.J. 278=1 Ind. Cas. 336.

——S. 4 (1) (k)—Trial and enquiry.

Trial is a judicial proceeding which ends in conviction or acquittal. All ither priceedings are enquiries and they have various endings according to circumstances. 9 Pat. 155=1929 Cr.C. 372=A.I.R. 1929 Pat. 644.

——S. 4 (1) (k)—Inquiry and trial—'Trial', meaning of.

In Bombay the word "trial" has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case.

The trial covers the whole of the proceedings in a warrant case. A.I.R. 1937 Bom. 55=38 Bom.L.R. 1189=38 Cr.L.J. 250=I.L.R. (1937) Bom. 211=166 Ind. Cas. 598.

——S. 4 (1) (k)—Trial, meaning of—When begins.

"Trial" is every proceeding which is not an enquiry begins when the accused is called on to answer. A.I.R. 1936 Mad. 353=1936 M.W.N. 281=43 L.W. 548=70 M.L.J. 635=37 Cr.L.J. 637=162 Ind. Cas. 592 (F.B.).

——S. 4 (1) (k)—Trial, when begins.

Sind Frontier Regulation 3 of 1892—Offence punishable with death or transportation for life—Trial commences only when the case is proceeded with in Sessions Court. A.I.R. 1938 Sind 9=32 S.L.R. 129=39 Cr.L.J. 294=173 Ind. Cas. 325.

——S. 4 (1) (k)—Inquiry and judicial proceedings—S. 176, Cr. P. Code—Proceedings under, fall within Ss. 4 (1) (k) and 4 (1) (m).

Proceedings of a Magistrate under S. 176 are an "inquiry" as defined by S. 4 (1) (*k*) and a "judicial proceeding" as defined by S. 4 (1) (*m*). 112 Ind. Cas. 567=30 Bom.L.R. 1050=29 Cr.L.J. 1063=11 A.I.Cr.R. 324=A.I.R. 1928 Bom. 390.

——S. 4 (1) (k)—Commitment to Sessions.

If a Magistrate on receipt of a complaint issues process against the accused and ultimately concludes that an offence triable at Sessions has been committed and commits the accused, the trial does not begin until the accused appears at the Sessions and the proceedings before the Magistrate constitute an enquiry only. 9 Pat. 155=1929 Cr.C. 372=A.I.R. 1929 Pat. 644.

——S. 4 (1) (k)—Explosive Substances Act, S. 4.

The failure to obtain necessary consent of Government as required by S. 7 of Explosive Substances

Act (4 of 1908) does not invalidate the commitment proceedings conducted by a Magistrate for an offence under S. 4 and exclusively triable by the Sessions Court as the committal proceedings are only an "inquiry" as defined in Cl. (*k*) of S. 4 of the Cr. P. Code. 99 Ind. Cas. 37=50 Bom. 695=28 Bom. L.R. 1290=28 Cr.L.J. 5=7 A.I.Cr.R. 161=A.I.R. 1927 Bom. 21.

7. S. 4 (1) (l)—Investigation.

——S. 4 (1) (l)—Investigation—"Collection of evidence conducted by Police Officer," interpretation of.

The expression 'collection of evidence conducted by a Police Officer' in S. 4 (1) (l), is a short way of saying collection of material to be used as evidence conducted by a Police Officer. The expression "giving or taking evidence" is nowhere used in reference to Police Officers. A.I.R. 1937 Lah. 160 =17 Lah. 593=38 P.L.R. 1042=38 Cr.L.J. 435= 167 Ind. Cas. 555.

——Ss. 4 (1) (l), 165—Recording of reasons prior to search.

An investigation includes all the proceedings under the Criminal P. C. for the collection of evidence, conducted *inter alia* by a Police Officer.

Where a Police Officer decides to make a search, the reasons in writing referred to in S. 165 can be recorded at any time or in any place prior to the actual search. A.I.R. 1933 Sind 240=148 Ind. Cas. 178.

——S. 4 (1)—'Investigation'—Definition of—How far complete.

The definition of 'investigation' in S. 4 is not complete. (1902) 4 Bom. L. R. 271=26 B. 533.

——S. 4 (1) (l)—Taking out a warrant, arresting accused, seizing books, etc., how far investigation.

Taking out warrant of arrest, arresting accused, seizing books, etc., form some part of investigation within S. 4. (1902) 4 Bom.L.R. 271=26 B. 533.

8. S. 4 (1) (m)—Judicial proceeding.

——S. 4 (1) (m)—Judicial proceeding.

Where a Magistrate holds an inquiry under Police Order No. 157, revision lies against an order relating to such inquiry when statements of witnesses are taken on oath. A.I.R. 1944 Mad. 37=56 L. W. 437=(1943) 2 M.L.J. 182=1943 M.W.N. 706 =45 Cr.L.J. 212=210 Ind. Cas. 321.

——S. 4 (1) (m)—'Criminal proceedings' meaning of.

The expression 'criminal proceedings' includes investigation by Police Officer of an alleged cognizable offence. A.I.R. 1931 All. 269=1931 A.L.J. 177= 33 Cr.L.J. 256=136 Ind. Cas. 277.

——S. 4 (m)—Judicial proceeding—Enquiry by Magistrate — Criminal Courts—Statements by accused in the course of enquiry.

A Magistrate holding an enquiry into matters disclosed in a communication containing imputations against a certain person is a criminal Court, and false statements knowingly made in the course of such an enquiry are deemed to be made in a 'judicial proceeding' within the meaning of the Code. The definition of that term as used in the Code is wide enough to include an enquiry in which the false statements are repeated. (1905) 2 A.L.J. 717=1905 A.W.N. 195=28 A. 89.

——S. 4 (1) (m)—Judicial Proceeding—Execution proceeding.

The definition of a judicial proceeding given in S. 4 (*m*) is wide enough to cover execution proceedings. 19 Cr.L.J. 153=43 Ind. Cas. 441.

——Ss. 4 (1) (m), 200, 476 and 552—Judicial proceedings—Inquiry—Oaths.

S. 200, Cr. P. Code, does not authorise Magistrates to administer oaths but directs examination of the complainant upon oath. It recognises the power and directs the time when Court should exercise the power. S. 552 recognises the power and the exercise made compulsory in the issue of orders therein contemplated. The inquiry, made compulsory on a Magistrate, for satisfying himself before issuing process under S. 100 is a judicial proceeding. 17 Cr.L.J. 491=34 P.R. 1916 Cr.=36 Ind. Cas. 171.

——S. 4 (1) (m)—Re-trial—If judicial proceeding.

The trial of a suit after an ex parte decree against the defendant is set aside may be regarded as a continuation of the trial of the same suit which first ended in a decree. The definition of "judicial proceeding" in S. 4 (*m*) Cr. P. Code, is not opposed to this view. 81 Ind. Cas. 219=18 M.L.W. 133= 25 Cr.L.J. 731=A.I.R. 1924 Mad. 86.

——S. 4 (1) (m)—Scope—Judicial proceeding.

The definition of judicial proceeding in S. 4 (*m*) is limited to that Code and does not apply to that phrase as used in the Penal Code. 60 Ind. Cas. 593 =45 Bom. 834=23 Bom.L.R. 1=22 Cr.L.J. 241= A.I.R. 1921 Bom. 3 (F.B.).

——Ss. 4 (1) (m) and 476—Transfer of case—Case false—Procedure.

Where a Magistrate to whom a case was sent by another for enquiry prior to the issue of process to the accused, finds, after making enquiry and recording evidence that the case is false, he can proceed under S. 476 and commit the complainant for trial under S. 211 of the I. P. Code and the proceedings taken by the Magistrate were judicial proceedings within S. 4, Cl. (*m*). 36 Cal. 72=13 C.W.N. 122 =9 Cr. L. J. 295=1 Ind. Cas. 203.

——Ss. 4 (1) (n)—Complaint by Police—Non-cognizable case.

A police officer is not prohibited under the Cr. P. Code from presenting a complaint to the Magistrate in a con-cognizable case. 82 Ind. Cas. 753=6 L. L.J. 606=25 Cr.L.J. 1361=A.I.R. 1925 Lah. 237.

9. S. 4 (1) (o)—Offence.

——Ss. 4 (1) (o), 5 (2)—Offence, what is—Contempt of Court—Process of securing attendance of offender residing outside jurisdiction.

Contempt of Court is an offence within the meaning of S. 4 (1) (o), Criminal P. C., and as such can be inquired into under S. 5 (2) of that Code. Hence, where a contempt has been committed within the territorial jurisdiction of a High Court, such Court can issue process to secure the presence of the offender wherever he may be residing in British India. A.I.R. 1945 All. 1=46 Cr.L.J. 272=1944 O.W.N. 158=1944 A.L.J. 459=I.L.R. (1944) All. 665=217 Ind. Cas. 247.

——S. 4 (1) (o)—Accused—Who is.

Person called on to give security is not an accussed. 81 Ind. Cas. 909=50 Cal. 985=25 Cr.L.J. 1085=A.I.R. 1924 Cal. 392.

——S. 4 (1) (o)—Triable offences—Mussalman Wakf Act.

There does not appear to be anything in the Mussalman Wakf Act which is repugnant to the definition of an offence contained in the General Clauses Act and in the Cr. P. Code and as the Act contains no provisions regarding the Court by which offences under S. 10 of the Act should be tried, they can be tried by any Magistrate. 105 Ind. Cas. 666=28 Cr.L.J. 954=3 A. I. Cr. R. 142=22 S.L.R. 141 =A.I.R. 1928 Sind 43.

——S. 4 (1) (o)—Cattle Trespass Act, S. 20—Complaints under.

A Magistrate generally empowered under the Cr. P. Code to receive complaints of offences has jurisdiction in respect of offences under S. 20 of the Cattle Trespass Act without any special authorization by the District Magistrate to receive complaints under the above section. 44 Bom. 42 and 34 Cal. 926, Foll. 100 Ind. Cas. 381=50 Mad. 841=25 M. L.W. 282=1927 M.W.N. 167=28 Cr.L.J. 301= A.I.R. 1927 Mad. 396=52 M.L.J. 251.

——S. 4 (1) (p)—Officer in charge of police station—Officer on tour.

Assistant Sub-Inspector on duty in mofussil during investigation is not officer-in-charge of the police station for purposes of S. 154, when the first information report is made to him unless he comes within the strict terms of S. 4. 117 Ind. Cas. 601=30 Cr. L.J. 803=A.I.R. 1928 Cal. 771.

——S. 4 (1) (p)—Writer Head Constable.

Where in a particular case Sub-Inspector-in-charge was ill and the Writer Head Constable was not generally empowered to investigate cognizable cases,

Held, that he being the officer-in-charge of the police station on that day, it was his duty to make the investigation. 72 Ind. Cas. 375=2 Pat. 379= 4 Pat.L.T. 521=1 Pat.L.R. (Cr.) 248=24 Cr. L.J. 375=A.I.R. 1923 Pat. 547.

——Ss. 4 (1) (p) and 166—Station house officer—Acting incumbent.

If a person is deputed to be in charge of a police station in the absence of the permanent incumbent, the fact that he was doing duty outside the station house does not deprive him of his capacity of station house officer. 42 Mad. 446=36 M.L.J. 252=20 Cr.L.J. 422=25 M.L.J. 274=(1919) M. W. N. 452=51 Ind. Cas. 198.

——S. 4 (1) (p)—Officer in charge of police station.

According to S. 4 (1) (*p*) 'officer in charge of police station' includes an officer in charge of the station, in the absence of the officer, but the Code empowers the Local Government to direct that some other person may be empowered to act as such officer; and the Local Government can so empower a senior constable. (1911) 1 M.W.N. 231=9 M. L. T. 414=12 Cr.L.J. 190=10 Ind. Cas. 667.

10. S. 4 (1) (r)—Pleader.

——S. 4 (1) (r)—Pleader—Vakils authorised to practise in Orissa—If can claim protection under second part of S. 4 (1) (r) for appearing in Courts in Madras Presidency.

Persons who claim to be entitled to practise as Vakils of a High Court must show that they are authorised to do so. Vakils authorised to practice only in the Orissa Courts are not persons who can claim protection under second part of S. 4 (1) (r), for appearing in Courts in the Madras Presidency. A.I.R. 1943 Mad. 470=1943 M.W.N. 223=56 L.W. 256=(1943) 1 M.L.J. 382=44 Cr.L.J. 662 =207 Ind. Cas. 623.

——S. 4 (1) (r)—Advocate on Appellate Side, if Pleader—Whether can appear in High Court Sessions.

Advocates on the Appellate Side do not come within the definition of "Pleader" as defined in the Criminal P. C. for the purposes of the Sessions Court, because they are not authorized by law for the time being in force to practise in that Court. Consequently, they have no authority to practice in the Sessions Side of the High Court. A.I.R. 1934 Bom. 70=58 Bom. 456=36 Bom.L.R. 1=148 Ind. Cas. 664 (F.B.).

——S. 4 (1) (r)—Pleader accepting engagement in a Court not authorised to practice in—Duty of.

A pleader appearing in the Court of a District to which his *sanad* does not apply, ought to inform the magistrate of the same and apply for permission under S. 4 (*r*) of the Cr. P. Code, better still if he had obtained permission before accepting the engagement. 7 S.L.R. 98=15 Cr.L.J. 382=23 Ind. Cas. 750.

——S. 4 (r)—Pleader—Mukhtear—Permission to appear—Power of Magistrate to withhold.

Where a Magistrate refused permission to a Mukhtear to appear in two cases and also passed a general order refusing permission to appear in any case before him owing to the latter's alleged misconduct in Court on a particular day: *Held*, that such orders were without justification and that even in punishing the Mukhtear for the particular misconduct the Magistrate should have dealt with the matter on its own merits, giving the Mukhtear an opportunity of defending himself. (1902) 7 C. W.N. 524.

——S. 4 (r)—Legal Practitioners Act, S. 9—Mukhtear—Authority of Mukhtear to practise in Criminal Courts.

A mukhtear is not entitled to practise generally and as of right in criminal Courts, but can act only when he has received the permission of the Court to act in any particular proceeding. But such permission should not be refused except for valid reason. 1908 A.W.N. 11=5 A.L.J. 40=30 A. 66 (F.B.).

——S. 4 (1) (r)—Mukhtear.

In Bombay Presidency "Mukhtyar" is a person who can with the permission of the Court represent an accused in any proceeding within the meaning of S. 4 (1) (*r*), Cr. P. Code, and so a general order of a District Magistrate against employment of Mukhtyars in criminal cases in his district is improper. 107 Ind. Cas. 56=29 Bom.L.R. 1587=29 Cr.L.J. 226=9 A.I.Cr.R. 403=A.I.R. 1928 Bom. 33.

——S. 4 (1) (r)—Mukhtear.

A mukhtear can only plead with the permission of the Judge. 4 S.L.R. 195=12 Cr.L.J. 118=9 Ind. Cas. 711.

——S. 4 (1) (r)—Mukhtear—Right to appear for accused.

It would not be a wise discretion on the part of the Court to refuse permission to a mukhtear appearing for the defence. A mukhtear should not be permitted to appear when his appearance is unnecessary. In exercising its discretion the Court should consider the character of the person appointed to plead. 38 Cal. 488=12 Cr.L.J. 111=15 C.W.N. 409=13 C.L.J. 635=9 Ind. Cas. 664.

——S. 4 (1) (r)—Pleader—Estate manager—When could appear for accused.

It is open to an accused to appoint his estate manager to appear in his stead, and plead and to other acts on his behalf in the case against him. and it is equally open to the Court to permit the estate manager to represent the accused as a pleader, but there should be clearly on record something to show that the person who represents the accused has been duly appointed by him and to show that the Court has given the requisite permission for his appearance in place of the accused. 93 Ind. Cas. 232=50 Bom. 250=28 Bom.L.R. 102=27 Cr.L.J. 440=A.I.R. 1926 Bom. 218.

——S. 4 (1) (r)—Constituted attorney, if can appear.

The words 'any other person' in the definition of 'Pleader' in S. 4 (1) (*r*), are not restricted in their meaning and are not limited to a person authorized by law to appear in a particular Court. A constituted attorney is hence authorized to appear for the accused. A.I.R. 1935 Bom. 212=36 Bom.L.R. 433=35 Cr.L.J. 1035=149 Ind. Cas. 1132.

——S. 4 (1) (r)—Pleader for accused—Public Prosecutor—If could be permitted.

The District Magistrate considering it possible that the complaint against two Government Officials was a false one, made in consequence of the accused performing their duty, directed the Prosecuting Inspector to defend the accused. The trying Magistrate allowed the Prosecutor to so defend the accused.

Held, that though the Public Prosecutor was not a member of the Bar it could not be held that he was not a person appointed by the accused with the permission of the Court to defend them though it was desirable that they had made such appointment. 122 Ind. Cas. 442=31 Cr.L.J. 419=26 N.L.R. 172=A.I.R. 1930 Nag. 150.

——S. 4 (1) (t)—Law officers—If public prosecutors. **See** CR. P. CODE, SS. 492, 494 AND 495. 28 Pat. 70=50 Cr.L.J. 699=A.I.R. 1949 Pat. 344.

11. S. 4 (1) (v)—Summons case.

——S. 4 (1) (v)—Summons case.

It is open to a Magistrate who entertains a complaint and records a sworn statement to come to the conclusion that although the complained allegation constitutes an offence triable under the warrant procedure yet in fact a minor offence was committed, that he may adopt the summons procedure if the offence appears to be one to which the summons procedure can be applied; and that he may proceed with the case as if the complaint was one of the minor charge only. A.I.R. 1942 Mad. 594=(1942) 1 M.L.J. 594=55 L.W. 372=1942 M.W.N. 373=43 Cr.L.J. 760=201 Ind. Cas. 451.

——S. 4 (1), Cls. (v) (w)—Summons case and warrant case—Distinction — Bengal Excise Act (5 of 1909), Ss. 46, 62—Prosecution under S. 46 (a)—Previous conviction — Accused liable to imprisonment exceeding six months — Magistrate following summons case procedure—Trial—Irregularity, S. 537.

The procedure for the trial of a summons case is laid down in Chap. XX, while that for a warrant case is laid down in Chap. XXI of the Criminal P.C. There is a difference between the two, the main difference lying in the fact that in a warrant case, it is necessary to frame the charge, and secondly, that the accused has the right to reserve cross-examination of the prosecution witnesses till a late stage.

In considering whether the trial should be in accordance with the procedure of a summons case or of a warrant case, it is not pertinent to consider the nature of the offence, but only the measures of the punishment which may be inflicted. That constitutes the deciding factor.

Where, therefore. it is apparent in a prosecution under S. 46 (*a*), Bengal Excise Act, from the beginning that the accused is liable to imprisonment exceeding six months by reason of a previous conviction under the provisions of S. 62, Bengal Excise Act, the proper procedure for the Magistrate to adopt is that laid down for a warrant case. The irregularity of following the summons case procedure instead of the procedure for warrant case is not a mere matter of form. The difference between the two forms of trial is of sufficient importance to lead to an almost indefeasible presumption of prejudice to the accused and the trial is not in accordance with law, and must therefore be set aside, the irregularity being of such a character as not to be curable by S. 537, Criminal P.C., or by any of the other curative provisions of the Code. A.I.R. 1938 Cal. 205=42 C.W.N. 222=39 Cr.L.J. 438=174 Ind. Cas. 454.

——S. 5 (2)—Contempt of Court is an offence, within the meaning of S. 4 (1) (o), Criminal P.C., and such can be inquired into under S. 5 (2) of that Code. A.I.R. 1945 Oudh 266=20 Luck. 442=1945 O.W.N. 169=222 Ind. Cas. 260=47 Cr.L.J. 294.

——S. 5 (2)—Commission of offences under Ss. 3 and 4 of Public Gambling Act—Search and arrest by Sub-Inspector of police—Chalan presented by city police:

Held, that the provisions of Criminal P.C., regulate investigation and trial of such offences which are cognizable and the procedure adopted by the Police for the arrest of the accused was proper. A.I.R. 1941 Nag. 35=194 Administrat 465=43 Cr. L.J. 89=I.L.R. (1942) Nag. 426=196 Ind. Cas. 869.

——Ss. 5, 29, 194 (1), 526—Offence under any other law than under Penal Code—Jurisdiction of High Court—Offence due to contravention of S. 35, Companies Act—High Court, when and how can take jurisdiction to try it.

There is absolutely no conflict between the provisions of S. 5 and those of S. 29. Section 29 merely empowers the High Court, when no Court is mentioned for any offence under any law other than the Penal Code. The mere fact that S. 29 empowers

the High Court to try such an offence does not show that the High Court can take cognizance of the offence straight off, try the accused and convict him and punish him without following the procedure laid down in the Code. In the case of offences due to the contravention of the provisions of S. 85, Companies Act, the High Court has no jurisdiction to take cognizance and try such offence and impose fine. If the case were committed to the High Court under S. 194 (1), Criminal P.C., or proceedings were started on an application of the Advocate-General under S. 194 (2), or were transferred to it under S. 526, Criminal P. C., then High Court would have jurisdiction to try the accused: but it would not have jurisdiction to try the accused merely on an application made under S. 85, Companies Act. A. I.R. 1936 All. 830=1936 A.L.J. 1105=1936 A. W.R. 964=38 Cr.L.J. 111=I.L.R. (1937) All. 220=166 Ind. Cas. 53 (F.B.).

——S. 5—Election petitions—Trial of.

The trial of election petition is not governed by rules applicable to Criminal cases. 63 Cal. 825=165 Ind. Cas. 489=40 C.W.N. 741.

——S. 5, Chap. XIV—Bombay Abkari Act (5 of 1878), Ss. 43 (1), 47—Offence under—Police, if have jurisdiction to search or arrest.

Chapter XIV, being controlled by S. 5 (2), the Police have no right to file a charge-sheet or otherwise to proceed under Chap. XIV, Criminal P. C., in respect of an offence under the Bombay Abkari Act. There is no provision in the Bombay Abkari Act, empowering Police Officers to effect searches or arrests or to send up cases for trial for offences falling under this Act, and no such powers can be presumed. A.I.R. 1933 Sind 325=35 Cr.L.J. 129=146 Ind. Cas. 419 (F.B.).

——S. 5—Offence covered by special as well as general law—Law applicable.

It is not a general rule of law that if an act is an offence under a special law providing penalties for such an act, the application of the general law would be repelled. It is possible that an act may be an offence both under special law as well as under general law, both laws being applicable simultaneously. In such a case, the offender may be prosecuted under either law though it would be more appropriate to prosecute the offender and to convict him under the special Act if the offence falls strictly within the purview of a section of the special Act and does not go beyond it. A.I.R. 1932 All. 69=33 Cr.L.J. 309=1932 A.L.J. 519=136 Ind. Cas. 571.

——Ss. 5, 239 (a)—Offences under Factories Act, whether offences of the same kind.

Offences under S. 41 (*h*) and S. 41 (*j*) of the Factories Act are offences of the same kind within the meaning of S. 239 (*c*) and so persons jointly and severally liable for offences under the said clauses may be tried together for two offences committed by them. A.I.R. 1932 Pat. 188=33 Cr.L.J. 274 (2) =13 P.L.T. 252=136 Ind. Cas. 289.

——S. 5—Special law—Abkari Act—Offences under.

The police have no right to file a charge sheet or otherwise to proceed under Chapter 14 of the Cr. P. Code in respect of an offence under the Abkari Act. Chapter 14 is controlled by S. 5 (2) of the Cr. P. Code and this is an offence under a special law, which can be investigated and tried only according to the provisions of the law. 72 Ind. Cas. 175=24 Cr.L.J. 335=17 M.L.W. 308=A.I.R. 1923 Mad. 339=44 M.L.J. 231.

——S. 5—Calcutta Rent Act—Not covered by S. 9.

Rule 4 framed under S. 23 of the Rent Act for regulating the procedure in enquiries by the President of the Tribunal in so far as it has provided that the procedure laid down in the C.P. Code, 1908, should apply is *ultra vires*. The rule is not an "enactment" within S. 5 (2) of the Cr. P. Code. 61 Ind. Cas. 210=48 Cal. 955=33 C.L.J. 551=25 C. W.N. 661=22 Cr.L.J. 354=A.I.R. 1921 Cal. 708.

——S. 5—Foreigners Ordinance (3 of 1914), Ss. 3, 4 and 7.

An ordinance is a law and an infringement of its provisions is an offence and an inquiry into such an offence under S. 5, must be dealt with according to the provisions of that Code unless there is any other enactment in force prescribing a different method of inquiry. 10 P.R. Cr. 1916=15 P.W.R. Cr. 1916 =17 Cr.L.J. 225=152 P.L.R. 1916=34 Ind. Cas. 641.

——S. 5—Offence under special Act, proof of—Strict proof required.

In the case of an offence under a Special Act, the guilt of the accused ought to be strictly proved. (1905) 2 A.L.J. 411.

——S. 5—Functions of Judge.

A Judge in this country exercising the functions of a jury would be bound to direct his mind to those considerations to which, had he been summing up to a jury, he would have been bound to direct their minds to. (1907) 12 C.W.N. 490=35 Cal. 495.

——S. 5—Duty to decide points of law raised at the trial—Postponement of case to enable accused to get a ruling from the High Court—Impropriety of.

Where the trying Magistrate finding it difficult to decide whether certain coins, which the accused was charged with making, were King's coins or not, postponed the case to enable the accused to obtain a ruling of the High Court on the point: *Held*—That the magistrate was wrong in doing so; it was his duty to decide whether the coins were King's coins or not and whether any offence was committed under S. 230, I.P. Code It was not the business of the High Court to decide the point at that stage. (1907) 12 C.W.N. 604.

——S. 5—Petitions, disposal of—Order one way or the other—Order file.

A magistrate is bound to grant or refuse the prayers in a petition presented to him. An order merely to file it is irregular. (1901) 6 C.W.N. 548.

——Ss. 5, 107 and 350—"Trial" meaning of—S. 350 (1), Proviso (a)—Applicability of.

S. 350 (1) Proviso (*a*) applies to a case under S. 107, Per *Wallis, C.J.*—"Trial" generally means the determination of the issues arising in the particular case. Per *Ayling, J.*—The word "trial" as used in the Cr. P. Code, presupposes the idea of an offence as defined in S. 4 of the Code. Inquiries under Chapter VIII of the Code are not trials; and the proviso of S. 351 of the Code does not apply to such proceedings. Per *Coutts-Trotter, J.*—Whether

a proceedings under S. 107, C. P. Code are a "trial" is doubtful. 43 Mad. 511=38 M. L. J. 370=11 L. W. 435=27 M. L. T. 178=(1920) M.W.N. 280=21 Cr.L.J. 402=56 Ind. Cas. 50.

——S. 5—Village Panchayats—Transfer of cases.

By S. 5 read with S. 526 High Court has jurisdiction to transfer cases from village panchayats constituted under the U.P. Village Panchayat Act of 1920. 99 Ind. Cas. 126=25 A.L.J. 157=8 L.R. A. Cr . 33=28 Cr.L.J. 94=49 All. 188=7 A.I. Cr. R. 246=A.I.R. 1927 All. 199.

——S. 5 (2)—Applicability—Offences under Cantonments Act — Procedure — Special procedure prescribed by latter Act—If overriden by Cr. P. Code.

The Cantonments Act is a Special Act, and the procedure in respect of offences under that Act is governed by S. 5 (2), Cr. P. Code and not by S. 5 (1). S. 5 (2) provides for dealing with an offence under a special Act according to the procedure prescribed in the special Act itself. The Court is not bound strictly by the provisions of the Cr. P. Code, with regard to acquittal, discharge, etc. 229 Ind. Cas. 174=A.I.R. 1947 Sind. 128=48 Cr.L.J. 300.

——S. 6—Court of Session—High Court.

The High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure. 84 Ind. Cas. 929=51 Cal. 980=29 C.W.N. 384=26 Cr. L. J. 385=A.I.R. 1925 Cal. 384.

——S. 6—Criminal Court—Sessions Court.

Sessions Court is criminal Court within S. 6. A. I. R. 1942 Sind 161=I. L. R. (1942) Kar. 323 =44 Cr.L.J. 137=204 Ind. Cas. 31.

——S. 6—Village Courts—If included.

A village *panchayat* constituted under U.P. Village Panchayat Act is not Court as defined under S. 6 and is therefore not a body subject to the revisional jurisdiction of the Chief Court. A.I.R. 1939 Oudh 143=1939 O.W.N. 231=1939 A.W.R. 54=14 Luck. 592=40 Cr.L.J. 338=180 Ind. Cas. 142.

——S. 6—Deputy Magistrate.

The terms 'Deputy Magistrate' and 'General Deputy Magistrate' are not known to the Code of Criminal Procedure. 23 M.L.J. 670=12 M.L.T. 601 =13 Cr. L.J. 850=17 Ind. Cas. 786.

——S. 6—District Magistrate — Subordinate to District Court.

There is no Court of a District Magistrate as such within the meaning of S. 6 of the Code. A District Magistrate's Court is only a Court of Magistrate, first class, and subordinate to the Court of the Sessions Judge for the purposes of S. 195 (3). An appeal, therefore, under S. 476-B lies to the Court of the Sessions Judge, from an order passed by the District Magistrate under S. 476-A and not to the High Court. 116 Ind. Cas. 77=25 N.L.R. 1=30 Cr.L.J. 550=12 A.I.Cr.R. 345=A. I. R. 1929 Nag. 97 (F.B.).

——S. 6—Municipal Magistrate—Calcutta Municipal Act.

The Municipal Magistrate appointed under S. 531 is a Court of inferior criminal jurisdiction within the meaning of S. 6, Cr. P. Code, and orders for demolition passed by such a Magistrate are subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. Further, an order for demolition is a judicial order and whether made in the exercise of the Magistrate's civil or criminal jurisdiction is open to revision by the High Court. 43 Mad. 146 (P.C.); Foll. 90 Ind. Cas. 317=52 Cal. 962=26 Cr.L.J. 1533=29 C.W.N. 898=A.I. R. 1925 Cal. 1251.

——S. 6—Order under S. 144—'Court'.

Order of the Magistrates acting under S. 144 is not the order of a Court. No revision, therefore, lies against such order under S. 435, in spite of omission of Cl. 3 from the Code of 1898. A.I.R. 1923 Mad. 473, Foll. Magistrates are not always Courts. S. 6 is not inconsistent with the idea that Magistrates may sometimes act in executive and administrative capacity and not as Courts. 113 Ind. Cas. 279=28 M.L.W. 506=1928 M.W.N. 779=52 Mad. 69=1 M. Cr. C. 304=30 Cr. L.J. 119=12 A.I.Cr.R. 17=A.I.R. 1928 Mad. 1108=55 M.L. J. 621.

——Ss. 7, 9—Notification does not create powers —Powers are conferred by Ss. 7 and 9—Formal notification though desirable is not absolutely necessary.

There is no particular virtue in a formal Notification. The notification does not confer the powers. S. 9, Cr. P. Code, confers the necessary powers; so does S. 7. A Government Notification merely declares or records the acts of Government. The powers themselves are conferred by and exercised under the sections. Neither S. 7 nor S. 9 of the Code requires formal publication in the *Government Gazette*. Whether a Court of Session is established is a question of fact, whether the limits of a sessions division or district are altered is a question of fact, although it is particularly desirable that in questions of jurisdiction the acts of Government should be declared with precision and particularity by a formal Notification which places the matter above all dispute or argument or doubt. A.I.R. 1943 Sind 39=44 Cr. L.J. 293=204 Ind. Cas. 415 (F.B.).

——Ss. 7 and 9—Sections 9 and 7, Cr. P. Code do not require formal publication in the *Government Gazette*. A.I.R. 1943 Sind 39=44 Cr. L.J. 293= 204 Ind. Cas. 415 (F.B.).

——Ss. 7, 10—Madras Government Notification constituting two Sessions Divisions of Tanjore District — 'District', meaning of—Appointment of one District Magistrate for two districts.

Held, by the Full Bench (*Jackson, J.*, dissenting) —The word 'district' in S. 7 (1), does not necessarily refer to a revenue district but means a district for the purposes of criminal administration. Therefore, the Notifications Nos. 175 and 177 of the Local Government dated 22nd June, 1921, constituting a Sessions Division of West Tanjore and a Sessions Division of East Tanjore are *intra vires* of the Local Government.

Per *Jackson, J.*—The word 'district' in S. 7, is used in its generally accepted sense of a revenue division in charge (in the Madras Presidency) of a Collector and the above said notifications are, therefore *ultra vires*. A.I.R. 1931 Mad. 697=1931 M. W.N. 161=34 M.L.W. 201=61 M.L.J. 265=32 Cr. L.J. 1095=54 Mad. 943=134 Ind. Cas. 51 (F. B.).

——S. 7 (2)—Notification declaring boundary between two districts—Power of District Magistrate to transfer.

It is not competent for one District Magistrate to transfer a case for trial to another District Magistrate, on the ground that the boundaries fixed by Government vest the jurisdiction over the offence in the latter. 5 O.L.J. 145=19 Cr. L.J. 671=45 Ind. Cas. 1007.

——S. 9—Court of sessions— Establishment of.

The establishment of a Court of Session and the appointment of a Judge to such Court, are, under the terms of S. 9, Cr. P. Code, two things very closely connected. The establishment of a Court of Session at Nawabshah for the Sessions division and district of Nawabshah with headquarters at Nawabshah was necessarily implicit in the terms of the creation of the post of the District and Sessions Judge at Nawabshah, and in the appointment of a certain person as District and Sessions Judge Nawabshah. A.I.R. 1943 Sind 39=44 Cr. L.J. 293=204 Ind. Cas. 415 (F.B.).

——Ss. 9, 193 (2), 409, 195—Sessions Judge can transfer appeal from order under S. 195 to Additional Sessions Judge who has jurisdiction to hear it.

The effect of Ss. 9, 193 (2) and 409, Cr. P. Code, is that an Additional Sessions Judge can hear all the appeals which lie to the Sessions Judge and the Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge. A.I.R. 1942 Oudh 50=1941 O.W.N. 1130=43 Cr. L.J. 56=1941 A.W.R. 313=196 Ind. Cas. 664.

——S. 9—Court of Sessions—What is.

Predecessors of Sub-Judge appointed Assistant Sessions Judges by name—No subsequent order appointing Sub-Judge by designation or name as Assistant Sessions Judge—Trial of sessions case by such Sub-Judge is illegal. A.I.R. 1941 Mad. 681=1941 M.W.N. 62.

——Ss. 9 (3), 268—Additional Sessions Judge appointed by Resident—Whether can exercise discretion under S. 268.

Held, that the Additional Sessions Judge appointed by the Resident under S. 9 (3), was entitled to exercise his discretion under S. 268, and try cases without jury or aid of assessors. A.I.R. 1937 P.C. 119=1937 O.W.N. 412=1937 A.L.J. 1055=3 B.R. 426=38 Cr.L.J. 498=39 P.L.R. 334=41 C.W.N. 741=1937 M.W.N. 546=46 M.L.W. 134=(1937) 2 M.L.J. 323=64 I.A. 148=39 Bom.L.R. 966=I.L.R. (1937) Bom. 711=1937 A.W.R. 1128=167 Ind. Cas. 790 (P.C.).

——S. 9—Court of Session—Hearing appeals transferred to additional Court.

The jurisdiction of the Sessions Judge in respect of an appeal is not ousted in consequence of any arrangement, which he might previously have made for the convenient disposal of the work of the Sessions Court. The absence of any corresponding provision to S. 531 in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division, whether he be the Sessions Judge or an Additional Sessions Judge, shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of S. 9 of the Cr. P. Code. 65 Ind. Cas. 491=44 All. 157=23 Cr. L.J. 107=19 A.L.J. 952=A.I.R. 1922 All. 387.

——S. 9—Jurisdiction — Appeal filed in Sessions Court A—Additional Sessions Judge hearing it at B—B farther from accused's house than A—Discretion, if properly exercised.

Where a Sessions division covers districts *A* and *B*, a criminal appeal in respect of an offence alleged to be committed in district *A* can be tried at *B* and it is a matter of discretion for the Sessions Judge or the Additional Sessions Judge to decide in which district it should be heard. The discretion must be exercised in a judicial manner and reasonable attention must be paid to the interest of the accused.

The Additional Sessions Judge heard an appeal at *B* thinking that the appellant had not been taken by surprise as he had ample notice of the Court's intention but he did not take into consideration the fact that *B* was at a greater distance from the place where the appellant resided (being more distant than *A* was from his house) and that it would be more inconvenient for him to take a lawyer to *A* than to *B*:

Held, that the discretion was wrongly exercised by the Additional Sessions Judge and that the appeal should be re-heard by such Appellate Court as the Sessions Judge might direct. A.I.R. 1934 Pat. 643=15 P.L.T. 604=1 B.R. 220=36 Cr. L.J. 371=153 Ind. Cas. 576.

——Ss. 9, 476—Offence before Additional Sessions Judge—Power of Sessions Judge to make complaint—Failure to record expressly that enquiry is necessary.

Under S. 9, the Local Government is empowered to establish a Court of Session for every Sessions division and to appoint a Judge of such Court and Additional Sessions Judge and Assistant Sessions Judges to exercise jurisdiction in such Court, and to direct at what place of places the Court of Session shall sit. But there is only one Court of Session in each Sessional Division though manned by a number of Judges and the Sessions Judge can, therefore, make a complaint in respect of an offence committed before the Court of the Additional Sessions Judge. A.I.R. 1931 Cal. 190=58 Cal. 1117=35 C.W.N. 400=53 C.L.J. 177=32 Cr.L.J. 842=132 Ind. Cas. 160.

——S. 10—Powers of Additional District Magistrate—He cannot exercise all powers of District Magistrate.

The mere fact that the Additional District Magistrate can exercise the powers of the District Magistrate for a great many purposes does not necessarily invest him with authority to exercise all the District Magistrate's powers. A.I.R. 1943 Nag. 26=1943 N.L.J. 1=44 Cr. L.J. 345=I.L.R. (1943) Nag. 154=205 Ind. Cas. 5.

——Ss. 10, 438—District Magistrate invested with powers under S. 10 has also other powers not contemplated by Code.

From the mere fact that the District Magistrate has been invested with certain powers under S. 10, it does not follow that he has not other powers which are not contemplated by the Cr. P. Code. He is in addition the Collector of the district. He is also the District Officer and in those capacities, he has to perform many functions which are not covered

by the Cr. P. Code. A.I.R. 1940 Cal. 30=I.L.R. (1939) 2 Cal. 532=41 Cr. L.J. 442=187 Ind. Cas. 310.

——S. 10 (2)—The Additional District Magistrate upon whom the ordinary powers of a District Magistrate had been conferred under S. 10 (2), is not in any way affected by the proviso to S. 337 (1) and he is in his own right empowered under the law to tender a pardon to the accused without the sanction of District Magistrate. A.I.R. 1938 Lah. 796=40 P.L.R. 758 (2)=40 Cr. L.J. 543=I.L.R. (1939) Lah. 38=181 Ind. Cas. 509.

——S. 10—Officials in dual roles — Caution required.

Officials who function both as Deputy Commissioners and District Magistrate sought to take meticulous care to differentiate between their exacting, and to some extent incompatible, duties as Deputy Commissioners and as District Magistrates. A.I.R. 1935 Rang. 137=36 Cr. L.J. 875=13 Rang. 336=156 Ind. Cas. 149.

——S. 10—Force of "in".

The phrase ''Local Government shall appoint a Magistrate in every district'' need not imply that the Magistrate so appointed shall be situate in the district and that he may not be one with headquarters elsewhere the word ''in'' being synonymous with ''to''. 1931 M.W.N. 1064.

——S. 10—Appointment of District Magistrate—One officer for two Districts—Legality.

S. 10 directs that a District Magistrate shall be appointed for every district; but that section does not say that one officer should not be appointed District Magistrate for two districts. There is nothing wrong in having one District Magistrate for both the districts of East Tanjore and West Tanjore. A.I.R. 1931 Mad. 697=1931 M.W.N. 161=32 Cr. L.J. 1095=54 Mad. 943=34 L.W. 201=61 M.L.J. 265=134 Ind. Cas. 51 (F.B.).

——S. 10—District Magistrate — Power to order summons to be issued in cases not in his file. *See* 6 C.W.N. 843.

——S. 10—District Magistrate — Duties of—Responsibility.

The duties and the responsibility attaching to the position of a District Magistrate in connection with the administration of law in the district indicated. (1886) 10 C.W.N. 82=2 C.L.J. 555.

——S. 10—Of Magistrate of first class in Head Quarters.

A Magistrate of the first class holding his court at the head quarters has local jurisdiction throughout the district. 10 C.W.N. 1095.

——S. 12—Power of District Magistrate under.

Where one of the First Class Magistrates is assigned cases under the Child Marriage Restraint Act from a particular Tahsil and another Magistrate of the First Class is also assigned ''complaints from that particular Tahsil'' the latter Magistrate has jurisdiction even under the distribution memo. to entertain a complaint under Child Marriage Restraint Act from that particular Tahsil. The District Magistrate has power under S. 12 (1) to permit two Magistrates to entertain the same class of complaint. There is nothing illegal is such action. The mere fact that he has given somebody else the right to try a certain class of complaint also does not take away the more general jurisdiction conferred on the latter Magistrate. 225 Ind. Cas. 624=47 Cr. L.J. 794=1946 N.L.J. 460.

——S. 12—District Magistrate—Power of.

Unless the powers of a Magistrate have been restricted to a defined local area, he has jurisdiction in the entire district. A.I.R. 1945 Nag. 56=1944 N.L.J. 508=I.L.R. (1944) Nag. 836=46 Cr. L.J. 654=220 Ind. Cas. 77.

——Ss. 12, 107—Sub-Divisional Magistrate, if can take proceedings under S. 107 against person residing outside his sub-division.

It is surely of the essence of the sub-divisional system that a Sub-Divisional Officer should be responsible for his own sub-division and for nothing beyond it. The appointments of Sub-divisional Magistrates by the District Magistrate are carried out under S. 12 and he, in fact, defines the local areas and restricts the Magistrates' powers to such areas. He has no jurisdiction to take cognizance of matters outside the local areas within which the District Magistrate has appointed him to act. The jurisdiction of a Sub-Divisional Magistrate is confined to his own sub-division and he cannot take proceedings under S. 107, against a person residing outside his sub-division. A.I.R. 1938 Nag. 448=I. L. R. (1939) Nag. 158=39 Cr.L.J. 810=176 Ind. Cas. 784.

——S. 12—Additional District Magistrate not subordinate to District Magistrate. (1907) 34 C. 918.

——S. 12—Headquarters Magistrate—Jurisdiction over entire district. I.L.R. (1944) Nag. 836=1944 N.L.J. 508=220 Ind. Cas. 77=46 Cr. L.J. 654=A.I.R. 1945 Nag. 56.

——S. 12—Jurisdiction — Sub-divisional Magistrate.

A sub-Divisional Magistrate cannot take cognizance of matters outside the local areas within which the District Magistrate has appointed him to act. although he may be a first class Magistrate. 59 Ind. Cas. 554=19 A.L.J. 77=22 Cr. L.J. 122=A.I.R. 1921 All. 123.

——S. 12—Jurisdiction of District Magistrate—Not restricted.

If the jurisdiction of the Magistrate is not defined in the manner laid down in S. 12, cl. (2), his jurisdiction and powers would undoubtedly extend throughout the district. 29 Cal. 389, Foll. 63 Ind. Cas. 873=24 O.C. 255=8 O.L.J. 632=22 Cr.L.J. 713=A.I.R. 1921 Oudh 162.

——S. 12—Jurisdiction—Magistrate appointed to a district—Local area not defined—Area of his jurisdiction.

Where a Magistrate is appointed to a district and the local area of his jurisdiction is not defined by the Local Government under S. 12 of the Criminal Procedure Code, his jurisdiction extends over the whole district. (1902) 6 C.W.N. 552=29 Cal. 389.

——Ss. 12, 460 and 528—Magistrate transferred to Municipality.

A Magistrate who is gazetted to the Office of Chairman of a Municipal Board and takes charge of that office is no longer a Magistrate and is also not

subordinate to the District Magistrate. Hence the latter cannot transfer any criminal case to him for trial. 36 All. 513=12 A.L.J. 890=15 Cr.L.J. 693=26 Ind. Cas. 141.

——S. 12—Transfer of Magistrate—Effect of.

Cases on the file of a Magistrate do not pass automatically to his successor if the former is transferred to another local area. 9 A.L.J. 448=13 Cr.L.J. 203=14 Ind. Cas. 203.

——S. 12 (1)—Construction and scope—District Magistrate conferring jurisdiction to entertain the same class of complaints on two Magistrates—Legality.

A District Magistrate has power under S. 12 (1). Cr. P. Code, to permit two Magistrates to entertain the same class of complaints and there is nothing illegal in his so doing when the District Magistrate has expressly invested a particular Magistrate with powers to try all complaints from a named Tahsil, the mere fact that he has given somebody else also the right to try a certain class of complaints from that area will not take away the more general jurisdiction conferred upon the former. I.L.R. (1947) Nag. 80=A.I.R. 1947 Nag. 79=225 Ind. Cas. 624=47 Cr.L.J. 794=1946 N.L.J. 460.

——S. 12 (1), (2)—Local area of Magistrate not defined—Jurisdiction extends to whole district.

Where the local area of the jurisdiction of a Magistrate of the First Class has not been defined under S. 12 (1), his jurisdiction extends under S. 12 (2) to the whole of his district. A.I.R. 1932 Cal. 864=36 C.W.N. 796=59 Cal. 1484=33 Cr.L.J. 858=139 Ind. Cas. 850.

——S. 12 (2)—Mere definition of areas if can exclude jurisdiction of Magistrate in rest of district.

The mere definition of areas cannot be taken as a provision excluding jurisdiction in the rest of the district. Sub-section (2) of S. 12, clearly requires some provision excluding jurisdiction in the rest of the district, which is either express or must be inferred by necessary implication. A.I.R. 1935 Bom. 409=37 Bom.L.R. 745=1935 Cr. Cas. 1113=37 Cr. L.J. 514=162 Ind. Cas. 207.

——S. 12—Magistrate in charge of one sub-division—Jurisdiction over entire district.

Although a Magistrate is placed in charge of one sub-division, his jurisidiction over the area outside his jurisdiction as a Magistrate of the First Class is retained unless specifically curtailed. A. I. R. 1935 Pat. 436=16 P.L.T. 576=2 B.R. 61=37 Cr. L.J. 55=159 Ind. Cas. 12.

——S. 12—Accused Sub-Inspector of Police—Proper Court for trial.

Where the accused is a Police Officer of the rank of a Sub-Inspector, the case against him should be tried by a Magistrate not below the rank of a First Class Magistrate. 1937 M.W.N. 983.

——Ss. 13 (3), 529 (f), 192—Distict Magistrate appointing Sub-Divisional Magistrate for particular period—Authority to be in charge of S. D. O's file during his tour—Such appointed Magistrate, not empowered under S. 192, transferring case in good faith in his own file.

A District Magistrate who has been delegated powers under S. 13 (3), Criminal P.C., is competent to appoint a Sub-Divisional Magistrate on a particular date or dates or for a particular period. This he might do without relieving the permanent incumbent. The mere authority from the District Magistrate to be in charge of the S.D. O's file at headquarters so long as he is on tour is an appointment within the meaning of S. 13 though the appointment is limited only to a particular kind of work and a particular occasion.

Where such a Magistrate appointed by the District Magistrate transfers erroneously but in good faith, a case of which he has not taken cognizance to his own file as second officer, the order of transfer is valid by virtue of S. 529 (*f*). The fact that he is not empowered to do so under S. 192, is immaterial. A.I.R. 1938 Cal. 195=42 C.W.N. 246=39 Cr.L.J. 417=174 Ind. Cas. 513.

——S. 14—'Case', meaning—Charges.

Where a public servant was suspended, and his prosecution was sanctioned in respect of three charges but the words used in an order under S. 14 were: "To try the case relating to the prosecution of Mr. . . . .Deputy Collector, under suspension."

Held, the words of the order must be interpreted in the light of the facts in relation to which they are used and the word "case" covered all the three charges. 106 Ind. Cas. 100=8 A.I. Cr. R. 324=29 Bom.L.R. 996=28 Cr.L.J. 1012=A. I. R. 1927 Bom. 501.

——S. 14—'Case', meaning of.

In S. 14, the word "case" is a comprehensive term and would include all the offences which come to light during the investigation. A.I.R. 1931 Bom. 517=33 Cr.L.J. 68=33 Bom.L.R. 1192=134 Ind. Cas. 1230.

——S. 14 (6)—Order under S. 144 expiring—Local Government cannot resuscitate it by extension.

Section 14, Criminal P.C., does not permit the Local Government to resuscitate an order under S. 144 which has expired and is no longer in force, by extending it. A.I.R. 1940 Lah. 459=42 Cr.L.J. 90=42 P.L.R. 786=191 Ind. Cas. 162.

——S. 14—Duration—Honorary Magistrate.

Where an Honorary Magistrate has been appointed in the Central Provinces for a term of years his jurisdiction to decide cases must be considered to continue unless there is an order cancelling such appointment. 120 Ind. Cas. 223=1930 Cr. C. 201=31 Cr.L.J. 24=A.I.R. 1930 Nag. 96.

——S. 14—Special Magistrate for whole province—Appeal—Any local area—Meaning of.

An appeal from an order of a special Magistrate appointed under S. 14, Cr.P. C. for the whole province lies to the Sessions Judge within the local limits of whose jurisdiction the special Magistrate held his Court in disposing of the case. The words "any local area" in S. 14 are not restricted to a local area within a specified district or sessions division, but extend to a whole province. 48 P.L.R. 1918=4 P.W.R. Cr. 1918=19 Cr.L.J. 310=44 Ind. Cas. 326.

S. 15. Bench of Magistrates.
(See also Sec. 16)
Synopsis.

1. **Bench Court—Absence of members.**
2. **Bench Court—Trial by.**
3. **Bench Magistrates—Duty of.**
4. **Bench Magistrates—Powers of.**

1. Absence of members—Effect of.

——Ss. 15, 16—'Sit together', meaning of—Rules of Bombay Govt.—Trial before Bench of three Magistrates having second class powers—Exercise of first class powers—Appeal—Jurisdiction of District Magistrate.

The words "sit together" in S. 15, Cr. P. C., must be construed as equivalent to "constitute", so that the Local Govt. may direct any two or more Magistrates to constitute a Bench, and then they may invest that Bench with special powers, and they may make rules under S. 16 providing how the Bench is to be constituted for the purpose of conducting trials. The rules made by Bombay Government providing that a Bench should consist, generally speaking, of five members with a quorum of three, are valid. Under the notification of the Government under S. 15, three Magistrates, members of the whole Bench of ten forming a trial Bench, have the powers of a First Class Magistrate under the notification, and the District Magistrate has no jurisdiction to entertain an appeal from the decision of the Bench. A.I.R. 1934 Bom. 176=36 Bom. L.R. 314=36 Cr. L. J. 592 =154 Ind. Cas. 827.

——Ss. 15, 16, 350—Benches of Magistrates—Rules framed by U. P. Government under Ss. 15, and 16—Bench delivering judgment consisting of two members—One not present throughout trial—Accused specifically asked whether he wished to have trial de novo but not so wishing—Effect.

The procedure of Benches of Magistrates is governed in some measure by rules made under Ss. 15 and 16, Criminal P. C. Rules recommended by the U. P. Government are to be found in Para. 814 of the Manual of Government Orders.

One of the rules which lays down that the provisions of S. 350, Criminal P. C., will apply when the personnel or a Bench is changed during a trial, does not in any way contravene the provisions of the Code.

Where the Bench which delivered the judgment consisted of two members one of whom was not present throughout the trial and the Magistrates specifically asked the accused whether they wished to have a de novo trial and the accused stated through counsel that they did not so wish, the proceedings cannot be said to be irregular. A.I.R. 1943 All. 20=1942 A.L.J. 609=44 Cr. L.J. 203= I.L.R. (1943) All. 23=1942 A.W.R. 325=204 Ind. Cas. 323.

——Ss. 15, 16—Rules framed under S. 16 requiring quorum of two Magistrates—Trial commencing before three Magistrates—Presence of two only throughout trial—Judgment signed by only those two.

A criminal trial for offences under Ss. 323 and 452, I. P. C., commenced before three Honorary Magistrates but at some subsequent hearing one of them was not present. The other two were present at all the hearings, and these two Magistrates delivered the judgment. It was found that according to the rules framed by the District Magistrate of the place under S. 16, Criminal P. C., two Magistrates would form the quorum of the Bench and these two were required to hear a particular case from start to finish and sign the judgment:

Held, that inasmuch as there was a quorum of two Magistrates throughout the conduct of the case and the judgment was delivered by those Magistrates only, the trial was not irregular, and that the presence of the third Magistrate was unnecessary and as he was not a party to the judgment, he did not in any way influence the opinion of the other two. A.I.R. 1933 All. 355=34 Cr.L.J. 701=1933 A.L.J. 547=55 All. 459=144 Ind. Cas. 123.

——Ss. 15, 16, 350 (a)—Bench Magistrates—Evidence taken in the absence of some members—Validity of conviction.

If any member of a Bench of Magistrates is not present on any hearing, there is no properly constituted Bench, and, therefore, if witnesses are examined by one or more Magistrates in the absence of others constituting the Bench, the witnesses cannot be considered to have been examined by the Bench and a conviction based on such evidence is unsustainable. A.I.R. 1932 All. 127=1932 A.L.J. 42=33 Cr.L.J. 200=135 Ind. Cas. 835.

——S. 15—Bench Court—Trial by two.

A case is not wrongly decided merely because one of the three composing the Bench left so early and the judgment was written by the other two of them. 15 A.L.J. 463=18 Cr.L.J. 749=40 Ind. Cas. 749.

——Ss. 15 and 16—Bench of Magistrates—Absence of some of the members—Effect of.

Absence of some of the Bench Magistrates, at the time of the judgment, who were present at the earlier stages of a trial does not vitiate the trial or invalidate the conviction. 38 Mad. 797=(1914) M.W.N. 867=15 Cr.L.J. 549=24 Ind. Cas. 957.

——Ss. 15, 16 and 350—Bench Magistrates—Rules by Local Government—Strength of Bench and quorum—Judgment pronounced by a Bench, of which one had not heard the whole evidence.

A rule appointing three persons to constitute a Bench of Honorary Magistrates is not ultra vires of the Local Government. The quorum would be vested with all the powers conferred on the Bench and as one of the members on the second occasion when judgment was pronounced, did not hear the evidence, etc., it was difficult to say that the accused were not prejudiced and consequently the trial was illegal. 41 All. 116=16 A.L.J. 884=19 Cr.L.J. 1004=48 Ind. Cas. 344.

——S. 15—Bench of Presidency Group. See 29 C. 498.

2. Bench Court—Trial by.

——S. 15—Trial by Bench Magistrates.

Where though a complaint was one for an offence under S. 430, I. P. C. which a Bench Court had

no jurisdiction to try, the case was treated as a case under S. 426, I. P. C., and sent to the Bench Court for trial and the accused was tried by the Bench Court for the lesser offence under S. 426:

Held, that the trial was not void. A.I.R. 1931 Mad. 494=1930 M.W.N. 770=32 Cr. L. J. 971=133 Ind. Cas. 4.

——S. 15—Procedure—Trial by Bench of two Magistrates—Only one of them signing proceeding—Whether proof that other who had not signed was absent.

Where there is nothing to show that one of the two members of the Bench of Magistrates hearing the case, who had not signed the proceedings was absent or was not paying attention to the proceedings when they were going on, the mere fact that he has not signed the proceedings is not enough to show that he was not present. A.I.R. 1942 Oudh 423=1942 A.W.R. 277=1942 O. W. N. 444=43 Cr. L. J. 646=201 Ind. Cas. 243.

——S. 15—Only one Magistrate hearing case on many occasions.

Where in a trial before a Bench of Magistrates, it appeared that on several occasions, the evidence was heard by only one of the members of the Bench and only one member signed the depositions of the witnesses on several hearings:

Held, that the trial was irregular and illegal and should be set aside. A.I.R. 1934 Oudh 85 =35 Cr. L.J. 417 (2)=11 O.W.N. 75=147 Ind. Cas. 516.

——S. 15—Evidence heard by three Magistrates—Judgment signed by seven.

Where, though only three Magistrates of the Bench heard the evidence and tried the case, the judgment was signed by seven:

Held, that there was an illegality which vitiated the proceedings and though the result was an acquittal, the nature of the illegality was such as would warrant interference in revision in the interests of the public. A.I.R. 1931 Mad. 494 =32 Cr. L. J. 971=1930 M.W.N. 770=133 Ind. Cas. 4.

——S. 15—Judgment signed by persons who did not hear evidence—Legality.

Where only three Magistrates of the Bench heard the evidence and tried the case but the judgment was signed by seven, **held**, that the judgment was illegal and must be set aside though it might have resulted in an acquittal. 1930 M.W.N. 770.

——S. 15 and S. 16—Bench of Magistrates—Some not present when evidence heard—Validity of decision.

Where a person was convicted by a Bench of five Magistrates one of whom had not heard all the evidence, the conviction is bad. 38 Mad. 304= 16 Cr. L.J. 489=29 Ind. Cas. 329.

3. Duty of Bench Magistrates.

——S. 15—Duty of Bench Magistrates.

The duty of Bench Magistrates lies in administering the law and in the performance of that duty, they should not allow their minds to be diverted by irrelevant consideration such as want of politeness on the part of the accused in his behaviour towards the police. A.I.R. 1937 Mad. 534=45 L.W. 239=1937 M.W.N. 184 (1)=(1937) 1 M.L.J. 310=38 Cr. L.J. 544=168 Ind. Cas. 511.

——S. 15—Benches of Magistrates—Bench of three Magistrates—All three must discuss and arrive at their conclusion—One Magistrate desiring to reserve his opinion and consider evidence and not participating in discussion—Order passed by other two—Effect.

Where a case is heard by a Bench of three Magistrates, before any order convicting or acquitting the accused can be properly passed, all three Magistrates will have to discuss the matter and arrive at their conclusion. It might be that by a majority, they can convict or acquit, but a discussion between all three is essential before any valid order can be passed.

Where one of the three Magistrates constituting the Bench desired to reserve his opinion and consider the evidence, and there was no discussion between all three Magistrates before the order was passed, the non-participation of such Magistrate in the discussions leading to the order vitiates the order. A.I.R. 1943 Pat. 381=45 Cr. L.J. 88=9 Cut. L.T. 8=209 Ind. Cas. 271=10 B.R. 138.

——S. 15—Difficult cases—Duty of Bench of Magistrates.

Where a Bench is of opinion that a case should be transferred from their file as it involves a difficult question it should move the matter officially and not to leave it to the parties to move. 106 Ind. Cas. 715=29 Cr. L. J. 123=A. I. R. 1929 Mad. 403.

——S. 15—Cases, which are likely to be keenly contested and intricate in nature, are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrate than by Honorary Magistrates. 105 Ind. Cas. 226=10 N.L.J. 184=28 Cr.L.J. 898= 9 A.I.Cr.R. 49=A.I.R. 1928 Nag. 21.

——S. 15—Obiter—It is extremely undesirable that cases involving difficult questions of fact or of law should be directed to be tried by a Bench of Honorary Magistrates. They cannot ordinarily be expected to deal satisfactorily with the questions that are involved in such cases. 81 Ind. Cas. 894= 47 Mad. 716=20 M.L.W. 573=1924 M.W.N. 880= 25 Cr.L.J. 1070=A.I.R. 1925 Mad. 64=47 M.L.J. 470.

4. Powers of Bench Magistrates.

——S. 15—Powers—Bench clutching at jurisdiction.

Where a complaint was made to a bench of Magistrates for an offence which they had no jurisdiction to try but they tried the accused for a lesser offence for which they had jurisdiction: **Held**, that the proceeding was not void. 1930 M.W.N. 770.

——S. 15—A Bench of Magistrates individually invested with powers of Third Class Magistrates was invested by a notification with the ordinary powers of a Second Class Magistrate, but the notification did not say that the Bench shall try any cases whatsoever or that they shall not try cases other than those triable by each of the Magistrates individually.

Held, that the notification was defective and that the Bench was empowered to try second class magisterial cases. 105 Ind. Cas. 433=22 S.L.R. 157 =9 A.I.Cr. R. 66=28 Cr.L.J. 913=A.I.R. 1928 Sind 1 (F. B.)

——S. 15—The true meaning to be attached to the section is that it is open to Government to invest a Bench composed of magis rates of a lower class with all the powers conferred on a Magistrate of a higher class, and also, if thought fit, to invest such Bench with powers conferrable on a Magistrate of such higher class, that is to say, that a Bench exercising third class magisterial powers may be invested with ordinary or additional powers of a Second Class Magistrate. 105 Ind. Cas. 433=22 S.L.R. 157=9 A.I.Cr.R. 66=28 Cr.L.J. 913=A.I.R. 1928 Sind 1 (F. B.).

——S. 15—"Any powers"—Meaning of.

"Any powers" in S. 15 refers to powers of any particular class of Magistrates either conferred or conferrable and does not mean any one of the powers conferred without the other. 105 Ind. Cas. 433=22 S.L.R. 157=9 A.I.Cr.R. 66=28 Cr.L.J. 913 =A.I.R. 1928 Sind 1 (F.B.)

——S. 15—Inferior Courts—Express power.

In inferior Courts and proceedings by Magistrates the maxim omnia praesumuntur rite esse acta does not apply to give jurisdiction. The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the superior Court but that which specially appears to be so; nothing is intended to be within the jurisdiction of an inferior Court but that which is expressly alleged. 105 Ind. Cas. 433=22 S.L.R. 157=9 A.I.Cr.R. 66= 28 Cr.L.J. 913=A.I.R. 1928 Sind 1 (F.B.)

——S. 15—Trial by successor.

There is ample authority for holding that all criminal cases should be decided by Magistrates who have heard the whole of the evidence, and that S. 350 of the Code does not apply to cases tried by Benches of the Magistrates. 3 Cal. 754; 12 Cal. 558; 13 C.L.R 212; 20 Cal. 870; 23 Cal. 194; 18 Mad. 394; 38 Mad. 304; 50 Ind. Cas. 672; 41 All. 116 and 15 A.L.J. 237, Foll. 64 Ind. Cas. 132=2 Lah. 237=99 P.L.R. 1921=A.I.R. 1921 Lah. 135= 22 Cr. L.J. 740.

——S. 15—Interpretation.

A notification investing certain Magistrates with certain powers can hardly fall within the category of statutes or notifications which are to be strictly construed. 105 Ind. Cas. 433=22 S.L.R. 157=9 A.I.Cr.R. 66=28 Cr.L.J. 913=A.I.R. 1928 Sind 1 (F.B.)

——S. 15—Bench of Magistrates—If can revise their own orders.

Held, that a Bench of Magistrates cannot sit in revision upon its own completed and pronounced judgment and that if there is any miscarriage of justice the proper course is for the President to refer the matter to the District Magistrate who if so advised can act under S. 438, Cr.P. Code. 53 M. 870=1930 M.W.N. 409=32 L.W. 152=1930 Cr.C. 1055=A.I.R. 1930 Mad. 1001=129 Ind. Cas. 628= 59 M.L.J. 708.

——S. 15—Difference of opinion among Bench of Magistrates.

In cases wherever the Chairman of the Bench Magistrates is opposed to the majority, and where he is not prepared to write a judgment for the majority, one of the Magistrates ought to be asked to write the judgment which should form part of the record. 91 Ind. Cas. 394=23 M.L.W. 537=27 Cr. L.J. 90=A.I.R. 1926 Mad. 354.

——S. 16—Bench Magistate—Constitution of.

Where, out of three Magistrates constituting the Bench only one is present on all hearings throughout the trial, sitting sometimes with one, sometimes with the other, and sometimes with both, the trial is bad as it contravenes the provisions of S. 350-A even though the quorum consisted of two. A I.R. 1926 Lah. 304, Foll. 4 O.W.N. 1240= 107 Ind. Cas. 875=9 A.I.Cr.R. 414=29 Cr.L.J. 310= A.I.R. 1928 Oudh 212.

——S. 16—See also CRIMINAL P.C., S. 15.

——S. 16—Difficult cases.

It is not desirable that Honorary Magistrates should try complicated cases of defamation involving difficult points of law. (1931) M.W.N. 407.

——S. 16—Local Government—Legality of rules made by—Honorary Magistrate—Guidance of.

S. 16 does not exclude the authority of the Local Government to make rules for the guidance of a Bench of Honorary Magistrates. 17 O.C. 142=15 Cr. L.J. 516=24 Ind. Cas. 604.

——S. 16—Powers.

There is nothing in the Criminal Procedure Code prescribing that any particular class of cases should be tried by Honorary Magistrates. 81 Ind. Cas. 44=25 Cr. L.J. 556=A.I.R. 1925 Nag. 40.

——S. 16—Bench Magistrates — Bengal, Behar, Orissa and Assam Laws Act, S. 3.

Where the notification of 1905 declared, the Chairman of Bench of Magistrate to have a casting vote in cases of difference of opinion among the members and the notification was applied to Faridpur in 1905, the conviction of the accused on the Chairman's casting vote was legal as the notification still applied to Faridpur under S. 3, Bengal, Behar, Orissa and Assam Laws Act. There is no general rule as to the accused's acquittal on appeal when there is a difference of opinion as to Magistrates composing a Bench. 19 C.L.J. 92=18 C.W.N. 394=14 Cr. L.J. 684=21 Ind. Cas. 1004.

——S. 16—Difference of opinions—Judgment—Writing of.

In a case where the President of the Bench is in a minority as to conviction or acquittal, the judgment should be written by some member of the

majority. 51 Mad. 338=29 Cr. L.J. 207=1928 M.W. N. 31=27 M.L.W. 239=106 Ind. Cas. 799=A.I.R. 1928 Mad. 197=54 M.L.J. 709.

——S. 16—Honorary Magistrate—Judgment by member who did not attend all the hearings.

A Bench of Honorary Magistrates consisted of four members. At the trial two of the members heard the evidence throughout and the other two attended only some of the hearings. The judgment was mostly written by one of the latter. **Held**, that it not being clear that the trial had been held before a Bench properly constituted, it could not be held that the first Court had jurisdiction and the whole of the proceedings was set aside with a direction for a fresh trial before a competent Court. 17 A.L.J. 379.

——S. 16—Judgment of Bench Magistrates—Differing judgments—One of the Magistrates not present when evidence was taken—Effective judgment—What is.

If the Magistrates composing the bench unanimously pass a judgment, it is effective. If they are divided unequally the judgment of the majority is the effective judgment. If they are divided equally, and the accused must be given the benefit of doubt, the judgment of acquittal is the effective judgment or if they must order retrial, the judgment of retrial is the effective judgment. If amongst the Magistrates one has not heard the evidence and his judgment is in support of the effective judgment, and there is just a chance of his having influenced the other members to come to the same view as he did, there must be a retrial. 4 A.I.Cr.D. 497=1950 A.W.R. 488=1950 A.L.J. 741.

——S. 16—Procedure — Person in minority voting for sentence.

The giving of the vote by the President of the Bench on the question of the sentence of the accused found guilty by a majority, though he was one of the minority who thought the accused was not guilty, is not illegal. 28 Cr.L.J. 310=100 Ind. Cas. 534=A.I.R. 1927 Mad. 500.

——S. 16—Evidence in the absence of the whole bench.

Where the rules as to the conduct of cases before a Bench provide that in order that there should be a quorum, two magistrates should be present, evidence recorded in the absence of one of them is not recorded in a Court, and, therefore, any Court is bound to disregard that evidence. A mere reading over to a Court of statements which are not evidence does not make such statements evidence. 20 S.L.R. 134=27 Cr.L.J. 542=93 Ind. Cas. 1038=A.I.R. 1926 Sind. 192.

——S. 16—Jurisdiction—One Bench Magistrate alone competent to try.

Where transfer of accused was made under S. 192 to the Bench Magistrates one of whom alone being invested with powers of a Magistrate of third class was empowered to hear and try the case under orders issued by the District Magistrate consonant to the provisions of S. 16 of the Criminal Procedure Code, and where he had jurisdiction to try the case sitting alone and he heard all the evidence and he was the Magistrate who pronounced judgment, **held**, there was no irregularity nor one vitiating the trial. 5 L.R.A. Cr. 93=A.I.R. 1924 All. 674.

——S. 16—Magistrate not fully present taking part in judgment.

The trial was commenced before a Bench of two Honorary Magistrates. They heard the evidence for the prosecution and examined one of the witnesses for the defence. On a subsequent date one of the Magistrates was not present; and his place was taken by another who recorded the remaining evidence for the defence and heard the arguments and the case was eventually decided by all the three, acting together, and ended in the conviction of the accused. On appeal the accused was acquitted. In revision the acquittal by the Appellate Court was set aside and re-trial was ordered as the trial was irregular and there was prejudice to the accused. 76 Ind.Cas. 556=10 O.L.J. 614=25 Cr.L.J. 198=A.I.R. 1923 Oudh 163.

——S. 16—Magistrates of the bench attending to other business during trial.

The object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attention, and apply their minds to the hearing of the evidence and the determination of the points at issue and arrive at an independent judgment in regard to the merits of the charge. This is not possible if, while one Magistrate is recording the evidence, the other Magistrate constituting the Bench is attending to some other work. Such a procedure defeats the very object with which a Bench is constituted and might lead in some cases to a miscarriage of justice. 69 Ind. Cas. 376=25 O.C. 182=23 Cr.L.J. 696=A.I.R 1922 Oudh 21.

——S. 16—Magistrate absent during part of trial.

It is certainly wrong that a Magistrate who has been absent during part of the trial should express an opinion on evidence which he has not heard, and very possibly influence his fellow Magistrates, although they are in a better position than he is to decide the case. 23 Bom. L.R. 833=22 Cr.L.J. 615=63 Ind. Cas. 151=A.I.R. 1921 Bom. 44.

——S. 16—Withdrawal.

It is not open to a Magistrate, after having taken part in the trial throughout and having heard the evidence to withdraw from the same. 23 Bom. L.R. 833=22 Cr.L.J. 615=63 Ind. Cas. 151=A.I.R. 1921 Bom. 44.

——S. 16—Trial commenced by three—Case heard by two.

If for any cause it is found necessary to adjourn the hearing of the case after the evidence had been partly taken, the trial must be completed before the same Magistrates who commenced it, or must be held a fresh before a different set of Magistrates. A bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent. The remaining two Magistrates went on with the trial, heard the defence evidence and convicted the accused. **Held**, that the trial

having been in contravention of the above rule was void. 44 Bom. 400=22 Bom. L.R. 154=21 Cr.L.J. 369=55 Ind. Cas. 849.

——S. 16—Trial by Bench of Honorary Magistrate—Difference of opinion—Procedure.

Where there is an irreconcilable difference of opinion between Honorary Magistrates trying a case as to the guilt of an accused, they should give the benefit of doubt to the accused and acquit him. A reference in such a case to a District Magistrate is irregular and is not justified by law. 16 Cr.L.J. 113=27 Ind. Cas. 177.

——Ss. 16 and 530 (h)—Trial before Bench of Magistrates—Absence of one Magistrate at the hearing and judgment.

If in a trial by Bench of Magistrates, one of the members constituting the bench is absent on the date when witnesses were examined the conviction is bad and there must be a re-trial. 38 Mad. 304, Foll. 26 M.L.T. 362=10 L.W. 366=20 Cr.L.J. 823 =53 Ind. Cas. 823.

——S. 16, Cl. (d)—Bench of Honorary Magistrates—Difference, mode of settling—Chairman's casting vote—Rule framed by Government—Rule No. 6, if ultra vires:— Per Curiam (Ghose and Pratt. JJ., contra):—Rule 6 of the rules framed by Local Government under S. 16 of the Code of Cr. P. C., providing that when the members of the Bench of Magistrates are even, the view of the Chairman shall prevail is not inconsistent with the Code. Per Ghose and Pratt, JJ.:—The rule is ulta vires. The court disapproved of the rule. (1906) 10 C.W.N. 642= 3 C. L. J. 492 (F. B.)

——S. 17—Scope.

The Code of Criminal Procedure strictly limits the powers of an Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Power to grant or cancel bail could be conferred on him under S. 17. Where no such power is conferred, the order of an Additional Sessions Judge granting or cancelling bail is ultra vires. A. I. R. 1930 Rang. 335=128 Ind. Cas. 577.

——S. 17—Scope of.

The powers of a District Magistrate under S. 17, Criminal P. C., relate to the distribution of the business among Subordinate Magistrates. The said section does not empower a District Magistrate to stay proceedings in a Criminal Court. A.I.R. 1931 Pat. 411 = 12 P.L.T. 671=33 Cr.L.J. 147=135 Ind. Cas. 513.

——S. 17—Stay of trial—Power of District Magistrate.

There is no provision in the Cr. P. Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and it would appear that the High Court's power to pass such an order can only be exercised under its general powers of superintendence. 76 Ind. Cas. 869 = 1923 M.W.N. 251= 25 Cr. L.J. 277=A.I.R. 1923 Mad. 688.

——S. 17—Deputy Magistrate—subordinate to Sub-Divisional Magistrate.

A Deputy Magistrate attached to a sub-division is subordinate to the Sub-divisional officer of that sub-division. 19 Cr. L. J. 126=43 Ind. Cas. 414.

——S. 17—Power to distribute work—If can be delegated.

The order of a District Magistrate authorising another magistrate to distribute work among magistrates is ultra vires. 36 All. 468=12 A.L.J. 803=15 Cr. L.J. 584=25 Ind. Cas. 336.

——S. 17—Revision—Power of High Court.

——On application for revision against order of Asst. Collector instead of against that of Collector who was responsible for that of the Asst. Collector, High Court's inherent power could be exercised under S. 561 (a). 82 Ind. Cas. 170=22 A.L.J. 803=5 L.R.A.Cr. 129=25 Cr. L. J. 1242=46 All. 879=A.I.R. 1924 All. 777.

——S. 17—Power of District Magistrate under.

A District Magistrate has wide powers of superintendence over his subordinate Magistrates which might be considered to justify special directions being issued by him to stop or go on with particular proceedings pending before them. 76 Ind. Cas. 872=25 Cr. L.J. 280=17 M.L.W. 570=32 M.L.T. 191=1923 M.W.N. 276=A.I.R. 1923 Mad. 595=44 M.L.J. 642.

——S. 17—Magistrate holding two capacities—Duty to indicate capacity in which he is trying the case.

Though it is the same officer who exercises jurisdiction in the two capacities of District Magistrate and Government Agent of an Agency tract, the capacities are quite different not only as regards the territorial limits within which the authority is to be exercised, but in other respects as well.

A Magistrate who exercises an authority as a Sub-Divisional Magistrate in the plains and as Assistant Agent in an Agency tract must bear in mind the particular capacity in which he acts in a particular case aud must indicate the same in his proceedings. Laxity in this respect should not be encouraged and the Magistrate should not be permitted to rectify the omission later on by making a special report after the case has been disposed of, as to the capacity in which he acted.

A report made by Magistrate after pronouncing his judgment cannot be used to contradict or vary what is contained in the judgments themselves.

The question whether a Sessions Judge has Jurisdiction or not to entertain an appeal in such a case does not depend upon the report of the subordinate Magistrate as to the capacity in which he acted but on the real facts of the case to be ascertained by the judge. A.I.R. 1937 Mad. 17=44 L.W. 689=1936 M.W.N. 1244=38 Cr. L.J. 81=(1937) 1 M.L.J. 759=165 Ind. Cas. 919.

——S. 17 (1)—Burma Courts Manual, Para. 102 —Discertion of District Magistrate under.

The instruction in the Burma Courts' Manual (Para. 102) which is based on the provisions of S. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner, and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable, it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. A.I.R. 1941 Rang. 114=1941 Rang. L.R. 82=42 Cr. L.J. 573=194 Ind. Cas. 370.

——Ss. 17 (4), 528 (1)—Sessions Judge—Power to transfer cases—Inherent powers—powers of Additional Sessions Judge.

There is nothing in the Criminal P.C. which gives jurisdiction to a Sessions Judge himself to transfer an appeal from the file of an Additional Sessions Judge to his own file, and even supposing a Sessions Judge has such jurisdiction, there is no provision in the Criminal P. C. by which an Additional Sessions Judge can issue such an order to another Judge of equal jurisdiction to himself. Section 17 (4) cannot confer any such jurisdiction on an additional Sessions Judge.

An application within the meaning of S. 17 (4) must be an application which is recognized by law, that is, a document properly stamped. A.I.R. 1931 All. 435=1931 A.L.J. 591=33 Cr. L.J. 158 =135 Ind. Cas. 252.

—S. 17 (5)—Charge of arson—Accused not admitting that fire was intentional.

In view of S. 17 (5), a Magistrate is not subordinate to the Sessions Judge. In the case of a charge of arson under S. 436 I.P.C., where the accused does not admit that the fire was intentionally caused, the accused is under no obligation to make any report. A.I.R. 1941 Rang. 324 =1941 Rang. L.R. 566=43 Cr. L.J. 373=198 Ind. Cas. 455.

——S. 17 (1), (5)—Subordination of Magistrates—Subordinate Courts—Sessions Judge—District Magistrate:—The District Magistrate and other Magistrates in the District are not subordinate to the Sessions Judge under S. 17 (1) & (5) Cr. P.C. 13 M.L.J. 272=26 M. 596.

—S. 18.

—Ss. 18 (4), 202—Power of Additional Chief Presidency Magistrate to send a case to Subordinate Magistrate for enquiry and report—Duty of Subordinate Magistrate.

By S. 18, cl. (4), an Additional Chief Presidency Magistrate has been vested with all the powers of the Chief Presidency Magistrate including the power to send a case to a Subordinate Magistrate under S. 202 of the Code which is one of those powers. An order made on a complaint, by the Additional Chief Presidency Magistrate under S. 202 sending the complaint to a Presidency Magistrate for enquiry and report, is one authorised by law and the latter has to comply with it. All that is necessary for him to do is to send a report to the Additional Chief Presidency Magistrate and it will be for the latter to deal with the complaint in accordance with law. A.I.R. 1934 Cal. 405= 35 Cr. L.J. 729=59 C.L.J. 204=38 C.W.N. 560= 61 C. 467=148 Ind. Cas. 691.

——Ss. 18, 21—Honorary Presidency Magistrates—Chief Presidency Magistrate—Powers of Magistrate—Distribution of work:—S. 18. Cr. P. C., confers full powers of a Presidency Magistrate on a Bench of Honorary Presidency Magistrates under the Criminal Procedure Code and the Bench can, therefore, take action under S. 106 of the Code. (1905) 7 Bom. L.R. 833.

——S. 20—Jurisdiction—Presidency Magistrate.

Presidency Magistrate has jurisdiction to try offences committed at any place within the limits of the town. 28 Bom. L.R. 1066=27 Cr. L. J. 1213=97 Ind. Cas. 973=A.I.R. 1926 Bom. 564.

——Ss. 20 and 29—Jurisdiction—Presidency Magistrates—Offence under Calcutta Port Act —Act (III of 1890), Ss. 83, 84, 138 and 139.

A Presidency Magistrate of Calcutta has jurisdiction under S. 20 of the Cr. P. C. to try an offence committed under S. 84 of the Calcutta Port Act, outside the limits of Calcutta but within the limits of the Port. Per Newbould, J. The provisions contained in the first part of S. 130 and the whole of S. 130 of the Calcutta Port Act were made through excess of caution, and were based upon the provisions of S. 29 of the Cr. P. C. 47 Cal. 147=24 C.W.N. 79=30 C.L.J. 252=20 Cr L.J. 782= 53. Ind. Cas. 622.

——S. 21—Hony. Magistrates—Difference of opinions—dissenting Judgment if part of record.

Though under Rr. 9 and 10 of the Rules by the Government of Bombay the judgment of the chairman prevails, the dissenting judgment of the Honorary Magistrate, even if the Bench consists of two members, should form part of the record. 29 Bom. L.R. 1470=28 Cr.L.J. 1025=106 Ind. Cas. 209=A.I R. 1927 Bom. 630.

——S.21—Powers—Chief Presidency Magistrate of Bombay.

The Chief Presidency Magistrate has power, in the event of any pressure of work occurring in other Courts, to give directions to bring up any particular class of cases arising in any division to his own Court, under R. 3 of the rules framed under S. 21, to regulate the conduct and distribution of business in the Courts of Magistrates of the town. 28 Bom. L.R. 1066=27 Cr. L.J. 1213 =97 Ind. Cas. 973=A.I.R. 1926 Bom. 564.

——S. 21—Rules framed under, by Chief Presidency Magistrate—Rule 8—Rule that in a Bench of two, the opinion of Chairman shall prevail—Inconsistent with Code—ultra vires:—

Rule 8 of the Rules framed by the Chief Presidency Magistrate in 1900 under S. 21, Cr. P. C.

is inconsistent with the provisions of the code, in so far as it recites that in a Bench composed of two members, the decision of the Chairman shall prevail. It is also arbitrary and not consonant with natural justice. (1904) 8 C.W.N. 862.

——S. 22—Charge Sheet—Penal Code, S. 75.

It is a part of the duty of the Courts to draw charge sheets accurately and the accused is entitled to the benefit of any material omissions. Where enhanced sentences are passed under S. 75, a separate head of charge must be distinctly drawn; on failure to do so, enhanced punishment to illegal. 139 P.L R. 1911=40 P.W.R. 1911 Cr.= 12 Cr.L.J. 233=10 Ind. Cas. 241.

——S. 26—Suspension—Interference by District Magistrate pending trial.

In the course of an inquiry held under S. 176 by a mahalkari who was invested with powers of a 2nd Class Magistrate by name the District Superintendent of Police reported, imputing a cognizable offence to the Magistrate in the conduct of the enquiry, to the Collector and District Magistrate; the Collector started departmental enquiry and suspended the Magistrate and relieved him of his functions as mahalkari and Magistrate.

Held, that if the Collector was satisfied on perusal of the papers that there was an illegality or an irregularity in the proceedings, under S. 176 he could have reported to the High Court under S. 438, and the High Court would have passed such orders as it thought fit, but the action of Collector in interfering with the judicial enquiry and virtually putting an end to it was both illegal and improper and that the Magistrate continued to be a 2nd Class Magistrate though he was suspended as mahalkari, as the power of suspending the Magistrate was given only to Local Government by S. 26. 112 Ind. Cas 567=30 Bom. L.R. 1050=29 Cr.L.J. 1063=11 A.I.Cr.R. 324=A.I.R. 1928 Bom. 390.

—S. 28.

(See also, CRIMINAL P. C., Ss. 30 AND 177.)

——S. 28 does not mean that person charged with petty offence can at discretion of Magistrate be sent for trial to Court of Session.

The effect of S. 28 is that a Court of Session has jurisdiction once a case has properly come before it, that is, on a legal order of commitment, even in matters of offences not ordinarily triable by it. This does not imply that a person charged with a petty offence can, at the discretion of a Magistrate, be sent for trial to the Court of Session. A.I.R. 1946 All. 365=I.L.R. (1946) A. 520=1946 A.L.J. 137=226 Ind. Cas. 22=47 Cr.L.J. 804.

[Overrules Cr. Appeal No. 398 of 1942.]

——S. 28:—Under S. 28, a Sessions Court can try any case. A.I.R. 1942 Mad. 440=1942 M.W.N. 297 =55 L.W. 229=(1942) 1 M.L.J. 455=43 Cr L.J. 715 =200 Ind. Cas. 740.

—S. 28—Jurisdiction—Case tried by second class Magistrate, instead of first class Magistrate—Magistrate invested with first class powers later—Trial or conviction if legal.

A case triable by a first class Magistrate was transferred to and tried by second class Magistrate. The trial commenced on 21st of July. The judgment was delivered on the 27th July. And on the 1st of August, the second class Magistrate was vested with first class powers. Held that until first of August Magistrate had no jurisdiction to conduct the trial at all—Held further, that conviction must be set aside. 25 Pat. 260=48 Cr. L. J. 13=228 Ind. Cas. 71=13 B.R. 132=A.I.R. 1947 Pat. 234.

——S.28 —Statement by accused that he committed graver offence and was not triable by Magistrate—Whether deprives the Magistrate of jurisdiction.

A statement by an accused person that the offence committed by him is a more serious one not triable by the Magistrate does not deprive the Magistrate of jurisdiction unless the prosecution accept the truth of that statement or the Magistrate is of opinion that it is true. A.I.R. 1938 Mad. 784=1938 M.W.N. 592=39 Cr.L.J. 659=(1938) 2 M.L.J. 43=48 L.W. 145 (1)=175 Ind. Cas. 896.

—S. 28—Jurisdiction—Magistrates should not usurp jurisdiction that they have not got.

The Legislature has decided that certain offences, either because of their serious or difficult nature, should be tried by one of the higher Courts of criminal jurisdiction, and this being so, it is not for a Magistrate to evade those provisions of law by usurping jurisdiction to himself. A.I.R. 1935 Sind 221=37 Cr.L.J. 80=29 S.L.R. 428=159 Ind. Cas. 271.

——S. 28—Usurping jurisdiction — Rivision— Interference by High Court.

Under special circumstances, it is possible to agree with a contention that if the facts charged show the commission of a more serious offence which is triable only by higher tribunal the Magistrate with less powers has no right, in spite of objection raised, to grab jurisdiction by seeking to try the accused for the smaller offence. But even where a Magistrate tries the accused for an offence under a less serious section, when really the offence fell under a more serious section which was beyond his competency, his proceedings are not illegal, and therefore the High Court is not bound to interfere in such cases. 27 M.L.W. 683= 29 Cr.L.J.635=109 Ind. Cas. 907=A.I.R. 1928 Mad. 585=54 M.L.J. 456.

——S. 28—Scope.

S. 30 must be read as qualifying or controlling the provisions of S. 28 which in its turn makes reference to column 8 of the second schedule. 95 I.C. 56=27 Cr.L.J. 728=A.I.R. 1926 Nag. 374.

——S. 28.

The Schedule to the Cr.P.C. and S. 28 must be read together and S. 28 is subject to the other provisions of the Code, that is, it is subject to S. 30. A.I.R. 1938 Nag. 56=20 N.L.J. 151=I.L.R. (1938) Nag. 248=39 Cr.L.J. 660=175 Ind. Cas. 935.

——S. 28—Respective jurisdiction of civil and criminal Courts explained.

Criminal Court is not to decide matters to be decided by the Civil Court and the Civil Court having tried all facts summarily the proceeding should be quashed. 12 Cut. L.T. 56.

—Ss. 28 to 30 —Power to try.

The power to try a case would necessarily include the power to take cognizance. A.I.R. 1931 Bom. 517=33 Bom. L.R. 1192=33 Cr.L.J. 68=134 Ind. Cas. 1230.

——S. 28—Scope and effect of. See Cr. P. Code, Ss. 254 and 28. 1946 A.W.R. (H.C.) 134=I.L.R. (1946) A. 520=A.I.R. 1946 A. 365.

——S. 29.

See also, Criminal P. C., S. 5.

——S. 29—Construction:— Section 269, Criminal P. C., cannot be read with S. 29, so as to hold that the local Government may direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court and not by Magistrates invested with powers under S. 30. A.I.R. 1938 Nag. 56=20. N.L.J. 151=I.L.R. (1938) Nag. 248=39 Cr.L.J. 660=175 Ind. Cas. 935.

—S. 29—Scope—Applicability of the Code to other Courts.

Having regard to the provisions of S. 29 read with S. 5 (2), Criminal Procedure Code, the application of the provisions of the Code ot Criminal Procedure to Courts which are not mentioned specifically in the Code of Criminal Procedure is not excluded. 71 Ind. Cas. 611 =37 C.L.J. 298=A.I.R. 1923 Cal. 339.

—S. 29-A—Trial as European British subject —claim to—When to be made.

The claim to be tried as a European British subject under S. 29-A, Cr. P. Code, must be made before the inquiry or trial actually begins so far as a case which falls within S. 528-A, Cr. P. Code, is concerned. Not having made this claim when a person is first brought before the Magistrate for the purpose of trial or inquiry, it is not open to revive or make it at any subsequent stage. 107 Ind. Cas. 353= 54 Cal. 1041=29 Cr. L.J. 245=9 A.I. Cr. R. 471=A.I.R. 1928 Cal. 97.

—S. 29-B—Ss. 29-B, 28 and Sch. II.—effect of—if jurisdiction affected.

Section 29-B was not intended to take away the jurisdiction already conferred on Magistrates under S. 28 and col. 8, Sch. II. It was intended to extend to certain Magistrates the power to try juvenile offenders for certain offences which would otherwise have been triable exclusively by the Court of Session. A.I.R. 1936 All. 675= 1936 A.L.J. 957=37 Cr. L.J. 1073=I.L.R. (1937) All. 101=1936 A.W.R. 735=165 Ind. Cas. 148.

—S. 29-B—Jurisdiction—Railways Act, S. 130.

In view of provisions of S. 29-B of Cr. P. Code a Magistrate other than a District Magistrate has no jurisdiction to try an offence under S. 130 of Railways Act. 29 P.L.R. 536=10 A.I. Cr. R. 499=29 Cr. L.J. 733=110 Ind. Cas. 589 =A.I.R. 1928 Lah. 909.

——S. 29-B—Jurisdiction under—if affected by other statutes.

——In absence of any express provision relating to trial of offences under S. 130, Railways Act, by any particular class of Magistrates, S. 133 of that Act cannot be invoked so as to confer jurisdiction upon a Magistrate to try an offence of this nature, when no such jurisdiction is conferred upon him by Sch. IV of Criminal P. C., more so when S. 29-B, Criminal P. C., provides for an adequate machinery for trial of such offences. A.I.R. 1936 Sind 185=30 S.L.R. 9=38 Cr. L.J. 83=165 Ind. Cas. 642.

—S. 29-B.

——Whether permissive—Juveniles, trial of—Special Magistrate.

Section 29-B is in its terms clearly permissive. When a juvenile under the age of fifteen years is brought before a Magistrate other than one of those specially referred to in S. 29-B, the Magistrate can, if he chooses, either under S. 9 of the Reformatory Schools Act, 1897, or under S. 319 of the Criminal P.C., refer the matter to the District Magistrate with a view to the case being tried by a Special Magistrate under S. 29-B; and the District Magistrate of his own volition can direct any such case to be tried by a Magistrate having special powers. But if neither of those courses is adopted, then the trial Magistrate can deal with the case under the regular provisions of the Code. If the case is one which he is empowered to try under the Second Schedule to the Code, he can try it and pass any sentence authorized by law. Section 29-B enables one of the Special Magistrates there referred to, to deal with many cases which, apart from that section, could only be tried by a Court of Session. But the section does not invalidate a trial which would be valid apart from the section. A.I.R. 1934 Bom. 211=36 Bom. L.R. 435=35 Cr. L.J. 1033=149 Ind. Cas. 1135.

——S. 29-B—Offence punishable with death or transportation for life—Jurisdiction of Central Children Court.

Section 29-B, implies that an offence under S. 304 of the I.P.C., which is punishable with transportation for life and which is exclusively triable by the Court of Session, cannot be tried by the Magistrate in charge of the Central Children Court.

Where an offence is committed within the local limits of the jurisdiction of the Sessions Court of Howrah, commitment from the Central Children Court, if it is to be made, must be made to the Sessions Court of Howrah and not to the High Court. A.I.R. 1932 Cal. 487= 36 C.W.N. 164=33 Cr. L.J. 645=59 Cal. 856 =138 Ind. Cas. 626.

——S. 29-B—Offender under fifteen years—Discretion of Magistrate to order trial by Special Magistrate.

Under S. 29-B, a Magistrate other than one of those particularly referred to in the section, before whom an offender under the age of fifteen years is brought was intended to have a discretion. He may deal with the matter under the ordinary provisions of the Code or he may direct that the accused be dealt with under S. 29-B, of the Code, that is to say, be tried by one of the Magistrates specially em-

powered under the section. A.I.R. 1931 Bom. 198=33 Bom. L.R. 312=32 Cr. L.J. 722=131 Ind. Cas. 476.

——S. 30.

See also, CRIMINAL P. C., S. 28.

——Magistrate with S. 30 Powers can try offence under R. 35, Defence of India Rules and impose sentence of seven years' rigorous imprisonment. A.I.R. 1943 Sind 87=I.L.R. (1942) Kar. 597=44 Cr. L.J. 461=206 Ind. Cas. 283.

——S. 30

——Additional District Magistrate invested with powers under S. 30 acting under S. 30—Describing himself in record as Additional District Magistrate and signing judgment in same way—Effect.

It does not matter what the Magistrate calls himself but what powers he really does exercise. Where the Additional District Magistrate actually invested with powers under S. 30, acts in exercise of those powers, the fact that throughout the record of the case, he described himself as Additional District Magistrate and signed the judgment in the same way, cannot affect the exercise of powers under S. 30. A.I.R. 1941 Lah. 324=43 P.L.R. 378=42 Cr. L. J. 890=196 Ind. Cas. 485.

——S. 30—Object of conferring special powers on District Magistrate.

The schedule to the Criminal P. C., and S. 28 must be read together, and S. 28 is subject to the other provisions of this Code, that is, it is subject to S. 30.

The object of conferring special powers on District Magistrate is to accelerate proceeding at the trial by avoiding the delay consequent on commitment to the Sessions Court which sits only at considerable intervals. It is also intended to afford relief to those who have to attend as witnesses in the Court. A.I.R. 1938 Nag. 56=20 N.L.J. 151=I.L.R. (1938) Nag. 248=39 Cr. L.J. 660=175 Ind. Cas. 935.

——S. 30.

——A Magistrate specially empowered under S. 30, can pass sentence of imprisonment in addition to whipping. A.I.R. 1937 Rang. 183 (184)=14 R. 662=38 Cr. L.J. 670=168 Ind. Cas. 975.

——S. 30.—Cases of rape and unnatural vice should be tried by Magistrate with powers under S. 30, and where an offence under S. 377, I.P.C. is committed with violence, sentence of whipping in addition to rigorous imprisonment is right and proper. A.I.R. 1936 Lah. 256=38 P.L.R. 437=37 Cr. L.J. 474 (1)=161 Ind. Cas. 591.

——S. 30—Case exclusively triable by Sessions—Case committed by Magistrate having powers under S. 30:

Held, that the commitment was not illegal. A.I.R. 1936 Pesh. 139=37 Cr. L.J. 852 (1)=163 Ind. Cas. 611.

——S. 30—Scope.

——S. 30 must be read as qualifying or controlling the provisions of S. 28 which in its turn makes reference to column 8 of the second schedule. 27 Cr. L.J. 728=95 Ind. Cas. 56=A.I.R. 1926 Nag. 374.

——Ss. 30, 28—S. 28 is to be read with S, 30 under certain circumstances.

Section 30 cannot be regarded in any other light than the provision of the code within which under certain circumstances and in certain parts of India, S. 28 of the code is to be read. A.I.R. 1936 Rang. 230=37 Cr. L.J. 773=14 R. 378=163 Ind. Cas. 163.

——Ss.30, 250—Special power Magistrate trying complaint under S. 376, Penal Code—Complaint found false—Accused discharged—S. 250.

If the Magistrate having special powers is able to try the case before him, it is a violation of the ordinary meaning of the word "triable" to say that the case is not triable by the Magistrate.

Consequently, a Special Power Magistrate, trying a complaint under S. 376, I. P. C. and passing an order discharging the accused, can pass an order under S. 250, notwithstanding the fact that the offence is exclusively triable by a Court of Session. A.I.R. 1936 Rang. 230=37 Cr. L.J. 773=14 R. 378=163 Ind. Cas. 163.

——S. 30—Charges under Ss. 420 and 465, I.P.C. —Conviction under S. 420 and acquittal under S. 465—Magistrate not having powers under S. 30 Criminal P. C.—Appeal against conviction under S. 420—Session Judge not going into merits setting aside conviction and ordering retrial under both sections:

Held, that the order was of doubtful legality and retrial should have been ordered only on charge under S. 420. A.I.R. 1935 Lah. 945=37 P.L.R. 564=37 Cr. L. J. 303=160 Ind. Cas. 363.

——Ss. 30, 34—Magistrate empowered under S. 30—Sentence covered by S. 34.

Once a Magistrate has been specially empowered under S. 30, by the Local Government he can necessarily, when acting as a Magistrate, exercise the powers mentioned in S. 34; he cannot at will divest himself of the powers conferred upon him and he cannot by any action of his own, become a First Class Magistrate not empowered under S. 30. Far less by an unintentional failure or even by a habitual failure to describe himself as being so empowered, can he divest himself of his powers.

A Magistrate empowered by the Local Government under S. 30, need not mention the existance of his special powers in order to exercise them, or in order to pass any sentence covered by S. 34. A.I.R. 1935 Pesh. 108=36 Cr. L. J. 1143=157 Ind. Cas. 211.

——S. 30—Power to pass sentence in excess of powers of First Class Magistrate.

A Magistrate exercising powers under S. 30, but not signing himself as a Magistrate exercising powers under S. 30 cannot pass a sentence in excess of the powers which are normally conferred upon an ordinary First Class Magistrate. A.I.R. 1934 Lah. 361=35 Cr. L.J. 1288 (1)=151 Ind. Cas. 265.

——S. 30.

—Case triable by Magistrate and also by the Sessions Court—Section 30 Magistrate present in the district—Reasons for commitment not given:

Held, that the commitment was not illegal. The proper procedure for the Sessions Judge would be to try the case and if he ultimately found that the case should not have been committed, he should bring the matter to the notice of the District Magistrate or issue general instructions for the guidance of Magistrates if this was considered necessary. A.I.R. 1934 Lah. 326=36 P.L.R. 218=150 Ind. Cas. 769.

——**Ss. 30 and 34**—Assistant Agent of Chicacole is empowered under S. 30 and has no power to pass sentences beyond three years. He is, therefore not competent to try offence under S. 397, I.P.C. 1934 M W.N. 1286.

——**S. 30—Trial under S. 29 of the Frontier Crimes Regulation—Conviction—Appealability of.**

The mere fact that the offence with which the accused is charged is one created by the Frontier Crimes Regulation and for which punishment is provided by the Regulation, does not make the trial for that offence a trial under the Regulation. Consequently, the trial for an offence under S. 29 Frontier Crimes Regulation, is governed by the Criminal P. C. and the accused is entitled to appeal from an order of conviction. A.I.R. 1933 Pesh. 90=35 Cr. L.J. 399=147 Ind. Cas. 180.

——**Ss. 30, 337, 338—Conditional pardon**—Tender by Local Govt.—Validity—Evidence of co-accused so pardoned—Admissibility—Trial by Dy. Commr. of case after tender of pardon by him:—The Local Government has no power to offer a conditional pardon to an accused, within the meaning of Ss. 337, 338, Cr. P. C. The evidence of an accused taken under a conditional pardon so offered is wholly inadmissible. When a Deputy Commissioner tries a case exclusively triable by the Court of Sessions under powers conferred upon him by S. 30, Cr. P.C., he does so as a Magistrate, and if he tenders conditional pardon to one of the accused, he is precluded from trying the case himself. (1906) 10 C.W.N. 847. See also 33 C. 1353.

——**S. 30—Magistrate of first class—Duty to** commit person accused of dacoity to Sessions—Object of conferring special powers on District Magistrates—Jurisdiction:— A Magistrate of the 1st class who is holding an enquiry in a case of dacoity has jurisdiction either to commit the accused to the Court of Sessions or to discharge him. He has no authority to make over the case to a District Magistrate who is a Deputy Commissioner specially empowered under S. 30, Cr. P.C., to try such cases. But where it was found that an accused person who had been convicted by the District Magistrate in a case thus made over to him had not been prejudiced at the trial, the High Court maintained the conviction. 7 C.W.N. 457.

——**Ss. 30 and 346**—Submission of case of murder to District Magistrate—Powers of District Magistrate to deal with evidence.

A Subordinate Magistrate of the first class, before whom two accused persons were charged for murder and abetment of murder respectively, submitted the case under S. 346 to the District Magistrate with a view to its disposal by the latter in the exercise of the power conferred by S. 30, being of opinion that the principal offence disclosed by the evidence for the prosecution did not amount to murder. Held, that the District Magistrate had jurisdiction to act upon the evidence already recorded by the Subordinate Magistrate. 12 N.L.R. 146=18 Cr. L.J. 35=36 Ind. Cas. 867.

—S. 31—Previous conviction—High sentence—Considerations.

More severe sentences than normal may be given if there are previous convictions but at the same time regard may be had to the nature of offence and humanity. 40 Pun. L.R. 118.

—S. 32.—Fine—Substantial terms of imprisonment—Small fine at end of term need not be imposed.

There is no propriety in the imposition of small fines at the end of substantial terms of imprisonment. A.I.R. 1942 All. 225=1942 A.W.R. 109=1942 A.L.J. 255=43 Cr.L.J. 654=201 Ind. Cas. 518.

—S. 32 and Bihar and Orissa Municipal Act (VII of 1922), Ss. 197, 203—Conviction under—Sentence imposing fine for every day encroachment is not removed—Legality of.

A fine in respect of an offence which has not yet taken place cannot be imposed in anticipation of the commission of offence. Consequently, when a person is convicted under S. 197, read with S. 203, Bihar and Orissa Municipal Act, he cannot be sentenced to pay a fine for every day until removal of encroachment, in respect of an offence which had not been committed at the date of the order. A.I.R. 1937 Pat. 352=3 B.R. 297=18 P.L.T. 332=38 Cr.L.J. 416 (1) =167 Ind. Cas. 665.

—S. 32—Discretion—Sentence.

The law vests a discretion in the trying Magistrate to pass adequate sentence in each case and it is for him to decide after taking into consideration all the pertinent circumstances of the case, what should be the adequate sentence. No rule of thumb can be laid down by a higher tribunal as a guide for the trying Magistrate in awarding an adequate sentence. 1930 Cr.C. 122=A.I.R. 1930 Sind 58=125 Ind. Cas. 46.

—S. 32—Jurisdiction Under.

——The jurisdiction conferred on the Magistrate under S. 12 of the Opium Act is a special jurisdiction and is not limited, in any way, by the Code of Criminal Procedure. Under the section a Magistrate, who has power to order confiscation has also the power to give the owner of the thing liable to be confiscated an option to pay in lieu of confiscation such a fine as the officer thinks fit even exceeding his jurisdiction under Criminal Procedure Code. 69 Ind. Cas. 635=2 P.L.T. 63=23 Cr.L.J. 747=1 Pat. L.R.Cr. 32=A.I.R. 1921 Pat. 232.

—S. 32—Continuing offence—Anticipation:— A fine imposed in respect of a continuing offence that may be committed after the date of the proceedings (e.g., putting a fence adjacent to a road contrary to a bye-law) is illegal. 37 C. 671=11 Cr. L J. 540=7 Ind. Cas. 931.

——**S. 32—Sentence under—form of—Duty of Magistrate:**—It is the duty of a Magistrate who pronounces a sentence to define precisely the nature

of the sentence intended. Generally the sentence like the decree in a civil case ought to be self-contained, so that the functionary who has to execute it should have nothing to do but to obey the directions given without making any inquiry on his own account. (1900) 24 M. 13.

—S. 32—Lenient sentence—Intending surety put unncessary questions—Perjury:—Where an intending surety committed perjury in the matter of answering a question as to whether he was imprisoned 30 years prior to that date, their Lordships observed that a lenient punishment should be given. (1904) A.W.N. 52 : 26 A. 371.

—S. 32—Sentence lenient:—Where an offence regarding the heinousness of which the popular conscience has not been aroused at the time it has been committed, and there was a dearth of prosecutions for the offence, though it was within the knowledge of the court that such offences are committed very often, the sentence should be lenient and serve rather as a warning than as a punishment. 25 A. 31=1902 A.W.N. 173.

—S. 32—Punishment—Conduct of accused during trial.

Magistrates when deciding on the question of sentence are justified in taking into consideration the conduct of an accused person in his own defence. Where an accused person is clearly guilty and instead of throwing himself on the mercy of the Court defends himself by throwing mud at witnesses who are persons of standing and honour, he really is deserving of very little considaration. 1929 Cr.C. 682=A.I.R. 1929 Sind 253.

—S. 32—Punishment—Vicarious punishment in criminal law—Recognition by civilised systems of law:—Per Ameer Ali J.—Generally speaking, vicarious punishment is not recognised by civilised system or criminal law, at least in these days. (1901) 28 C. 504=5 C.W.N. 771.

—Ss. 32 and 35—Scope—Allegation of wrongful confinement and extortion by threat of prosecution on false charge—Charge and conviction under Ss. 342 and 384, I.P. Code—Separate sentences of fine of maximum amount within Magistrate's power—Legality—Proper procedure.

The prosecution alleged that the accused persons entered the complainant's house and searched it falsely alleging theft by him, took him to a place and kept him under confinement and extracted from him a sum of Rs. 50 on threat of prosecution and then left him off. The case was tried by a Magistrate having second class powers and the accused were convicted under Ss. 342 and 384 and sentenced on each count to pay a fine of Rs. 200 and in default to imprisonment for two months, this being the maximum sentence of fine within the Magistrate's power for each count.

Held: that the offence was essentially one under S. 384; it was but one transaction and one offence though it came within two definitions under the Penal Code, and it was therefore improper to award two different sentences for the same set of acts and to award a sentence in excess of the Magistrate's power to punish for one offence. The conviction under S. 384, I.P. Code alone ought to be upheld and that under S. 342 should be set aside, as also the separate sentence under that section. 229 Ind. Cas. 454=A.I.R. 1948 Cal. 6=48 Cr.L.J. 389=51 C.W.N. 534.

—Ss. 32 (2), 34, 30—Magistrate specially empowered under S. 30—Whether can pass sentence of imprisonment in addition to whipping.

A person who commits an offence under S. 326, I.P.C. may be punished with whipping in addition to any other punishment to which he may be liable. He may, therefore, be sentenced to a term of imprisonment not exceeding seven years and in addition to a sentence of whipping, in view of S. 32 (2) Cr. P.C. and S. 3 of Burma Act VIII of 1927. A.I.R. 1937 Rang. 183=14 R. 662=38 Cr.L.J. 670=168 Ind. Cas. 975.

——S. 32 (2)—Whipping—Rule that a certain number of lashes is equivalent to imprisonment—Whether applies when sentences of different kinds are combined.

The guide that a certain number of lashes might be taken as the equivalent of a certain number of months' imprisonment, which is of importance when questions of commutation of sentences have to be considered, is of no application in a case where a Magistrate is lawfully combining two different kinds of sentences in accordance with the powers under S. 32 (2), Cr. P.C. A.I.R. 1937 Rang. 183 = 14 R. 662 = 38 Cr. L.J. 670=168 Ind. Cas. 975.

——S. 32 (c)—Very minor offence—Sentence of one week and fine of Rs. 25 by 3rd Class Magistrate—Appellate Court setting aside imprisonment and increasing fine to Rs. 150—Sentence illegal—Fine reduced to Rs. 50. 1936 M.W.N. 1382.

——S. 32—Anticipatory fine on and from day of conviction—Legality.

Even though a Magistrate is empowered under an Act to impose continuing fine, he cannot legally impose an anticipatory fine on and from the day when he convicts of the offence. A.I.R. 1935 Pat. 208=16 P.L.T. 154=36 Cr. L.J. 1048=14 Pat. 455=1 B.R. 676=156 Ind. Cas. 1001.

——S. 32.—Where a Magistrate of the first class tried an accused for an offence under Emergency Powers Ordinance and sentenced him to pay a fine of Rs. 1500, but the proceedings showed that the trial was as a Court of a First Class Magistrate though he was in fact empowered as Special Magistrate:

Held, that the sentence was ultra vires. A.I.R. 1933 Bom. 58=34 Bom. L.R. 1676=34 Cr. L.J. 162=141 Ind. Cas. 574 (S.B.)

——S. 32—Substantial term of imprisonment and fine, impropriety of.

It is altogether inappropriate to add a fine to a substantial term of imprisonment except in very exceptional circumstances. It is only suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeed. A.I.R. 1931 Cal. 710=35 C.W.N. 519=53 C.L.J. 455=33 Cr.L.J. 31=134 Ind. Cas. 1136.

——S. 32—Sentence.

Whether a fine is severe or not depends to a large extent on the position and status of the person fined. A.I.R. 1931 Cal 633=35 C.W.N. 436=33 Cr.L.J. 28 =134 Ind. Cas. 1129.

——S. 32—Fines under several sections—Payment into Court—Accused's right to ask for appropriation towards particular sentence.

An accused person who has been convicted and fined under different sections of the I. P. C. is entitled, on paying a certain amount into Court, to ask that the amount paid should be appropriated by the Court towards the fine inflicted on him under any particular section or sections. A.I.R. 1931 Sind 73=24 S. L. R. 437=32 Cr. L.J. 922=132 Ind. Cas. 475.

——S. 33—See also, Penal Code, Ss. 63—70.

Under S. 33 (1)—Cr P. C., a Magistrate may award, in default of payment of fine, such a term of imprisonment as is authorised by law. A.I.R. 1943 Sind 124=44 Cr.L.J. 637=I.L.R. (1944) Kar. 1=207 Ind. Cas. 348.

——S. 33, provisos—Provisos, if extend period of imprisonment which may be awarded under S. 65, Penal Code.

The provisos to S. 33, Cr. P. C., do not extend the period of imprisonment which may be awarded under the provisions of S. 65 of the I.P.C. A.I.R. 1941 Pat. 48 =21 P. L. T. 795=7 B. R. 58=41 Cr. L. J. 957=190 Ind. Cas. 598

——S. 33—Sentence—Joint fine with terms of imprisonment in default in case of each of two accused—Legality.

Sentence of a joint fine with terms of imprisonment in default passed on two accused in the case of each of them is plainly open to the objection that it is impossible to say whether either of the convicted persons is liable to suffer the entire term of imprisonment and for what proportion of the default. Such a sentence cannot be sustained. A.I.R. 1938 Pat. 271=4 B.R. 539=39 Cr. L.J. 531 (1)=19 P.L.T. 748=175 Ind. Cas. 176.

——Accused undergoing full term of imprisonment—Release on offering security to pay fine by instalments—Re-committing him to jail—Imprisonment in default of fine, if can be inflicted.

Where a person who was sentenced to imprisonment and fine was released after undergoing his full term of imprisonment on offering security for fine payable by instalments, he cannot be re-committed to jail and imprisonment in default of fine cannot be inflicted on him. A.I.R. 1936 Lah. 348=37 P.L.R. 45=37 Cr.L.J. 503 (1)=161 Ind. Cas. 886.

—S. 33—Jurisdiction—Trial for lesser offence than that charged—No jurisditionc—Time if void.

Where the offence complained of was one under S. 430, I. P. C, but the Bench tried the accused for a lesser offence under S. 426 I. P. C. and it appeared that they had jurisdiction to try the former and not the latter offence,

Held, that the proceeding was not void. 24 M. 675 and 27 M. L. J. 594, Foll. (1930) M.W.N. 770.

—S. 34.

——A Magistrate empowered under S. 30 need not mention the existence of his special powers in order to exercise them, or in order to pass any sentence covered by S. 34, Cr. P. C. A. I. R. 1935 Pesh. 108=36 Cr.L.J. 1143=157 Ind. Cas. 211.

——Ss. 34 and 235—Mis-joinder—Criminal misappropriation—Acts forming one transaction.

Where, to three charges of criminal misappropriation alleged to have been committed by the accused in a year, there was added another charge of an offence under S. 210, I. P. C. not committed within that year, **held,** that the accused could not be legally tried on the fourth charge along with the three charges of criminal misappropriation, as it was not an act forming one transaction with them. A retrial of the accused was directed. 22 C. W. N. 596=27 C. L. J. 311= 19 Cr.L.J. 868=47 Ind. Cas. 64.

—S. 34-A.

——European British subject—Jurisdiction of Courts —Sentence that can be passed—Foreigner not European British subject, whether entitled to any privileges.

Although there is still some privilege as regards the Courts by which a European British subject can be tried, there is practically no privilege with regard to sentence and under S. 34-A, Cr. P. C. as amended by Act XXVIII of 1923, a Court of Session can pass a sentence of death, penal servitude or imprisonment with or without fine, or of fine upon a European British subject.

A foreigner who is not a European British subject is not entitled to any privileges in the matter of trial or of sentence. A.I.R. 1933 Nag. 136=29 N.L.R. 251= 34 Cr.L.J. 505=143 Ind. Cas. 17.

S. 35—Synopsis.

1. Applicability and scope
2. Concurrent sentences
3. Seprate sentences
4. Separate offences
5. Separate trials
6. Defective sentences
7. Appeal

1. Applicability and scope.

——S. 35—Applicability—Fine. S. 35 (3) refers only to sentences of imprisonment and not of fines. 28 Bom. L.R. 668=96 Ind. Cas. 270=27 Cr.L.J. 926=A.I.R. 1926 Bom. 416.

——S. 35—Measure of Punishment—how determined.

The principal object of punishment is the prevention of crime and the measure of punishment must consequently vary from time to time according to the prevalence of a particular form of crime and other circumstances. 127 Ind. Cas. 209=1930 Cr.C.911= A.I.R. 1930 Lah. 867.

——S. 35.

——S. 35 to be read with S. 64, Penal Code (Act XLV of 1860)—Substantive sentence of imprisonment with fine passed—Sentence of imprisonment in default of fine must be consecutive.

Section 35, Criminal P. C., does not expressly refer to substantive sentences of imprisonment but that section must be read with S. 64, I. P. C., which clearly contemplates that when imprisonment in default of payment

of a fine is ordered, the imprisonment shall be in excess of any other imprisonment to which the accused may have been sentenced. When a sentence of imprisonment is to be in default of payment of a fine, the sentence of imprisonment in default must be consecutive to any substantive sentence of imprisonment which may have been passed upon the accused. There is no difference in principle between a case where two sentences of imprisonment are imposed in default of fine, and a case where there is a substantive sentence of imprisonment and a sentence of imprisonment in default of payment of the fine. A.I.R. 1942 Sind 80= I.L.R. (1942) Kar. 1=43 Cr. L. J. 779=201 Ind. Cas. 772.

——S. 35—Effect of amendment.

The amendment of S. 35 does not alter the law regarding S. 71, I. P. Code as laid down in 16 Cal. 443 (F. B.). 35 C.W.N. 184=32 Cr. L. J. 890=1931 Cr. C. 602=132 Ind. Cas. 247=A.I.R. 1931 Cal. 450.

——S. 35—Scope of.

A sentence of imprisonment cannot be ordered to run concurrently with another sentence passed in another case. 4 Bur. L.T. 174=6 L.B.R. 22=12 Cr. L.J. 465=11. Ind. Cas. 1001.

——S. 35—Scope—Conviction under S. 457 and S. 380, I. P. Code—Separate sentences—Legality. I.L.R. (1945) Mad. 896=221 Ind. Cas. 304=(1945) 1.M.L.J. 179=A.I.R. 1945 Mad. 330=58 M.L.W. 75 (1)=1945 M.W.N. 106 (1)=47 Cr.L.J. 157.

——S. 35 (1)—'Or'—Effect of.

In spite of the word "or" between the terms "imprisonment" and "transportation", S. 35 (1) includes cases in which one of the punishments inflicted is imprisonment and the other is transportation. 23 C.L.J. 596=21 C.W.N. 608=17 Cr.L.J. 238=34 Ind. Cas. 654.

2. Concurrent sentences.

——S.35—Separate trials but Concurrent sentences.

In respect of three separate acts of offence there were three separate trials of the same accused, and three separate sentences of imprisonment, passed by the same Magistrate and on the same date; the Magistrate ordered in each case that the sentence was to run from the date of conviction. As a result the sentences were to run concurrently.

Held, that inasmuch as there had been three separate trials under S. 397, the sentences could only run consecutively and that S. 35 did not give the Court power to direct them to run concurrently inasmuch as S. 35 relates to sentences in cases of convictions of several offences at one trial. 62 Ind. Cas. 408=19 A.L.J. 310=22 Cr.L.J. 520=A.I.R. 1921 All. 126.

——S. 35—Concurrent Sentences.

A Sessions Judge cannot order a sentence passed by him to run concurrently with one passed by another court in some other trial. 11 A.L.J. 263=14 Cr. L. J. 240=19 Ind. Cas. 336.

——Ss. 35, 123—Concurrent sentences—Arms Act S. 19 (c):—The accused was sentenced to a term of imprisonment, for an offence under the Arms Act, 1878, and the sentence was ordered to run concurrently with another sentence previously passed upon him under S. 123 Cr. P. Code. **Held,** (1) that the sentence for the sentence for the substantive offence must commence at once and cannot be postponed to take effect after the expiry of the period of imprisonment in default of giving security for good behaviour which the accused was at the date of the conviction undergoing; (2) that S. 35, Cr. P. C. applies to sentences on conviction of offences at one trial. It has no application to imprisonments under S. 123 of the Code. 5 Bom. L. R. 26.

——S. 35—Concurrent sentence—imprisonment in default of fine.

Sentences of imprisonment in default of fines imposed for two or more offences cannot be directed to run concurrently as not being justified by S. 35, Cr. P. C. 5 S.L.R. 263=13 Cr. L.J. 536=15 Ind. Cas. 808.

——S. 35—Concurrent sentences in separate trials —Legality of.

An order that the sentences against the accused in two separate trials should run concurrently is illegal. 22 C.W.N. 597=19 Cr.L.J. 702=46 Ind. Cas. 158.

——S. 35—Concurrent sentences—Validity of.

Concurrent sentences could be passed only in cases where a person is convicted at one trial of two or more distinct offences. 16 O. C. 370=15 Cr. L. J. 300=23 Ind. Cas. 508.

——Ss. 35 and 537—Conviction on separate charges —Failure to pass separate sentences—Irregularity.

A Court should pass two separate sentences for conviction on two charges. But its failure to specify the sentence under each count may be treated as an irregularity and the single sentence passed may be treated as a concurrent sentence on both charges. 51 Cr. L. J. 717= A.I.R. 1950 Lah. 97.

——Ss. 35 and 397—Conviction—Similar conviction in another trial—Concurrent sentence.

Where a person is convicted of an offence and sentenced to undergo a term of imprisonment and found guilty by another judge of a precisely similar offence in another case, it is illegal to pass a concurrent sentence along with the previous one. If the Judge is of opinion that the previous sentence is adequate he should pass a nominal sentence on the accused. 2 U.P.L.R. (All.) 96=21 Cr. L.J. 398=55 Ind. Cas. 1006.

——S. 35—Default of fine—Concurrent sentences— Illegal.

Section 35, which empowers a Court to direct that imprisonment imposed on a person convicted at one trial of two or more offences should be concurrent does not refer to sentence of imprisonment in default of payment of fine but refers only to substantive sentences. That being so the order that the sentences of imprisonment in default of fines should run concurrently is illegal. 1929 Cr. C 452=118 Ind. Cas. 224=30 Cr.L.J. 907=A.I.R. 1929 Sind. 179.

——S. 35—Concurrent sentence—Illegal.

The sentences of imprisonment in default of payment of the fine cannot run concurrently. 5 S.L.R. 263, Foll. 27 Bom. L.R. 1351=27 Cr. L.J. 111=91 Ind. Cas. 543 =A.I.R. 1926 Bom. 62.

——S. 35—Different trials.

Court can order two or more sentences to run concurrently only when they are passed in the same trial. 85 Ind. Cas. 714=47 All. 59=26 Cr. L. J. 570=6 L.R.A. Cr. 10=A.I.R. 1925 All. 305.

——S. 35—Imprisonment and transportation.

Under S. 35 imprisonment may legally be ordered to run concurrently with transportation. 21 P. R. 1913, Cr.=50 P.L.R. 1914=15 Cr.L.J. 68=22 Ind. Cas. 420.

——S. 35—One sentence—Ss. 148 and 326, I. P. C.—offences under—separate Sentences—Legality.

Separate sentences under Ss. 148 and 326 read with 149, I. P. C. are illegal. The amendment of S. 35, Cr. P. Code, has not effected any change in the law. 16 Cal. 442 (F. B.) and 3 Pat. L. J. 641, Foll.; 17 Bom. 260 (F. B.) and A.I.R. 1926 Bom. 64, not Foll. 8 Pat. 274=10 P.L.T. 353=31 Cr. L. J. 83 =120 Ind. Cas. 311=1929 Cr. C. 23= A.I.R. 1929 Pat. 263.

——S. 35—Offences forming part of same transaction—Separate sentences—Legality.

Imposing separate sentences, where the acts constituting the two different offences form part of the same transaction against the same accused is not justified. (**Adami and Macpherson, JJ.**) MT. Champa-Passin **v.** Emperor. 9 A. I. Cr. R. 545=108 Ind. Cas. 81=29 Cr. L. J. 325=A.I.R. 1928 Pat. 326.

——S. 35—Offences under—Ss. 147 and 353 I.P.C.—separate sentences—Legality.

Separate sentences under Ss. 353 and 147, Penal Code, cannot be passed when the act which converts the accused into an unlawful assembly is the same as renders them liable to punishment under Penal Code, S. 353. 27 Cr. L. J. 834=95 Ind. Cas. 754= A.I.R. 1926 Lah. 581.

——S. 35—If a person abducts a woman with intent to rape her and does rape her, he cannot be awarded separate sentences under Ss. 363 and 376, I. P. C. 27 Cr.L.J. 338=92 Ind. Cas. 850=A.I.R. 1926 Lah. 212.

——S.35—Manufacture and possession of excisable article.

The offence of manufacture of an excisable article necessarily includes that of possession, and the two offences cannot be called "distinct" for the purposes of S. 35 of the Cr. P. Code. (1 Bom. L. R. 314, Foll.) 76 Ind. Cas. 19=25 Cr. L. J. 83=A.I.R. 1924 Nag. 32.

3. Separate Sentences.

——S. 35.

See also, Penal Code, S. 64.

— Ss. 35, 395 and 398—An order directing imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment awarded for any other offence tried in the same case is illegal. A.I.R. 1944 Mad. 448=57 M.L.W. 274=1944 M.W.N. 294=1944-1 M.L.J. 395=45 Cr. L. J. 770= 215 Ind. Cas. 39.

——Ss. 35, 397—Imprisonment in default of payment of fine cannot be directed to run concurrently with substantive sentence of imprisonment for different offence.

There is no provision of law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. A.I.R. 1941 Lah. 209=43 P.L.R. 163=42 Cr. L. J. 642=195 Ind. Cas. 3.

——S. 35—Sentence — Person's connection with specific offence only through conspiracy—Person sentenced for conspiracy—Additional sentence for specific offence should not be passed.

Where a person's proved connection with the specific offence of cheating is only through the general conspiracy to cheat and he has already received a sentence of two years' rigorous imprisonment for his part in the general conspiracy, there should be no additional sentence on the cheating charge. A.I.R. 1939 Cal. 376= 69 C.L.J. 298=41 Cr. L.J. 255=186 Ind. Cas. 171.

——S. 35—Concurrent sentences of rigorous and simple imprisonments.

Simple imprisonment and rigorous imprisonment may be ordered to run concurrently. A man who is being rigorously imprisoned is also necessarily and **ex-hypothesi** being imprisoned. 1937 M.W.N. 1334.

——S. 35—Sentences of imprisonment in default of fines—Direction.

A Criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Under S. 35-Cr. P.C., which relates to the subject, such a direction can be given only in respect of sentences of imprisonment or transportation. A.I.R. 1937 Mad. 406=45 M. L.W. 87=1937 M.W.N. 52=(1937) 1 M.L.J. 74=I.L. R. (1937) Mad. 362=38 Cr. L.J. 796 (2)=169 Ind. Cas. 607.

——S. 35, Proviso (a)—Scope—Consecutive sentences beyond period of fourteen years—Concurrent sentences not exceeding fourteen years.

Proviso (a) to S. 35. Cr. P.C., aims at the prohibition of the giving of consecutive sentences in one trial beyond the Period of fourteen years. If the sentences given in respect of two or more convictions in one trial are directed to run concurrently instead of consecutively and the period of such concurrent sentences does not exceed fourteen years, the proviso is not in any way infringed. A.I.R. 1937 Rang. 391=39 Cr. L.J. 28 (1)= 171 Ind. Cas. 912.

——S. 35.

Theft of calf and subsequent killing of it constitute two offences of theft and mischief. Separate convictions and sentences are therefore legal in such cases. A.I.R. 1936 Bom. 172=60 Bom. 627=38 Bom. L.R. 164=37 Cr. L. J. 553=162 Ind. Cas. 283.

——S. 35—Mistake as to concurrent nature of sentence—Benefit of doubt to be given to accused.

With respect to the sentence on a certain accused person it was stated in the trial Court's judgment that the sentences on the second and third charges are concurrent and the total term of imprisonment is three years:

Held, that if the sentences are concurrent on the second and third charges, the total term of imprison-

ment would be four years but the benefit of doubt as to what the Court intended must be given to the accused. A.I.R. 1935 Lah. 230=35 Cr. L.J. 1180=150 Ind. Cas. 1056.

——**S. 35—Scope of**—Charge at same trial with commission of two different offences—Conviction only for one—Conviction and sentence for the other—Necessity of—Penal Code (Act **XLV** of 1860), S. 71.

Section 35, Cr. P. C., relates merely to the quantum of the punishment that the Court has jurisdiction to pass where the accused is convicted of two or more offences at one trial, and does not purport to provide whether, and if so under what circumstances, the Court has jurisdiction to pass or to refrain from passing sentence in respect of the offences of which the accused has been convicted, or any of them. The object and effect of S. 35, Cr. P.C., was to regulate and in some instances to increase (subject to S. 71 of the Penal Code) the punishments that the Courts in certain circumstances were competent to award (see Ss. 31 to 34); and it was not intended thereby to provide that it was not incumbent upon the Court to pass a sentence upon the accused in respect of any of the offences of which he had been convicted in the circumstances referred to in the section.

Where the accused was charged at one trial with having committed two offences, one under S. 37 and the other under S. 30, Excise Act, the accused pleaded guilty to both charges and the Magistrate convicted the accused for the second offence and imposed a fine but did not convict the accused for the first offence.

Held, that in a case where the provisions of S. 71 of the Penal Code do not come into play, the Court has no discretion whatever to pass only one sentence for one offence and decline to pass sentences for the other offences of which it may find the accused guilty. Separate sentences must be passed for the several offences of which the Court finds the accused guilty. The aggregate punishment and the length of the period of imprisonment must not exceed the limit fixed by the provisos and that the accused must be convicted under S. 37 as well. A.I.R. 1934 Rang. 338=12 Rang. 419=36 Cr. L. J. 460=154 Ind. Cas. 75.

——**S. 35—Two dacoities by accused—Two separate offences—Separate punishments, if can be awarded.**

Separate punishments can be awarded if the offences committed are two separate and distinct dacoities. A.I.R. 1934 Rang. 122=35 Cr.L.J. 1161 (1)=150 Ind. Cas. 747.

——**S. 35—'May,' significance of.**

The word 'may' in S. 35, Cr. P . C., not only confers a power but also imposes the duty of putting it in use. A.I.R. 1933 Sind 9=26 S L.R. 416=34 Cr.L.J. 143=141 Ind. Cas. 280.

——**S. 35—Separate sentences.**

—Where the accused was convicted and sentenced under Ss. 366 and 376, I. P. Code and it appeared that the sentence for each offence was less than four years but the aggregate of the two exceeded that term.

Held, that the sentences should be treated as a single sentence under S. 35(3) and that an appeal could be preferred to the High Court. 1930 A.L.J. 1206.

——**S. 35—Rioting and hurt—separate sentences.**

Where on conviction for rioting and hurt, the accused had been sentenced to rigorous imprisonment for two months for the former, and to a fine of Rs. 25 for latter offence,

Held, that two separate sentences in such case were legal. A.I.R. 1926 All. 225; A.I.R. 1926 Lah. 521; A.I.R. 1924 Rang. 291 and 17 Bom. 260 (F.B), Foll. A.I.R. 1929 Lah. 225=114 Ind. Cas. 331=30 Cr. L. J. 295=12 A.I. Cr. R. 213.

——**S. 35.—Ss. 146 and 325, I. P. C.**

Separate sentences for the offence of rioting and hurt are legal when it is found that each person took an individual part in the assault. 40 Cal. 511, Foll., 89 Ind. Cas. 241=41 C.L.J. 471 =26 Cr. L. J. 1297=A.I.R. 1925 Cal. 1939.

——**S. 35—Ss. 380 and 457, I. P. C.**

There is nothing in S. 71 of the Indian Penal Code that in any way restricts the power of Court under S. 35 of the Code of Criminal Procedure of 1923. Therefore separate sentences can be passed under S. 35 as amended for an offence of housebreaking at night with intent to commit theft under S. 457 of I.P.C., and of theft of ornaments from that house under S. 380 of I.P.C. and the sentences of imprisonment can be made to run one after another. 88 Ind. Cas. 997=41 C.L.J. 563=26 Cr. L.J. 1253=A.I.R. 1925 Cal. 1015.

——**S. 35—Separate sentence—Same facts**:—Facts which form the basis of a conviction and sentence under one charge cannot form the basis of a conviction and also a separate sentence under another charge. There cannot be cumulative sentences though a conviction might take place on an alternative charge or even both charges. (1906) 11 C.W.N. 101.

4. Separate offences.

——**S. 35—Separate offences—punishment for.**

Being members of an unlawful assembly with the common object of committing an offence and the actual commission of that offence may be considered as separate and distinct offences. Having regard to the provision of S. 71, Penal Code and S. 35, Cr. P. Code, a person convicted of such offences would not be liable to separate punishment for each offence. 8 C.W.N. 305 and 483, Foll. 74 Ind. Cas. 1043=37 C.L.J. 171=24 Cr. L.J. 851=A.I.R. 1923 Cal. 408.

——**S. 35—Punishment for offences under—Ss. 121 and 124-A. I.P.C.—Separate Sentences.**

If the Court had held that accused was guilty under S. 121, the Court could not impose a second penalty without setting aside the sentence already passed under S. 124-A as the accused would be liable to one punishment only in respect of the speech, in view of the explanation to Cr. P. Code, S. 35 and Penal Code, S. 71. 75 Ind. Cas. 299=24 Bom. L.R. 885=24 Cr. L. J. 923=A.I.R. 1922 Bom. 284.

——**S. 35—Offences of house-breaking with intent to commit theft and commission of theft.**

As S. 71, Penal Code, now stands and as S. 35 now stands amended, they do not restrict the

passing of separate sentences for house-breaking with intent to commit theft and theft which follows it. There can be no doubt that these two separate offences, though they form part of one transaction, can be punished with separate and consecutive sentences. A.I.R. 1939 Sind 76=40 Cr. L. J. 466=I.L.R. (1939) Kar. 378=181 Ind. Cas. 45.

——**S. 35—Separate sentences for offences under Ss. 457 and 380, Penal Code (Act XLV of 1860), if can be passed.**

As S. 35, Cr. P. C. now stands, there is nothing to prevent the Court to pass separate sentences for offences under Ss. 457 and 380, Penal Code. But the question is not of much practical importance as in an overwhelmingly large number of cases, the punishment provided for any one of these two offences will be sufficient and if the Court of Appeal finds that the trial Court has wrongly passed two separate sentences but the sentences taken together are not excessive, they can be consolidated. A.I.R. 1939 Pat. 349=5 B.R. 907=40 Cr. L.J. 751=20 P.L.T. 736=183 Ind. Cas. 217.

——**S. 35—Sentence—One sentence under two sections of the Penal Code—Whether can be passed.**

A conviction of all the accused persons under Ss. 325 and 147, Penal Code, read with S. 149, Penal Code, is not correct inasmuch as there should not be one sentence under two sections of the Penal Code. A.I.R. 1934 Oudh 275=35 Cr. L.J. 1159=11 O.W.N. 992=10 Luck. 100=150 Ind. Cas. 945.

——**S. 35—Conviction under Ss. 392 and 75, I,P.C.—Distinct offences.**

A person convicted of offences under Ss. 392 and 75 of the I.P.C. is not convicted of separate offences within S. 35, Cr. P. C. and the awarding of two separate sentences for those offences is illegal. 18 M.L.T. 121=2 L. W. 631=16 Cr.L.J. 611=30 Ind. Cas. 435.

——**S. 35—Separate offences—Separate sentence.**

If an accused commits house trespass and attempts to murder an occupant of the house he may be convicted of both these offences, but a separaate sentence for each offence is not justified. 60 Ind. Cas. 54=22 Cr.L.J. 198.

——**S. 35—I. P. C., S. 71—effect of—Separate sentences.**

Separate offences falling within the provisions of S. 71 are not distinct offences within the meaning of S. 35, Cr. P. C. The legislature intends that the court should pass one sentence for either of the offences in question and not a separate one for each offence, while awarding punishment under S. 71. I.P.C. 3 S.L.R. 224=11 Cr. L. J. 415 =6 Ind. Cas. 880.

——**S. 35.—Penal Code, Ss. 457, 380**—Distinct offences—Conviction—Sentence—Powers of the Magistrate to pass consecuttive sentences:—The offences under Ss. 457 and 380 of the Indian Penal Code not being distinct offences, the trying Magistrate's ordinary Jurisdiction is not enhanced by the provisons of para 2 and proviso (b) of S. 35 of the Criminal Procedure code. 8 Bom. L.R. 850.

——**S. 35, ill—Penal Code, Ss. 147, 447**—Riot and criminal trespass—Intention in one same as common object in the other—Sentences, separate, if lawful:—Where an accused person was found with several others to have entered upon another person's land with the common object of cutting crops standing on it and in prosecution of that common object hurt was caused:—**Held**, that the accused could not be convicted and sentenced for criminal trespass under S. 447, Penal Code, in addition to a conviction and sentence for rioting under S. 147, I.P.C., the common object of the riot and the intention in criminal trespass being substantially the same in the case. It may be that they might have been charged and convicted of mischief. (1903) 8 C.W.N. 305.

——**S. 35—Separate offences.**

Offence of forgery and that of using forged document as genuine are separate offences and separate sentences may be passed on an accused person who has been convicted at the same trial of both. 52 Mad. 532=29 M.L.W. 559=1929 M.W.N. 279=2 M. Cr. C. 87=30 Cr. L. J. 983=119 Ind. Cas. 63=A.I.R. 1929 Mad. 450=56 M.L.J. 554.

——**S. 35—Distinct offences.**

Under the present law it is not necessary that the offences should be distinct in order to enable a Magistrate to pass consecutive sentences subject to the provisions of S. 71, Penal Code. 109 Ind. Cas. 368= 30 Bom. L.R. 383=10 A.I. Cr. R. 159=29 Cr. L.J. 544=A.I.R. 1928 Bom. 145.

——**S. 35—Ss. 411 and 414, I.P.C.**

Offence of receiving stolen property under S. 411, I. P.C., and that of assisting to conceal other stolen property under S. 414, I.P.C., are distinct. 109 Ind. Cas. 368=30 Bom. L.R. 383=10 A.I. Cr. R. 159=29 Cr. L. J. 544=A.I.R. 1928 Bom. 145.

——**S. 35—Bombay Abkari Act (1879), S. 43 (1) (a) and (b).**

The offence of possessing illicit liquor is not necessarily covered by the offence of possessing the apparatus for manufacturing such liquor. The two offences are quite distinct. (1890) Rat. Unrep. Cr. C. 523, Foll. 52. Bom. 277=29 Cr. L. J. 412=10 A.I. Cr. R. 114=30 Bom. L.R. 378=108 Ind. Cas. 512=A.I.R. 1928 Bom. 141.

——**S. 35—S. 120-B with 396 and 412, I. P. C.**

The offence under S. 120-B with S. 396 is a separate offence from the offence of participation in a particular dacoity or the dishonest reception of property stolen in dacoity knowing it to be stolen. Separate sentence, can be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence of participation in conspiracy. 5 O.W.N. 985=12 A.I.Cr.R. 252=30 Cr.L.J. 473= 115 Ind. Cas. 276=A.I.R. 1928 Oudh 507.

——**S. 35—Ss. 323, 324 and 325, I. P. C.**

Separate sentence on charges under Ss. 323, 324 and 325, I. P. C., is not bad in law because the acts in respect of which such charges were made were included within the charge under S. 147. (3 C.W.N. 174 and 8 C. W. N. 483 held to be no more good law.) 31 C.W.N. 691=103 Ind. Cas. 799=28 Cr.L.J. 751= 8 A.I.Cr. R. 380=A.I.R. 1927 Cal. 575.

——S. 35—Ss. 148 and 326, I. P. C.

Under S. 35 as amended, a Court can pass separate sentences for offences under Ss. 148 and 326, I.P.C., provided the aggregate of those sentences does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court sentencing the offender. (17 Bom. 260 (F.B.); 23 Bom. 706 (F.B.); A.I.R. 1924 Cal. 771, Foll.) 49 Bom. 916=27 Bom. L.R. 1371=27 Cr.L.J. 113=91 Ind. Cas. 689= A.I.R. 1926 Bom. 64.

——S. 35—Ss. 147 and 332 I. P. C.

Separate sentences under Ss. 147 and 332 of the Indian Penal Code are not illegal in view of amended S. 35. (A.I.R. 1926 Bom. 64 and 49 Bom. 916, Foll.) 27 Cr.L.J. 824=95 Ind. Cas. 600=A.I.R. 1926 Lah. 521.

——S. 35—Separate offences in the same transaction.

If the three distinct offences are committed, the offenders are liable to punishment for each offence though all three are committed in the course of the same transaction. 95 Ind. Cas. 594=8 L.L.J. 198 =27 Cr.L.J. 818=27 P.L.R. 347.

——S. 35—Ss. 149 and 325, I. P. C.

Accused can be convicted both under S. 325 and S. 149, I.P.C., at one trial. 16 Cal. 442, Foll. 27 Cr.L.J. 830=95 Ind. Cas. 606=A.I.R. 1926 Nag. 459.

——S. 35—Ss. 394 and 366, I. P. C.

Where after robbing a husband and wife the accused abducted the wife, such abduction being no part of the act of robbery, separate convictions of the accused under Ss. 394 and 366 of the Penal Code are legal. 67 Ind. Cas. 731=3 L. L. J. 574=A. I. R. 1921 Lah. 323.

——S. 35—Ss. 147 and 325, I. P. C.

The use of force whereby grievous hurt under S. 325 is caused is quite distinct and separate from the use of froce which is an ingredient for an offence under S. 147 Penal Code. Hence separate sentences are permissible. 61 Ind. Cas. 844=2 P.L.T. 549=22 Cr.L.J. 460= A.I.R. 1921 Pat. 374.

5. Separate Trials.

—S. 35—Separate trials—Sentences cannot run concurrently.

Where trials on two charges purported to have been separate,

Held, that the sentences could not be made to run concurrently. 7 L.L.J. 39=26 Cr.L.J. 731=86 Ind. Cas. 219=A.I.R. 1925 Lah. 334.

——S. 35—Separate trials upon distinct charges —Councurrent sentences, legality of—Conterminous sentences—Legality of.

Where the accused was tried at four separate trials upon four distinct charges, no sentence can be passed against the accused so as to run concurrently, nor can sentences be passed to be served conterminously. 6 Bur. L.T. 67=14 Cr.L.J. 388=20 Ind. Cas. 212.

——Ss. 35 and 234—Trial for two charges.

The accused was tried and convicted separately for wo offences of cheating on one and the same day but one after the other. For all practical purposes the trial was one and under S. 35 sentences can be ordered to run concurrently. 13 Bom. L.R. 200=12 Cr.L.J. 24 =10 Ind. Cas. 769.

——S. 35—Two or more offences—Separate convictions.

Where there are two or more separate convictions for two or more distinct offences in the same case, S. 35 contemplates that a separate sentence should be passed for each offence. 46 P.R. 1917, Cr.=19 Cr.L.J. 223 =43, Ind. Cas. 799.

——S. 35(1)—Concurrent sentences.

A direction that punishments in respect of distinct offences should run concurrently can be given only when they are passed at the same trial. 11 P.R. 1911 Cr.=32 P.W.R. 1911, Cr.= 146 P.L.R. 1911=12 Cr. L. J. 217=10. Ind. Cas. 156.

——S. 35 (1)—Sentences passed at different trials.

Court cannot direct sentences passed in different trials on an accused for two or more offences to rum concurrently. Such a direction can be given only when such sentences have been passed at one trial. 24 C.L.J. 54=20 C.W.N. 1300=18 Cr. L.J. 410 =38. Ind. Cas. 970.

6. Defective Sentence.

——S. 35—Sentence—Defective — Imprisonment and transportation.

The Court, when sentencing an accused at one trial to imprisonment as well as to transportation must determine whether the sentences are to run concurrently or consecutively; otherwise the sentence is defective. 23 C.L.J. 596=21 C.W.N. 608=17 Cr. L.J. 238=34 Ind. Cas. 654.

——S. 35—Sentence for offence directed to take effect after expiry of prior sentence.

A Magistrate acts illegally if he directs a sentence of imprisonment for an offence to take effect after expiry of sentence which the accused may be undergoing for failure to furnish security for good behaviour. 31 M. 515, foll. 16 Cr. L.J. 622=30, Ind. Cas. 446.

——S. 35—Sentence of six months' imprisonment on each of two counts by Presidency Magistrate.

Two sentences, each of six months' imprisonment passed simultaneously under S. 35 and directed to run concurrently, cannot be held to be a single sentence of one year's imprisonment but would be considered as a single sentence of six months' imprisonment. 17 C.L J. 392=13 Cr. L.J. 787=17 Ind. Cas. 531.

——S. 35—Separate conviction and sentence for grievous hurt and rioting, when illegal—Penal Code, Ss. 147, 149, 326: — It is illegal to pass separate sentences for the offences of rioting and grievous hurt upon persons who are not proved to have

individually committed any acts to cause such grievous hurt or guilty of that offence under S. 149, I.P.C. 16 C. 144 foll. (1903) 8 C.W.N. 344.

S. 35—Separate sentences for being member of unlawful assembly and for each of common objects of that assembly—Legality.

Under S. 35, Cr. P. Code (as amended), separate sentences for being member of an unlawful assembly and for each of the common objects of that unlawful assembly are legal. 31 C.W.N. 691, foll. 2 D.R. 311.

——S. 35—Cr.P.C. and—Ss. 148 and 326, I.P. Code—Practice.

Since the amendment of S. 35 it is legal to pass separate sentences for charges under S. 148 and S. 325 or S. 326, although in practice it is undoubtedly better to give a single sentence for all the offences or order the sentences to run concurrently. 4 P. R. 1901 (Cr.), not Foll., A. I. R. 1926 Bom. 64, Foll. 116 Ind. Cas. 216 =30 Cr.L.J. 575=1929 Cr.C. 210=12 A.I.Cr. R. 433 =A.I.R. 1929 Lah. 670.

Ss. 35 (2)—Proviso (a) and 397—Aggregate terms of imprisonment.

Aggregate sentence of 20 years' rigorous imprisonment is contrary to S. 35, proviso (a). 105 P.L R. 1910 =11 Cr.L.J. 679=8 Ind. Cas. 550.

——S. 35 (2) proviso (b) and Cl. (3)—Concurrent sentences—Aggregate sentence—Appeal.

The accused were convicted by a Magistrate' exercising powers under S. 30 of the Cr. P. C. under Ss. 209 and 467 read with S. 471, I. P. C. and sentenced to two years' and three years' rigorous imprisonment respectively, both sentences running concurrently. **Held,** concurrent sentences preclude the idea of an aggregate sentence within proviso (b) to Cl. (2) and Cl. (3) of S. 35, Cr.P.C. and there was no appeal to the High Court. 3 Pat. L.W. 492.

7. Appeal.

——Ss. 35 and 408—"Aggregate sentences"— Concurrent sentences—Appeal.

The term "aggregate sentences" in S. 35 (3) applies only to consecutive and not to concurrent sentences. No appeal lies to the High Court where all the sentences to be served do not exceed four years. 15 C.W.N. 734; 17 C.W.N. 72; 40 C. 631; 35 All. 154, foll. 3 Pat. L.J. 138=3 Pat. L.W. 249=19 Cr.L.J. 90 =43 Ind. Cas. 250.

——S. 35 (3)—Conviction for several offences— Aggregate sentence exceeding four years—Forum of appeal.

Under S. 35 (3), Cr.P.C., the aggregate of consecutive sentences passed for several offences at one trial is to be deemed a single sentence.

An appeal from an order of an Assistant Sessions Judge convicting the accused at one trial for two offences and sentencing him to three years for each of the offences and sentences to run consecutively, will lie to the High Court under S. 408 (b), Cr. P. C. and not to the Sessions Judge. 129 Ind. Cas. 731 = 1930 A.L.J. 1206=32 Cr. L.J. 469.

——S. 35—Appeal—Concurrent sentence.

Where the total term of imprisonment to which an appellant has been sentenced, either by an Assistant Sessions Judge or by a S. 30 Magistrate, does not exceed four years, the appeal undoubtedly lies to the Court of the Sessions Judge. 15 C.W N. 734 and 17 C.W.N. 72, not Foll, A.I.R. 1921 Cal. 152 Foll. The fact that other concurrent sentence of a lesser period has been passed against the appellant under provisions of the Penal Code does not preclude the Sessions Court from dealing with the appeal. A. I. R. 1921 Cal. 152, Foll. Further, appellate Court in such a matter is only concerned with the actual substantive sentence imposed, so far as the question of where the appeal lies is concerned, and the fact that the Magistrate, in determining the length of the sentence, took into account the length of time the appellant had been under trial, will not affect the question. 103 Ind. Cas. 208=28 Cr.L.J. 672=8 A.I.Cr. R. 295=10 N.L.J. 135=A.I.R. 1927 Nag. 255.

——S. 35—Appeal—Several offences — Conviction for.

An appeal does not lie to the Sessions Court when a Magistrate of the first class has convicted an accused person of more offences than one and has sentenced him on each offence to imprisonment for one month directing at the same time that the sentences should run concurrently. Case-law referred. 25 C.W.N. 613 =66 Ind. Cas. 65=23 Cr.L.J. 225=A.I.R. 1921 Cal. 152.

——S. 35 (2)—Concurrent sentences—Appeal.

An accused who has been sentenced to concurrent terms of imprisonment, no one of which is individually appealable, has no right of appeal against them collectively. 40 Cal. 631=17 C.W.N. 825=14 Cr.L.J. 254=19 Ind. Cas. 510.

——Ss. 35 (3) and 413.

For the purposes of appeal concurrent sentences must be taken in aggregate. A Deputy Magistrate convicted the accused under Ss. 143 and 365/114 Penal Code and sentenced to one month's rigorous imprisonment under each section, the sentences to run concurrently. **Held,** that an appeal lies to the Sessions Judge. 17 C.W.N. 72=13 Cr.L.J. 877=17 Ind. Cas. 813.

—S. 36—Jurisdiction—Notification.

Where, by notification, first class Magistrate's powers are conferred in the President of the Bench, the Bench has jurisdiction to exercise power under S. 106, Cr.P.C. though it is not mentioned in S. 36 or Sch. III. 1932 M.W.N. 151.

——Ss. 36 and 37—Notification—Jurisdiction.

The powers conferred on Justices of the Peace by Notification No. 2770, F. B. of 14th July 1904 are the ordinary powers of a First Class Magistrate under S. 36 and are not powers with which a Magistrate of first class may be invested under S. 37. 34 Mad. 343= (1911) 2 M.W.N. 196=12 Cr.L.J. 535=12 Ind. Cas. 303.

——Ss. 36, 443, 446, Sch. 3 Cls. (iii) and (v)—Notification.

Notifications No. 680, 1-B, of 19—3—1912, and No. 732 D. of March 1913 of Government of India

under Foreign jurisdiction, jointly invest the District Magistrate of Bangalore, Civil and Military station, with all powers of a District Magistrate under Cr. P. C. not limited by provision for European British Subjects. He can therefore try and sentence a European British subject for not more than two years. 4 L.W. 405=17 Cr.L.J. 293=35 Ind. Cas. 165.

——S. 37—Jurisdiction—Magistrate entertaining complaint beyond his powers.

A Magistrate of the 2nd Class cannot take cognizance of a complaint that certain persons were guilty of murder. Where therefore he does entertain such a complaint and finding it to be false takes action under S 190, though defect in conviction could be cured by S. 529, complainant cannot be prosecuted for false complaint. The powers of a 2nd Class Magistrate can be extended only to the extent specified in S. 37 and Sch. IV which provisions are to be read with S. 190 in such cases. 94 Ind. Cas. 896=5 Pat. 447=7 P.L.T. 335 =27 Cr.L.J. 704=A.I.R. 1926 Pat. 400.

——Ss. 37 and 260—Conferring of powers to try summarily as Special Magistrate for six months— Reversion from post of Special Magistrate—Summary trial subsequently—Legality.

Where the power to try summarily as Special Magistrate for six months is conferred on a Magistrate and he is subsequently reverted from the post of Special Magistrate, his subsequent trial of a case summarily would be illegal and would have to be retried. 1950 A.L.J. 449=1950 A W.R. (H.C.) 575=A.I.R. 1950 A. 488.

——Ss. 37, 88, 110, 112 and 114—Warrant for arrest of person who had left Court's jurisdiction—Attachment of property.

The person proceeded against under S. 114 must be actually and physically present in the district in which the Magistrate exercises jurisdiction and the Magistrate cannot legally issue a warrant under S. 114, for the arrest of a person who has already left the local limits of the Magistrate's jurisdiction. A warrant under S. 114 was issued for the arrest of person who had left the district and subsequently a proclamation against the person was issued and proceedings taken under Ss. 87 and 88. **Held**, the warrant, proclamation and attachment were all illegal. 14 Bom. L.R. 889=13 Cr.L.J. 796=17 Ind. Cas. 540.

——S. 39—Ss. 39 (2), 530—Summary trial— Magistrate not invested with summary powers at time of trial—subsequent notification purporting to invest him with such powers retrospectively—Effect of—Criminal powers, if can be granted retrospectively.

Where at the time of the trial of a case summarily, the Magistrate had not been invested with summary powers, but it appeared he was subsequently invested and a notification purported to invest him with retrospective effect:

Held, that in the case of S. 39 (2), Cr. P. C., such a notification could not grant criminal powers retrospectively and that the trial Magistrate had no jurisdiction to try the case summarily. A.I.R. 1933 Pesh. 97=35 P.L.R. 310=35 Cr.L.J. 462=147 Ind. Cas. 757.

——S. 39—Specially empowered—Meaning of.

S. 39 throws light on what is meant by specially empowered persons in S. 3 of the Opium Act. It declares the power of the Local Government to empower a class of officials generally by their official titles or persons specially by name or in virtue of their office. When therefore a class of officials is invested with powers to try certain offences, they are 'generally' empowered. 2 L W. 233=17 M.L.T. 191=(1915) M.W.N. 269=16 Cr. J. 268=28 Ind. Cas. 156.

——S. 39—Special power—Opium Act—Cases under.

Notification of Government published in the **Fort St. George Gazette** under date 4th June, 1915, empowers the Second Class Magistrates mentioned in the list appended to the Notification to try cases under the Opium Act. This is a special empowering of the person within S. 39 of the Cr. P. Code. 74 Ind. Cas. 958=24 Cr.L.J. 846=A.I.R. 1924 Mad. 256.

——S. 40—Deputy Tahsildar empowered to record confessions but subsequently sent on foreign service—On being re-called, posted as Tahsildar—Power to record confessions.

A Government servant was empowered to record confessions, when he was Deputy Tahsildar. Subsequently he went on 'foreign service' as manager of an estate under the Court of Wards. But after about a year, he was re-called and posted by Government as Tahsildar. It was argued that the confessions recorded by him after his appointment as Tahsildar were invalid as no fresh notification was issued empowering him once more as Tahsildar to record confessions and the original notification empowering him to record confessions had effect only up till the date he was deputed on foreign service:

Held, that the Government retaining some form of control over his service even when he was on foreign service had re-called him to direct service under Government and, then having re-called him had posted him as Tahsildar. His case, therefore, fell directly under S. 40. When he was re-appointed Tahsildar, he was a person holding an office in the service of Government within the meaning of S. 40. Consequently the powers granted to him as Dy. Tahsildar could lawfully be exercised by him as Tahsildar and the confessions which he had recorded were not invalidated. A.I.R. 1944 Mad. 302=1944 M.W.N. 57=(1944) 1 M.L.J. 91 =57 M L.W. 100=46 Cr.L.J. 667=220 Ind. Cas. 129.

——S. 40—Sub-Judge with powers of First Class Magistrate—Transfer to another place— Whether can exercise Magisterial powers.

Where a Sub-Judge is transferred from one place to another, he may or may not be called upon to perform additional duties of a Magistrate. He is not transferred qua Magistrate but qua Subordinate Judge. When he is required to perform additional duties of a Magistrate in the place to which he is transferred, a fresh notification is issued in that behalf. When he is not so authorised in the new place, he cannot exercise the powers of a First Class Magistrate there. A.I.R. 1933 Sind 398=35 Cr. L. J. 187=27 S.L.R. 427=146 Ind. Cas. 893.

——S. 40—Jurisdiction of Magistrate of first class in Head Quarters;—A Magistrate of the first class holding his court at the head quarters has local jurisdiction throughout the district. 10 C.W.N. 1095.

——S. 40—Leave.

The grant of leave to a Magistrate who belongs to the Provincial Civil Service as an Extra Assistant Commissioner, does not cause the cessation of his criminal powers so as to take his case out of the category of the cases contemplated by S. 40. 126 Ind. Cas. 521=31 Cr. L.J. 1051=1930 Cr. C. 850=A.I.R. 1930 Lah. 833.

——S. 41—Criminal appeal—Procedure.

When a District Magistrate on a Criminal appeal coming up before him sends for the record and on the receipt of the record dismisses the appeal without hearing the appellant or his pleader, his procedure does not come within the requirements of law. If a record is sent for, it cannot be said that the appellant has been given a reasonable opportunity of being heard if he is not heard upon the receipt of the record. 1 Pat. L.W. 577=18 Cr. L.J. 639=39 Ind. Cas. 1007.

——S. 42.

—Ss. 42, 59—A question whether a man is or is not a proclaimed offender is one of fact. A.I.R. 1937 Sind 254=38 Cr, L.J. 1101=32 S.L.R. 41=171 Ind. Cas. 672.

——Ss. 42, 59—Distinction between S. 42 and S. 59, pointed out—Sub-Inspector authorising private person to arrest not proclaimed offender—Arrest of such person by private individual.

A sharp distinction must be drawn between the provisions of S. 42 and S. 59, Cr. P.C. In S. 59 is included a proclaimed offender, but in order that a man may be a proclaimed offender, it is not sufficient for a Sub-Inspector to say or write that he is a proclaimed offender. It is a matter for the Court as laid down in S. 87, Cr. P.C., and the following sections. Under S. 59, Cr. P.C., a private person may himself arrest; under S. 42, Cr. P.C., he must assist a Police Officer to arrest but the Police Officer must be present before he can demand the private person's aid. It was never intended that this section should allow the wholesale delegation by the Police of their duties. Where a Sub-Inspector gives a written authority, which in itself contains mis-statements, to a zemindar to arrest a man, whom he states to be a proclaimed offender but who in fact is not so, and the zemindar arrests such person and brings him bound to the Police after having injured him, the action is illegal and cannot be justified under S. 42, Cr. P.C. A.I.R. 1937 Sind 254=38 Cr. L.J. 1101=32 S.L.R. 41=171 Ind. Cas. 672.

——S. 42.

—A person, when arrested, lying down on the ground and refusing to move—Police Officer seeking the help of the accused—Accused refusing to help.

Held, that as the person lay down in order to secure his eventual escape from being taken to the thana and the help was damanded to prevent his escape, the refusal of the accused made him liable for conviction under S. 187, Penal Code. A.I.R. 1932 All. 506=33 Cr. L.J. 736=139 Ind. Cas. 106.

——S. 42—Police Officer—Right to call for assistance—Whereabouts of persons sought to be arrested not known—Refusal to assist.

Members of the public are bound to assist a Police Officer reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer is authorised by law to arrest. The law, however, does not intend that the police officers should have a general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts are not known. Refusal to assist the police officer in such a quest is not an offence under S. 287, I. P.C. 42 All. 314=18 A.L.J. 169=21 Cr. L.J. 801=2 U.P.L.R. (All.) 88=58 Ind. Cas. 673.

——S. 44.

No doubt under S. 44, Cr. P.C., it is the duty of every person to make a report to the Police of the commission of certain specified offences, but there is no such duty cast upon a citizen, much less on a Police Officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of S. 44, Cr. P.C., if he concocts a purely false story and then makes a report of such a false story, knowing it to be false. A.I.R. 1935 All. 538=1935 A.L.J. 459=1935 A.W.R. 547=57 All. 935=155 Ind. Cas. 131 (FB).

——S. 44—First information—Hearsay—Inadmissible.

As the first information report can only be used by the prosecution for the purpose of corroborating in the witness box the person who supplied the information contained in the document, if the informant himself can only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence of the witness. 90 Ind. Cas. 145=6 Lah. 437=7 L.L.J. 259=26 P.L.R. 601=26 Cr. L.J. 1489=A.I.R. 1925 Lah. 418.

——S. 44—Penal Code S. 202.

S. 44 of Cr. P. C. enjoins a person witnessing the commission of an offence to inform the nearest Police officer or Magistrate. A failure to do so is an offence under S. 202 of Penal Code. 21 Cr. L.J. 486=16 N.L.R. 30=56 Ind. Cas. 673.

—S. 45.

—Ss. 45, 87—"Proclaimed offender," scope of—Proclamation, not strictly in terms of S. 87.

The term "proclaimed offender" as used in S. 45, Cr. P. C., must be taken, not in any technical sense, but in its obvious general meaning. If a proclamation has been made in respect of person under S. 87, Cr. P. C., it is sufficient to constitute him a proclaimed offender under S. 45 of the Code. A.I.R. 1938 Oudh 80=39 Cr. L.J. 154=1938 O.W.N. 7=172 Ind. Cas. 530.

——S, 45, Sub-S. (2) 'Proclaimed offenders':-

In S. 45, Sub-S. (2), Cl. (ii) of the Code of Criminal Procedure, the persons included in the expression 'proclaimed offenders' are persons over and above those to whom the words in their ordinary signification apply and who might but for this explanation have escaped out of the category of 'proclaimed offenders.' Blair J.—The explanation clause in the section dealing

with 'proclaimed offenders' does not apply to persons proclaimed offenders for any act committed in British India, and applies only to acts which if committed in British India, would be punishable under certain sections. (1901) A.W. N. 10.

—S. 45. (1)

——Proclamation under S. 87 issued—Failure to report by the village headman:

Held, that in order to find whether the accused (village headman) is guilty under S. 176, Penal Code, read with S. 45 (1), Cr. P. C., it is necessary to see whether he possessed any information respecting the proclaimed person's passage through or visit to his village. The fact that the proclamation was not made strictly in accordance with the terms of S. 87, Cr. P. C., does not render such person a proclaimed offender any the less. A.I.R. 1938 Oudh 80=39 Cr. L.J. 154= 1938 O.W.N. 7=172 Ind. Cas. 530.

——S. 45.

—Village Munsif sending report under S. 45, Cr. P. C.:

Held, that he was not acting in his capacity as Magistrate, nor is he a public servant and consequently a previous sanction of the Local Government is not necessary for his prosecution. A.I.R. 1937 Mad. 578=45 L.W. 697=1937 M.W.N. 638=38 Cr. L.J. 950=170 Ind. Cas 481.

——S. 45—Contents—Police Report.

Report made by any Police Officer is not "Police report" in technical sense. But "Report" in S. 45 must state facts which constitute offence. Mere assertion that offence had been committed is not enough. 81 Ind. Cas. 220=51 Cal. 402=38 C.L.J. 388=25 Cr. L.J. 732=A.I.R. 1924 Cal. 476.

—S. 45—Rumour—Knowledge of informant.

This section does not make it incumbent on the village chaukidar to communicate to the officer in charge of the Police Station any rumour of the occurrence prevailing in the village. It is only an information which he may himself possess that is to be communicated to the officer in charge of the Police Station. The word "possess" in place of the old word "obtain" in S. 45 requires only such information to be given which the imformant may possess to his own knowledge as is fit to be communicated to the officer in charge of the Police Station. 81 Ind. Cas. 620=5 P.L.T. 505= 1924 P.H.C.C. 181=25 Cr. L.J. 972=A.I.R. 1924 Pat. 691.

—S. 45—Interpretation—Owner of houses.

The section is not intended to be punitive in itself, but to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same. The section speaks of the owner or occupier of land but not of a house. Where there are houses, it is expected that the place would be populous and the police would somehow get the information. In cases of land in the mofussil, it is necessary that the owner or occupier of the land should give such information to policeman. The section should not be extended so as to include owners or occupiers of houses. 12 Mad. 92, Foll. 113 Ind. Cas. 510=53 Bom. 184=30 Bom. L.R. 1570=30 Cr.L.J. 172=12 A.I.Cr.R. 67=A.I.R. 1929 Bom. 12.

—S. 45—Unnatural death — Death two days after accident.

Where the accused did not communicate forthwith to the nearest Police Station the accidental death of a person, who fell from a tree and died of the fall within two days and were charged under S. 45, Cr.P. Code.

Held, however unnatural, in the ordinary sense, of the word, the cause of death might be it would not come within the meaning of the word "unnatural" as used in S. 45 so as to require to be reported immediately, unless it occurred fairly soon after the cause. 66 Ind. Cas. 1001=23 Cr.L.J. 345= A.I.R. 1922 Nag. 87.

—S. 45 (1) (c)—Theft of a Jewel.

A Village Munsif was convicted under S. 176 of the I.P.C. for not giving information to a Police of the loss of a jewel or theft of it in a certain person's house. It was held that as the information did not relate to the Commission of a non-bailable offence which the Village Munsif was bound to communicate to the police under S. 45 of the Cr.P.C., his conviction was illegal. 5 M.L.T. 257= 9 Cr.L.J. 224=1 Ind. Cas. 245.

—Ss. 45 (3) and 435—439—Orders as to appointment of headman and orders passed on appeal against it—Revision—Competency.

Orders of a Magistrate under S. 45 (3), Cr.P. Code, in regard to the appointment of headman and orders passed by District Magistrate on appeal against such orders constitute executive orders passed by officers specially designated to carry out the provisions of S. 45 (3) and not judicial orders of an inferior Criminal Court. The proceedings are not of a criminal nature and so the revisional powers of the High Court cannot be exercised for setting aside such orders. 4 A.I.Cr.D. 474=A.I.R. 1950 All. 540=51 Cr.L.J. 1489.

—S. 46.

——A person who makes a statement to a responsible Police Officer voluntarily confessing that he has committed an act which the Penal Code regards as an offence, is submitting himself to custody within the meaning of S. 46 (1). A.I.R. 1941 Nag. 86=1940 N.L.J. 623=I.L.R. (1940) Nag. 679=42 Cr.L.J. 390=193 Ind. Cas. 6.

——S. 46.

——Accused shown a warrant to sign and asked to follow—Accused refusing to do either—Accused untouched by the process-server, by way of arrest:

Held, that there was no arrest. 1932 M.W.N. 856.

—S. 46.—Warrant of arrest—Person sought to be arrested creating disturbance so that substance of warrant could not be communicated—Disturbance put down and warrant shown and arrest effected.

Where a Police party came to arrest a woman with a bailable warrant, she, with her companions, offered resistance and created such disturbance that the substance of the warrant could not be notified. The head constable and others overcame the assault and then showed the warrant and effected the arrest:

Held, that there was no irregularity in the procedure in effecting the arrest. The irregularity, if any was not such as to bring the case outside the scope of S. 99, Penal Code, and give the accused a right of private defence. A.I.R. 1938 All. 120=1937 A.L.J. 1334=39 Cr.L.J. 360=1938 A.W.R. 17=173 Ind. Cas. 734.

—S. 46—Person entering house to carry out amours with married woman—Person armed and evading arrest:

Held, that the owner has right to use all means necessary for securing the person entering in the house. A.I.R. 1935 Pesh. 83=36 Cr.L.J. 1135=156 Ind. Cas. 704.

—S. 46—Arrest—Police Officer—Delegation.

A Police Officer cannot send persons other than police officers to make an arrest which he himself could lawfully make. 5 L.B.R. 21=10 Cr.L.J. 118=2 Ind. Cas. 619.

—S. 46—Custody.

——The submission to the custody of a police officer within the meaning of S. 46 is 'custody' within the meaning of S. 27, Evidence Act. 49 Cal. 167=A.I.R. 1922 Cal. 342.

—S. 46—Mode of arrest.

——In making an arrest the person authorised to make it shall actually touch the body of the person to be arrested, unless there be a submission to the custody by word or action. 6 W.R. 690, Rel. on. 123 Ind. Cas. 127=7 Rang. 598=A.I.R, 1930 Rang. 131.

—S. 46. (1) —Mere oral declaration —Legality.

An arrest by a mere oral declaration without the actual touch of the process server is not a legal arrest within the meaning of S. 46 (1) of the Cr.P. Code. 113 Ind. Cas. 288=30 Cr.L.J. 128.

—S. 46—Non-Compliance—S. 80, Cr. P. Code.

A police Officer who has made an arrest without having observed the provisions of S. 80, may be able to justify his action under the provisions of S. 46 (2). 116 Ind. Cas. 723=33 C.W.N 284=49 C.L.J. 264=30 Cr. L J. 703=56 Cal. 881 = 13 A.I. Cr. R. 129=A.I.R. 1929 Cal. 174.

—S. 46.—Every trial which is preceded by a police investigation in which the police have failed to comply with Ch. V of the Cr.P. Code need not necessarily be bad in its entirety. 85 Ind. Cas. 236=26 Cr.L.J. 492=3 Bur. L.J. 265=3 Rang. 11=A.I.R. 1925 Rang. 122.

—S. 46—Warrant executed against others:

—When a person is arrested for an offence not really under a warrant the mere fact that a warrant had been issued for his arrest which warrant had been executed against other persons who have since been convicted, can hardly be put forward as a justification for the arrest. (1905) 4 C.L.J. 92.

——S. 46 (1)—Statement to Police Offcer—Evidence—Strength of evidence to be considered before conviction.

When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a Police Officer as such, he submits to the custody of the officer within the meaning of S. 46 (1), Cr.P.C. and is then in the custody of a Police Officer within the meaning of S. 27 of the Evidence Act.

The strength of the evidence against the accused is a matter to be considered before but not after conviction.

Where a Sessions Judge having convicted the accused of a murder by assassination, sentenced them to imprisonment for life instead of to death on the ground that the evidence was not of a sufficiently convincing character to justify the latter punishment:

Held, that the Sessions Judge was wrong in not giving the capital sentence. A.I.R. 1933 Pat. 149=14 P.L.T. 82=12 Pat. 241=34 Cr. L.J. 349=142 Ind. Cas. 474. (S.B.)

——S. 46 (2)—"All means"—What is included in.

The persons making the arrest would, in accordance with S. 46 (2) of the Cr. P. Code, be authorised to use all means necessary to effect the arrest and this would include the seeking of help from the neighbours in making the arrest. I.L.R. (1948) A. 3=1947 A.W.R. (H.C.) 352=1947 A.L.J. 573=49 Cr.L.J. 62=A.I.R. 1948 All. 103.

——S. 47.

——Ss. 47, 48, 54—Offence under S. 363, I.P.C., committed—Sub-Inspector during investigation going to petitioner's home and asking him to produce girl and person suspected to have kidnapped her—Petitioner denying the presence of such persons—Sub-Inspector having no warrant under S. 100 seeking to search house—Assault on him by the petitioner:

Held, that under S. 47, the petitioner was bound to allow the Sub-Inspector free ingress. A.I.R. 1942 Pat. 281=43 Cr.L.J. 279=8 B. R. 307=197 Ind. Cas. 827.

——Ss. 47 and 48—Scope—Duty to afford to the police facilities for search.

S. 47 of the Code does not restrict the powers of the police to enter the place to be searched, but on the contrary it compels householders to afford to the police facilities for the search and S. 48 provides that if difficulties are placed in the way of a police officer, he may use force to make his ingress. 41 Cal. 350=18 C.W.N. 498=15 Cr. L. J. 385=23 Ind. Cas. 985.

——S. 51.

——Search of person without his arrest.

Section 51, Criminal P. C., comes into operation only after a person has been arrested either under

a warrant or without a warrant. The law gives to a Police Officer no authority whatsoever to search a person until he has arrested him. A.I.R. 1942 All. 424=1942 A.L.J. 528=44 Cr.L.J. 67=I.L.R. (1942) All. 914=1942 A.W.R. (H.C.) 300=203 Ind. Cas. 467.

——S. 51.

—Money found on person of accused and placed in safe custody under S. 51—Sentence of fine—Order to recover fine from money found on accused and placed in custody:

Held, that the order was not legal and justifiable. A.I.R. 1934 Bom. 193=36 Bom. L.R. 324=35 Cr. L. J. 1344=151 Ind. Cas. 472.

——S. 51—Medical examination of accused without consent—Evidence of doctor.

Per **Lort-Williams J.**—It is not permissible under Criminal Procedure Code, forcibly to take hold of a prisoner and examine his body medically without his consent for the purpose of qualifying some medical witness to give medical evidence in the case against that accused. Any such examination without the consent of the accused amounts to an assault and the Police are not entitled without statutory authority to commit assault upon prisoners for the purpose of procuring evidence against them.

Per **S. K. Ghose J.**—The examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by the Code; and in such a case, the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report so that the doctor would be in a position to testify to such consent if called upon to do so. But mere absence of such consent will not constitute an assault.

Under S. 5I, Criminal P.C., a Police Cfficer has power to search arrested persons. It is not necessary that the purpose of the search should always be to book for something definite, such as an incriminating article. The searching officer may and should take notice of anything worthy of attention such as marks of injury and if called as a witness he may depose to such marks.

In the case of injuries, the ends of justice require that the examination should be by a doctor, and it would be anomalous to admit the evidence of a searching Police Officer and not to admit that of an examining doctor. A.I.R. 1931 Cal. 601=35 C.W. N. 1212=33 Cr. L. J. 11=54 C.L.J. 499=134 Ind. Cas. 1053.

Cr. P. C. S. 54—Synopsis.

1. Applicability of
2. Object and Scope of
3. Resistance to arrest under.
4. Miscellaneous.

1. Applicability of.

——S. 54—Applicability.

—A complaint had been made by a certain girl that she had been raped by two persons named Mahesh and Ram Lal. The Sub-Inspector deputed certain police constables to arrest the accused. When these constables reached the place Mahesh and Ram Lal ran inside the house of Ujagar and when the constables wanted to enter that house to arrest them, they were stopped by the applicants who, armed with lathis threatened to attack the constables, if they moved further towards the house.

Held, that though the constables were not armed with a warrant of arrest and were not in their uniforms they had sufficient authority under S. 54, Cr. P. Code, to effect the arrest. 81 Ind. Cas. 140=21 A.L J. 791=4 L.R.A. Cr. 251=25 Cr.L.J. 652=A.I.R. 1924 All. 201.

——S. 54—Arrest without warrant — When justified.

In order to justify a police officer taking action under the first clause of S. 54, Cr. P. Code, there must be a reasonable complaint or reasonable suspicion of the person to be arrested having been concerned in a cognizable offence. What is a reasonable complaint or reasonable suspicion, no doubt depends upon the facts of each case. But it should be at least founded upon some definite facts other than the personal feelings tending to throw suspicion on the person arrested and the proceedings. I.L.R. (1948) All. 477=1948 A.W.R. (H. C.) 113=1948 A.L.J. 147=1948 O.A. (H.C.) 113=A.I.R. 1948 A. 366=49 Cr.L J. 521=1948 A.L.W. 130 (F.B.).

——S. 54—Arrest without warrant—When justified.

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——Ss. 54 and 491—Arrest on the strength of a letter from a brother officer, in another presidency.

The arrest effected by a Police Officer in Calcutta under S. 54 only on the strength of a letter from a Police Officer in the Bombay Presidency but without personal knowledge of the facts is not proper as S. 54 requires great discretions caution and circumspection in exercising the wide powers vested by it in Police Officers. 44 Cal. 76=20 C.W.N. 1233=18 Cr.L.J. 73=37 Ind. Cas. 57.

——Ss. 54, 56—Police officer, when can arrest without warrant—Police Officer knowing that

person ordered to be arrested was deserter from army—Arrest is legal under S. 54, even if there is no written order under S. 56.

If a Police Officer has himself a reasonable suspicion that a person is a deserter from the army, he is entitled, under S. 54, Criminal P. C., to arrest him without order from a Magistrate or a warrant but not otherwise. On the other hand, if he receives an order in writing under S. 56 of the Code, he is then entitled to make the arrest whether he has any personal knowledge or suspicions himself or not. Where, therefore, a police Officer arresting a person under the oral orders of his superior officer himself knows that the person ordered to be arrested is a deserter from the army the arrest would be legal under S. 54, even if there is no order in writing from the superior officer under S. 56 for the arrest. A.I.R. 1945 Pesh. 46=47 Cr. L.J. 452=222 Ind. Cas. 424=1945 Pesh. L.J. 46

——Ss. 54, 56—Power under S. 54, if limited by written order under S. 56.

Power conferred by S. 54, Criminal P.C., is not limited by issue of a written order under S. 56. A.I.R. 1938 Pat. 229=19 P.L.T. 247=16 Pat. 763=39 Cr. L.J. 563=4 B.R. 584=175 Ind. Cas. 335.

——Ss. 54, 56—Scope—S. 54, whether controlled by S. 56—Arrest without warrant in cognizable case—Sub-Inspector directing constable, on complaint to him of cognizable offence, to bring offender before him—Arrest of offender without written order—Resistance to arrest—S. 353, Penal Code.

The terms of S. 54, Criminal P.C., are very wide and they are not controlled by S. 56. A police constable is entitled to arrest, under S. 54, independently of 56, the person required without a warrant, in a cognizable case. The word 'complaint' in the first clause of S. 54 does not admit of a restricted meaning that the complaint should be made to the arresting constables for action. And it is immaterial whether the police constables were then conscious of the specific provisions of the Code to which their acts were referable.

Where, therefore, the constables are directed by the Sub-Inspector of police to bring the offender before him, on a complaint being made to him the constables shall be acting within their powers under S. 54 (1). The offender who refuses to submit and those who prevent the constables from carrying out the arrest are guilty under S. 353, Penal Code. A.I.R. 1937 Bom. 56=38 Bom. L.R. 971=I.L.R. (1937) Bom. 127=38 Cr. L.J. 267=166 Ind. Cas. 632.

—Ss. 54 and 56—Police Constable acting under S. 56, arresting accused—No order in writing.

Section 56, Criminal P. C., applies to cases where a Police Officer is acting not on his own information but on the order of his superior, but where facts exist which do attract the application of S. 54, Criminal P.C., itself, there appears no reason why a police officer should not act under that section even if the formalities required by S. 56, Criminal P. C., are not complied with.

Where the Police constables knew of their own knowledge and upon the information supplied by the Head Constable and the complainant that a complaint had been made by the complainant, of house-breaking against the accused:

Held, that they could have acted under S. 54 as well as under S. 56, if they had had the order in writing required by S. 56; the fact that they did not have this order, could not preclude the application of S. 54 when the provisions of that section were satisfied. A.I.R. 1937 Sind 308=39 Cr. L.J. 107=32 Sind L.R. 63=172 Ind. Cas. 149.

—Ss 54, 56—S. 54 (1), cl. (9), if limits other clauses—S. 56, whether restricts S. 54.

Clause 9 of S. 54 (1) does not seek to limit in any way the application of the other clauses. It merely introduces another class of persons who can be arrested without a warrant, viz., those persons for whose arrest a requisition had been received from another Police Officer. Section 56 (1) does not purport to confine or restrict the application of S. 54. It lays down the procedure to be adopted by an officer in charge of Police Station desirous of requiring an officer subordinate to him to arrest without a warrant. A.I.R. 1943 Mad. 207=1942 M.W.N. 723=(1942) 2 M.L.J. 710=44 Cr. L.J. 272=205 Ind. Cas. 158.

——S. 54:—A complaint of cognizable offence recorded by a Magistrate and sent by him to Police for investigation and report is sufficient information to justify resort to the provisions of S. 54. 72 Ind. Cas. 375=2 Pat. 379=4 Pat. L.T. 521=1 Pat. L.R. Cr. 248=24 Cr. L.J. 375=A.I.R. 1923 Pat. 547.

——Reasonable complaint made to Magistrate

Where a Magistrate after taking down the statement of the complainant acts upon it on a complaint of a cognizable offence and issues a warrant, there is a "reasonable complaint of the accused being concerned in a cognizable offence" and a constable is justified in arresting the accused person without warrant. It is not necessary that the complaint must have been made to the constable who makes the arrest; it is sufficient, if there is a resonable complaint made to any person, entitled to entertain it. 64 Ind. Cas. 278=A.I.R. 1922 All. 457=22 Cr. L.J. 758.

—S. 54—Arrest—What should justify.

The detention and arrest of members of the public are not matters of caprice, but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is one of the most serious encroachments upon the liberty of the subject which can well be contemplated. The fact that because a party of persons are in a certain place at a certain time it cannot be said simply from these circumstances that they are about to engage in a criminal act, and therefore there is no legal justification for the arrest of those persons by the police, and they are not guilty of rioting if they oppose their arrest. 7 P.L.T. 218=26 Cr. L.J. 1608=90 Ind. Cas. 712=A.I.R. 1926 Pat. 560.

—Ss. 54, 56—Cognizable offence—Arrest without authorisation in writing—Police constable merely deputed by superior officer to arrest—Whether can arrest without observing formalities mentioned in S. 56.

Section 54, Criminal P.C., does not give an unqualified power in all cases to any Police Officer to arrest, without an authorisation in writing, a person concerned in a cognizable offence but its provisions are limited by those of S. 56. Where a Subordinate Police Officer is not acting independently, but is merely deputed by a superior officer to arrest some one concerned in a cognizable offence, he cannot do so without observing the formalities mentioned in S. 56. A.I.R. 1936 Rang. 119=13 Rang. 754=37 Cr. L.J. 462=161 Ind. Cas. 459.

2. Object and scope of.

—S. 54—Object—Prevention.

The Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crimes, although there are specific instances given permitting the arrest of persons suspected of crimes. 73 Ind. Cas. 343=46 Mad. 605=24 Cr. L.J. 599=17 M.L.W. 592=32 M.L. T. 352=1923 M.W.N. 425= A.I.R. 1923 Mad. 523=44 M.L.J. 655 (F.B.)

——S. 54—Grounds—'Credible and reasonable cause'—Essential of S. 54 (7).

Per **Walmsley. J.**—The expressions "credible and reasonable" in clause 7 of Section 54 must refer to the mind of the person by whom the information is received and mere assertions cannot form the material for the exercise of an independent judgment, by such person.

Per **Mukerji, J.**—There are two conditions necessary to satisfy the requirements of Section 54, clause 7. The first is one which contemplates either the proof of a fact, viz., the fact of the person having been involved in the act or a reasonable complaint or credible information or a reasonable suspicion of his being concerned therein. The second is that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise. Under the first requisite the the arresting police officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. Under the second requisite, what is necessary is the existence of the present liability for apprehension or detention and not a future contingent liability. Such liability would be created by the issue of some sort of process under the law, though the process may not arrive and may not be available for execution. It is the duty of the police when all the conditions necessary to fulfil the requirements of Section 54, clause 7 are present and an arrest is validly and lawfully made, to forthwith produce the arrested person before a Magistrate. 85 Ind. Cas. 913= 40 C.L.J. 489=29 C.W.N. 98=52 Cal. 319=26 Cr. L. J. 625=A.I.R. 1925 Cal. 278.

——S. 54—Immunity.

The mere fact there is an intention to act under Ch. 8 by the police does not grant to the accused persons immunity from pril.minary arrest. 94 Ind. Cas. 404=20 S.L.R. 85=27 Cr. L. J. 628= A.I.R. 1926 Sind 190.

—•—S. 54—Insufficient evidence—arrest on the basis of—legality.

Where certain persons were arrested and remanded for the offence of dacoity but the investigating officer made a report that there was no case for dacoity but proceedings under S. 110, Cr. P. Code, should be instituted and pending enquiry the accused were kept in jail.

Held, that the detention of the persons after the police had reported that there was not sufficient evidence against them as regards the arrest was illegal and that the Magistrate should have allowed the police to re-arrest the men under S. 55 Cr. P. Code, but the irregularity was cured when the accused persons came before the Magistrate subsequently and the Magistrate, having jurisdiction to do so, proceeded upon proper meterials to pass the formal order under S. 112, Cr. P. Code. 59 Ind. Cas. 547=43 All. 186=22 Cr. L.J. 115=A.I.R. 1921 All. 278.

——S. 54.

—Responsibility of Police — "Reasonable suspicion" and "credible information" must relate to definite, averments which must be considered before taking action.

Section 54 Criminal P. C., gives very wide powers to the Police and ought to be rigorously construed. The "reasonable suspicion" and the "credible information" referred to in S. 54 must relate to definite averments which the Police Officer must consider himself before he acts under this section. The authority which the section confers is personal and the responsibility is personal also. A.I.R. 1934 Sind. 197=28 Sind L.R. 205=36 Cr. L.J. 332=153 Ind. Cas. 361.

——S. 54—Scope of—Powers of Police Officers

There is nothing in the language of S. 54 to suggest that a Police Officer may not arrest a person suspected of having committed a cognizable offence, when a warrant has been issued against him and the exercise of that power is not confined to the officer to whom the warrant is directed. The only limitation of the wide power given to Police Officers in cognizhble cases, is the necessary requirement of reasonablity and credibility of information to prevent the misuse of the powers. 40 Mad. 1028=18 Cr. L. J. 709=40 Ind. Cas. 709.

——S.54—Village Chaukidar,if a Police Officer.

The village **Chaukidar** has the limited powers of arrest provided under S. 27, Village Administration Act, and has not the full powers of arrest of a Police Officer laid down in S. 54, Criminal P. C. He cannot be regarded as a Police officer within the meaning of S. 54. A.I.R. 1940 Pat. 696 (698)=42 Cr. L. J. 199=7 B.R. 236= 22 P.L.T. 80=191 Ind. Cas. 590.

——S. 54 (1), Para. 7—'Reasonable complaint', what amounts to—To justify arrest under S. 54 (1), para. 7, there must be in existence as a fact, as opposed to belief, warrant issued under Extradition Act. (XV of 1903).

What is a reasonable complaint or suspicion depends on the cicumstances of each case but it must be founded on some definite fact or some tangible proof which is sufficient to establish in the mind of a resonable Police Officer, the resonableness or credibility of the charge, information or suspicion. Further, to justify an arrest under S. 54 (1), para. 7, Criminal P. C., there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act. A.I.R. 1939 Pat. 129 (133)= 18 Pat. 121=19 P.L.T. 909=40 Cr. L. J. 500=5 B.R. 491=180 Ind. Cas. 787.

——S. 54 (1), cl. (ii)—Police Officer must have definite knowlegde or information about person to be arrested being in possession of implement.

Under cl. (ii) of S. 54 (1), Criminal P. C. what the law contemplates is that the Police Officer acting in the exercise of the powers given by that clause must have definite knowledge or at least definite information that a certain person is in a possession of an implement of house-breaking before putting that person under arrest. Where, therefore, the only information the constables had was that some bad characters were in a certain place, the arrest of such persons cannot be justified even though house-breaking implements are recovered from them after arrest. A.I.R. 1942 All. 74=1942 A.L.J. 32=43 Cr. L.J. 338=I.L.R. (1942) All. 35=1941 A.W.R. (H.C.) 353=198 Ind. Cas. 264.

——Ss. 54 (1) (ix) and 56—"Requisition" in S. 54 (1) (ix), if covers telephonic message—Order for arrest of person by telephone.

There is no warrant for the proposition that a Police Officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in S. 54 (1) (ix), Criminal P. C., is quite general and clearly covers a message communicated by thlephone, although it will be necessary for him when he is asking another Police Officer to do what he could have done himself to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of S. 54 (1).

Section 54, Criminal P. C., applies to all Police Officers whether superior or subordinate. It is not limited by the provisions of S. 56 in all cases. Section 56 only applies to such Police Officers as are in charge of a Police Station or as are making investigations under Chap. XIV. If in their capacities as such officers, they depute their subordinate to arrest without a warrant (otherwise than in their presence) they have to give that order in writing. But if they are not acting in that capacity, a compliance of the general provisions contained in S. 54 (1) (ix) would be enough. A.I.R. 1942 Mad. 539=(1942) 2 M.L.J. 14=44 Cr. L.J. 45=1942 M.W.N. 602= I.L.R. (1942) Mad. 696=203 Ind. Cas. 45.

——S. 54 (1) (ix)—Requisition—Scope of the word—If includes telephone or wireless message.

The word "requisition" in S. 54 (1) (ix) of the Cr. P. Code, is quite general and covers a message communicated by telephone or wireless. But it is necessary for a police officer when he is asking another police officer to do what he would have done himself to disclose under S. 54 (1) not only the identity of the person whom he wishes to be arrested but also the offences or the reasons for which the arrest is to be made. A.I.R. 1950 M. B. 83=4 A.I. Cr. D. 480 & 702.

——S. 54(vii)—Reasonable suspicion—"Credible information"—Requisites.

What is a "reasonable suspicion" or "credible information" must depend on the circumstances of each particular case, but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. The police officer must consider the facts for himself before he acts under S. 54 (7) and he cannot take shelter under the belief or judgment of another police officer. A.I.R. 1950 M.B. 83=4 A. I. Cr. D. 480 & 702.

——S. 54 (7)—Scope—Power to arrest without warrant—Condition necessary for exercise of—if person arrested should also be liable to be arrested without a warrant if offence had been committed in British India.

S. 54 (7) of the Cr. P. Code, authorises any Police Officer to arrest without a warrant any person (1) against whom credible information has been received that he has done an act outside British India, which, if done within British India would be an offence and (2) who, under any law relating to extradition, etc., is liable to be appprehcnded or detained in custody in British India. But there is nothing in S. 54 of the Cr. P. Code, which justifies a conclusion that the person arrested should be liable to be arrested without a warrant if the offence had been committed in British India.

In any event when the person arrested is charged under the Travancore Penal Code of offences corresponding to Ss. 148, 149, 324 and 436, read with S. 109 of the Indian Penal Code, it being a cognizable case, the accused could have been arrested by the police without a warrant if such offence had been committed in British India. Such a person can therefore be arrested in British India without a warrant. I.L.R. (1947) Mad. 640=229 Ind. Cas. 173=48 Cr. L.J 299=1947 M.W.N. 108=60 L.W. 10=A.I.R. 1947 Mad. 358=(1947) 1 M.L.J. 2.

——S. 54 (1)—Constable assaulted while attempting to arrest accused without warrant or authority to do so—No allegation by constable that he proceeded under S. 54 (1).

Held, that S. 54 (1) did not apply. A.I.R. 1941 Oudh 385=1941 A.W.R. (CC) 151=1941 O.W.N. 602=42 Cr. L. J. 501=193 Ind. Cas. 887.

——S. 54 (7) — Interpretation of.

Section 54 (7), Criminal P. C., means that at the time the police take action, there must be in existence as a fact, as opposed to any belief which may be entertained by any person, a warrant which has been issued under the Extradition Act. The concluding words of the clause do not merely define the nature of the offence which must have been committted. A.I.R. 1933 Lah. 159 (160)=34 Cr. L. J. 679 (2)=144 Ind. Cas. 67.

3. Resistance to arrest under.

——S. 54—Rightful resistance—Essentials of an arrest.

When a constable arrests a man and tells him expressly that he is doing so under a particular authority, which he claims to have, to arrest him and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. Any man who is being arrested has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant, the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and when the warrant is not shown to him and the arrest is made, such an arrest will not be a legal arrest. A man is entitled to know when a constable is arresting him, under what power he is acting and if he (constable) states that he acts under certain power, which the man knows he has not got, he is entitled to object to arrest and to escape from custody when he is arrested. 81 Ind. Cas. 51=47 Mad. 442=19 M.L.W. 504=34 M.L.T. 95=25 Cr. L.J. 563=A.I.R. 1924 Mad. 555=46 M.L.J. 447.

—Ss. 54, 51 and 353 I.P.C.—Sub-Inspector suspecting accused to be in possession of papers "connected with Congress" attempting to search—Refusal by accused to allow search—Sub-Inspector attempting to take by force—Accused catching hold of Sub-Inspector's hand—Accused prosecuted under S. 353, Penal Code—legality.

The only section which could have enabled the Sub-Inspector to arrest an accused without any warrant was S. 54, Cr. P.C., cl. (1) of which alone applied to the facts of the case. Having papers "connected with the Congress" was not a cognizable offence and S. 54, Criminal P.C., could not, therefore, come into operation and the Sub-Inspector could not have arrested the accused without a warrant and he could not have searched the accused under any provision of law. The conduct of Sub-Inspector was very high-handed and utterly without any justification in law. The accused could not, therefore, be convicted under S. 353, I.P.C. A.I.R. 1942 All. 424 (425)=I.L.R. (1942) All. 914=1942 A.L.J. 528=44 Cr. L.J. 67=1942 A.W.R. (HC) 300=203 Ind. Cas. 467.

4. Miscellaneous.

—S. 54—Deserter, arrest without warrant.

—An arrest of a deserter, without the warrant of arrest, is legal because of S. 54(1) of Criminal P. C. A.I.R. 1943 Mad. 280=(1943) 1 M.L.J. 59=1943 M.W.N.47=56 M.L.W. 34=44 Cr.L.J. 465=I.L.R. (1943) Mad. 827=206 Ind. Cas. 307.

——S. 54.

—Accused wanted for offence under S. 186, Penal Code—His arrest without warrant — Accused escaping.

Held, that the arrest without warrant was illegal and the accused commits no offence if he escapes from the custody of the constable who arrests him. A.I.R. 1936 Pat. 249=2 B.R. 227=17 P.L.T. 81=37 Cr. L. J. 318=160 Ind. Cas. 604.

——Ss. 54 (1) and 537.

An arrest under S. 54 Cr. P. C. is not illegal merely because a warrant has been issued. The omission to notify to the person arrested of the order for his arrest is an irregularity covered by S. 537 Cr. P. C. (Knox J.) Rangpal V. Emperor 18 Cr. L. J. 666=40 Ind. Cas. 314.

——Ss. 54 (1) and 58—Officer in charge of thana giving written order to his constables to effect arrest in neighbouring thana—Arrest by such constables—Legality. See Cr. P. Code, Ss. 58 and 54 (1). 223 Ind. Cas. 96=47 Cr.L.J. 352=A.I.R. 1946 Cal. 314.

——S. 54—Procedure—Investigation.

On a complaint of a limited company in Ahmedabad which charged its commission agents with breach of trust, the commission agent was arrested by C.I.D. Officer, Poona, under S. 61 of Cr. P. Code on 5th March, 1924. He produced him before the Chief Presidency Magistrate who granted the accused bail and asked him to appear in Ahmedabad Court on 16th March.

Held, that the mere statement of an investigating police officer was not sufficient for an action by the Magistrate who should have asked for the production of a warrant from Ahmedabad and who should have released the prisoner on bail, calling upon him to appear before himself when required. The precautions laid down in these sections seem to be designed to secure that within the 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be. 82 Ind. Cas. 131=28 C.W.N 850=25 Cr. L. J. 1203=A.I.R. 1924 Cal. 893.

——S. 54—Arrest—Illegal extradition proceedings—Effect on.

Illegality of arrest does not vitiate extradition proceedings if the further action was gone through correctly. 31 W. R. 60; R. V. Wall, 9 Q. B. D. 701, Foll. 39 Cal. 164=15 C.W.N. 1053=14 C.L.J. 375=12 Cr. L.J. 505=12 Ind. Cas. 273.

——S. 54—Being in company of revolutionary or bad character.

There is nothing in law to prevent any person from being seen in the company of a revolutionary or a bad character. That does not by any means constitute a cognizable offence. A.I.R. 1942 All. 424=1942 A.L.J. 528=44 Cr. L.J. 67=I.L.R. (1942) All. 914=1942 A.W.R. (H. C.) 300=203 Ind. Cas. 467.

——S. 54—Bail—power to grant.

——Magistrate has power to grant bail to an accused who has been arrested in pursuance of S. 54 (7) of the Cr. P. Code, whom he has been asked to retain in custody, by the District Magistrate of a Native State.

Per **Fawcett, J.**—As S. 54 (7) does not apply to arrest in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (g). But even in such a case, under S. 23 of the Extradition Act, the Magistrate has power to grant bail. 87 Ind. Cas. 100=26 Bom. L. R. 984=26 Cr. L. J. 948=A.I.R. 1925 Bom. 104.

——Ss. 54, 56—Evidence on points in question introduced at appellate stage.

Evidence on the question whether the substance of the **hukumnama** was read over to the accused or whether the Police Officer did have credible information to the effect that the accused was concerned in a cognizable offence cannot be introduced at the appellate stage as the temptation to fill in blanks would be extremely strong. A.I.R. 1940 Cal. 321 (321)=44 C.W.N. 502=41 Cr.L.J. 744=189 Ind. Cas. 480.

—S. 54—Interpretation—Village chowkidar.

A village chowkidar is not a "police officer" within the meaning of S. 54. The whole of the Code shows that "Chowkidars" who have been given a distinctive name were not intended to be included under the term "police officer". 120 Ind. Cas. 205=11 L.R.A. Cr. 8 =31 Cr.L.J. 12=1930 A.L.J. 242=13 A.I.Cr.R. 126= 1929 Cr.C. 663=A.I.R. 1929 All. 935.

——S. 55—Habitual offender—Clause of S. 55 should be specified.

If it is intended that the police officer should arrest a man with a view of taking proceedings under S. 110, it is strictly and specially necessary that he should specify one of the clauses given in S. 55, although it may be for the cause so stated that he intends to proceed under S. 110. 94 Ind. Cas. 404=20 S.L.R. 85 =27 Cr.L.J. 628=A.I.R. 1926 Sind 190.

——S. 55—Independent of—Chap. VIII, I. P. C.

Section 55, Cr. P. Code, is independent of Chap. VIII of the Code, which includes S. 110 although proceedings under that chapter might follow an arrest, under S. 55 as a natural sequence and a Police Officer can therefore arrest or cause to be arrested without warrant or an order of a Magistrate any person who comes within provisions of S. 55. 124 Ind. Cas. 638 =1930 Cr.C. 79=31 Cr.L J. 717=A.I.R. 1930 Pat. 106.

—S. 55—Liability of surety.

——Surety's liability to produce accused to answer one charge does not extend to producing the accused to answer charges for other offences. 76 Ind. Cas. 227= 25 Cr.L.J. 131=A.I.R. 1924 Lah. 622.

—S. 55—Suspicion.

——Arrest under S. 55 (c) is not justified by mere suspicion that the accused was concerned in several offences since the section refers to reputed habitual offenders. 81 Ind. Cas. 51=47 Mad. 442=19 M L.W 504=34 M.L.T. 95=25 Cr.L J. 563=A.I.R. 1924 Mad. 555=46 M.L.J. 447.

——S. 55—Applicability of, to Calcutta Police—Arrest by Calcutta Police Inspector—Legal arrest.—S. 55 having expressly made applicable to the Police in Calcutta, an arrest of a person for trial on a charge under S. 239 (b) Cr. P. C., by a Calcutta Police Inspector is legal. 7 C.W.N. 661=31 C. 557.

——S. 55—Arrest under—Police, if bound to release arrested persons immediately, on bail—Custody, if illegal merely because they are not informed that they are entitled to be released on bail.

When the Police make an arrest under S. 55, Criminal P. C., they are not bound to release the persons arrested on bail immediately after the arrest. Nor can it be said that their custody is illegal merely because they were not informed that they are entitled to be released on bail. 164 Ind. Cas. 1007=63 Cal. 189=37 Cr.L.J. 1070.

——S. 55:—It is enough for the Police Officer in his requisition to specify S. 55 and by so doing, he conveys sufficient information to the person to be arrested. A.I.R. 1934 All. 879=35 Cr.L.J. 1452=1934 A.L.J. 997=4 A.W.R. 107=151 Ind. Cas. 834.

——Ss. 55 and 57—Acquittal on charge of dacoity—Detention—Re-arrest.

Detention of persons after orders for his immediate release by court, may expose the Magistrate or the Police Officer to serious results. The re-arrest of a person after his acquittal on a charge of dacoity and his detention by the Police for 12 days is illegal. 41 All. 483=17 A.L.J. 458=1 U.P.L.R. (H. C.) 19= 20 Cr.L.J. 381=50 Ind. Cas. 989.

——Ss. 55 and 110 and 167—Arrest on suspicion of dacoity—No proof of—Detention in custody with a view to proceed under S. 110.

Accused were arrested on suspicion of a dacoity. The Police could not find sufficient evidence to justify the suspicion, but continued to detain them in custody with a view to institute proceedings under S. 110 of the Cr. P. Code and obtained an order from a Magistrate directing such further detention. Ultimately a formal report was made under S. 110 and an order was drawn up under S. 112 by a Magistrate having jurisdiction. **Held,** the first Magistrate had no authority to order the further detention of the accused in custody, on a matter different from the dacoity case, unless and until they were re-arrested under S. 65 of the Cr. P. Code. This irregularity was cured when the formal order under S. 112 was passed. 18 A.L.J. 1114=59 Ind. Cas. 547=43 A. 186=A.I.R. 1921 A. 278=22 Cr.L.J. 115

——Ss. 55 and 110—Police Officer, power of— Arrest without warrant.

S. 55 Cr. P. Code is independent of Chapter VIII of the Code and a Police Officer may arrest a person against whom proceedings under section 110 are contemplated without a warrant order from a Magistrate. 35 All. 407=11 A.L.J. 596=14 Cr.L.J. 618=21 Ind. Cas. 666.

——S. 56—See also, Criminal P. C., S. 54.

—Sub-Inspector not present on spot asking constable to bring certain person to thana—Order, if direction for arrest—Use of force by constable—Person resenting it—Scuffle following and brickbats thrown.

Where a Police Sub-Inspector who is not present on the scene asks the constables to bring certain persons with some papers to the Police Station, his order does not amount to a direction to arrest those persons, as contemplated by S. 56, Cr. P. C., unless the order is given in writing. If in such a case the constables try to take one of the persons to the **thana** by force, the use of the force is illegal and if such person resents it and it is followed by a scuffle in the course of which brick-bats are thrown, the person resenting cannot be convicted under S. 224, I. P. C., nor can the persons assisting him be convicted under Ss. 225 and 353, I.P.C. A.I.R. 1940 Pat. 361=21 P.L.T. 144=41 Cr.L.J. 742=6 B.R. 835=189 Ind. Cas. 539.

——S. 56—Station Officer directing constable to arrest without warrant—Authority in writing.

Wehre a Police constable was in no way acting independently, no complaint had been made to him and no credible information had been received by him independently, but he was acting on definite instructions from his Station-house Officer and was required by that officer to arrest without a warrant: **Held,** that the police constable could not effect the arrest unleess he had in his possession an authority in writing as required by S. 56, Cr. P. C. A.I.R. 1939 Nag. 95=I.L.R. (1939) Nag. 488=1939 N.L.J. 101=40 Cr. L. J. 905=184 Ind. Cas.. 231.

——S. 56—Applicability.

Per **Broomfield, J.**—Section 56 is not superfluous. It applies to subordinates other than Police Officers for instance, **chaukidars**; and moreover, there may be cases where it is necessary to give orders to Police Officers who cannot act under S. 54, not having the requisite knowledge as to the existence of cridible information or resonable suspicion. A.I.R. 1937 Bom. 56=I.L.R. (1937) Bom. 127=38 Bom. L.R. 971=38 Cr. L.J. 267=166 Ind. Cas. 632.

——Ss. 56, 55—Police Officer specifying S. 55 in his requisition—Sufficiency of.

As no particular form is prescribed under S. 56, Cr. P. C., it is enough for the Police Officer in his requisition to specify S. 55, Cr. P. C, and by so doing he conveys sufficient information to the person to be arrested. A.I.R. 1934 All. 879=35 Cr. L. J. 1452=4 A.W.R. 107=1934 A.L.J. 997=151 Ind. Cas. 834.

——Endorsement of names of constables actually making arrest.

There is no provision in S. 56 requiring an endorsement of the names of the constables who actually go to make the arrest. A.I.R. 1934 All. 879=35 Cr. L. J. 1452=4 A.W.R. 107=1934 A.L.J. 997=151 Ind. Cas. 834.

——S. 56—Chowkidar—Officer subordinate to offieer in charge of police station—Arrest—Resistance—Penal Code, S. 225 B—Village Chowkidari Act [VI (B. C.) of 1870], S. 39:—A Chowkidar having regard to his duties as set out in S. 39 of the Village Chowkidari Act [VI (B. C.) of 1870] is an officer subordinate to an officer in charge of a police station within the meaning of S. 56, Cr. P.C. An arrest of a person who may be lawfully arrested without a warrant by a chowkidar on the authority of an order in writing delivered to him in conformity with the provisions of S. 56 (1), Cr P. C., would be legal. Resisting such arrest is an offence under S. 225—B of the Penal Code.—(1905) 10 C.W.N. 287.

——S. 56—Omission to notify—Cases where the constable can arrest under S. 54.

Where a command certificate has been given to a constable under S. 56 for effecting the arrest of a person, but the constable arrests that person without notifying to him the substance there of the arrest does

not become illegal if facts of the case are such that the constable can arrest the person under S. 54 without a warrant, irrespective of a command certificate under S. 56. 5 Pat. 533=27 Cr. L. J. 1310=8 P.L.T. 237=98 Ind. Cas. 254=A.I.R. 1926 Pat. 424.

——S. 56 (1)—Chaukidar.

Section 56 (1) does not require a chaukidar on his own initiative to show to the accused an order given to him by the officer in charge of the Police Station. 26 Cr. L. J. 795=86 Ind. Cas. 427 = A. I. R. 1925 Oudh 544.

——S. 56—Powers of arrest—Sub-Inspector investigating case—Assistant Sub-Inspector assisting and acting under—Power to arrest without written order.

An Assistant Sub-Inspector acting under the directions of a Sub-Inspector who is investigating a case cannot arrest a person unless he is armed with a written order of arrest from the investigating officer. If he arrests without such a written order it is illegal except when the arrest is in the immediate presence of the investigating officer. 229 Ind. Cas. 611=48 Cr. L. J. 464=A.I.R. 1948 Cal. 95.

——S. 57.

—Accused not committing offence under R. 7 (1) of Motor Vehicles Act—Head Constable demanding name and address of accused—Accused not complying—Constable mounting foot-board of lorry and telling accused that he is under arrest under S. 128, Motor Vehicles Act — Accused pushing aside the constable, abusing him and decamping:

Held, that the accused was not guilty and S. 57 did not apply as no known cognizable offence was committed. A.I.R. 1941 Lah. 422=43 Cr. L. J. 127=197 Ind. Cas. 136.

——S. 58.

——Jurisdiction — Foreign subject — Irregularly arrested.

Where a subject of country **A** who has committed an offence in country **B** is irregularly arrested by the Police Officer of country **B** in country **A** but has been validly surrendered by the authorities of country **A** to the trying Court in country **B**, the proceedings are perfectly regular and in order. The validity of his trial or of his conviction therein is in no way affected by the irregularity in his arrest and irregularity of such arrest is no plea to the jurisdiction of the Court to try him. (On facts held that the trial was perpectly valid and was not vitiated by any illegality in the accused's arrest.), A.I.R. 1944 P.C. 73=57 M.L.W. 408=1944 A. L. J. 385=1944 M.W.N. 502=11 B.R. 94=1944 A.W.R. (PC) 38=46 Cr. L. J. 119=46 Bom. L.R. 838=48 C.W.N. 493=71 I.A. 75=I.L.R. (1944) Kar. P.C. 269=215 Ind. Cas. 63 (P.C.)

——Ss. 58 and 54 (1)—Officer in charge of **thana** giving written order to his constables to effect arrest in neighbouring **thana**— Arrest by such constable—legality.

Under S. 58, Cr. P. Code, an officer in charge of a thana is fully empowered to go into the jurisdiction of the neighbouring thana and arrest a person in connection with a dacoity case within his own thana. If he gives a written order to his constables to effect that arrest they are duly authorised to arrest under S. 54 (1), ninthly, Cr. P. Code. The person arrested if he escapes from their custody, would therefore be guilty of an offence under S. 224, I. P. Code, and the fact that at the time of the escape he was actually held by a constable of the local thana who was sent to render assistance on requisition for help, does not affect the question. 47 Cr. L. J. 352=223 Ind. Cas. 96=A.I.R. 1946 Cal. 314.

——S. 58—Railway lands in Gwalior—Jurisdiction.

The arrest of a person at the Gwalior Railway station for an offence committed in British India is illegal. The British Government has no jurisdiction in such area in respect of offences not connected with the Railway administration. 1 Lah. 406=21 Cr. L. J. 303=55 Ind. Cas. 351.

——S. 59—Applicability—Attempt to commit offence. I.L.R. (1945) Lah. 403=227 Ind. Cas. 255=1946 A. I. Cr. D. 9. 47 Cr. L. J. 1036=47 P.L.R. 229=A.I.R. 1945 Lah 334.

——S. 59—Scope of.

Section 59, Criminal P.C., only entitles a private person to arrest any person who, in his view, commits a non-bailable and cognizable offence, and the words "in his view" mean "in his presence" or "within sight of him" and not "in his opinion."

Per **Rowland J.**—A private person is entitled to arrest only a criminal whom he sees in the act of committing the crime but not one whom he sees in the act of flight immediately after. A.I.R. 1933 Pat. 508=14 P.L.T. 464=35 Cr. L. J. 725=148 Ind. Cas. 574.

——S. 59 (as amended in 1923)—Arrest by private individual—Accused escorted in charge of **chaukidar**—Rescue of accused from **chaukidar's** custody—Penal Code (Act **XLV** of 1860), S. 225—Offence under—If committed.

Under S. 59, Criminal P.C., as amended in 1923, a **chaukidar**, though not a Police Officer, has power to receive the custody of a person arrested under S. 59 by a private individual and to take such person to the Police Station. Consequently, where such a person is rescued from the custody of a **chaukidar**, an offence under S. 225, Penal Code, is committed. A.I.R. 1932 Pat. 214=13 P.L.T. 321=33 Cr. L. J. 572=138 Ind. Cas. 95.

——S. 59.

—Sch. II—Food grains (Movement Control) Order, 1943, S. 3.

An offence under S. 3, Food Grains (Movement Control) Order is both cognizable and bailable. A.I.R. 1945 Lah. 334=47 P.L.R. 229=I.L.R. (1945) Lah. 403 =227 Ind. Cas. 255=47 Cr. L. J. 1036.

—Arrest without warrant—Distinction between powers of Police Officer and private individual must be made.

In considering the question of the lawfulness of an arrest or imprisonment, distinctions have been, and will have to be, drawn between the powers of a Police Officer and that of a private citizen. There may be cases where the former may without a warrant arrest on reasonable suspicion, "reasonable" being understood to mean a **bona fide** belief that an offence had been committed or is about to be committed necessitating the arrest of the person cancerned. (**Bona fide** on part of Police Officers held absent.) A.I.R. 1943 Mad. 218=1942 M.W.N. 725=(1943) 1 M. L. J. 447 =56 M.L.W. 331=206 Ind. Cas. 220.

Accused entering the house of a woman with deadly weapon to commit cognizable offence—Woman not known to be of low character:

Held, that any person can arrest the accused and cause death if necessary, and the right of private defence is not available to the accused. A.I.R. 1937 Pesh. 92=1937 Pesh. L. J. 97=39 Cr. L. J. 35=171 Ind. Cas. 346.

In S. 59, is included a proclaimed offender but in order that a man may be a proclaimed offender, it is not sufficient for a Sub Inspector to say or write that he is a proclaimed offender. A.I.R. 1937 Sind 254=38 Cr. L. J. 1101=32 Sind L.R. 41=171 Ind. Cas. 672.

Ss. 59, 46—Frontier Crimes Regulation (III of 1901), S. 38—Person entering house to carry out amours with married woman—Right of owner to arrest him—Person armed and evading arrest—Right to use all means necessary for securing him.

Where a person goes to a house with the intention of carrying out his amours with a married woman, which is an offence under S. 448, I.P.C, and is cognizable, the owner of the house has every right to arrest him. If such person is armed with a dagger and evades arrest, the owner is perfectly justified under S. 59. Cr. P.C, to pursue him for arrest and under S. 56. Cr. P.C., read with S. 38, Frontier Crimes Regulation, to use all means necessary for securing him. A.I.R. 1935 Pesh. 83=36 Cr. L. J. 1135=156 Ind. Cas. 704.

——S. 59.

—Quoere.—Whether in India a private person responsible for an arrest cannot look for protection elsewhere than in S. 59. A.I.R. 1933 Cal. 708=60 Cal. 955 =148 Ind. Cas. 262.

——S. 59—Right of private persons to arrest criminals —Extent of.

The right of private persons to arrest offenders is more restricted in India than in England where private persons are not only permitted but also required to arrest any person, who, in their presence, commits a felony or dangerous wounding, etc., and are empowered to arrest on a reasonable suspicion of the commission of these and some other offences: but that right must be taken with its restrictions in applying the I.P.C. A.I.R. 1933 Pat. 508 (512)=14 P.L.T. 464=35 Cr. L. J. 725=148 Ind. Cas. 574.

——S. 59—Chowkidar—If a Police Officer—Escape.

A Chowkidar is not a Police Officer within S. 59 of the Code and escape from his custody is not unlawful. 27 C. 366, Foll. 41 Cal. 17=17 C.W.N. 978=14 Cr. L. J. 494=20 Ind. Cas. 750.

——S. 59—Exercise of powers.

Section 59 of the Cr. P. Code gives powers to a private person to arrest any person, who, in his view, commits a non-bailable and cognizable offence. Arrest of the offender by a person in whose presence the offence is not committed is not justified. 64 Ind. Cas. 371=19 P.L.R. 1922=23 Cr. L. J. 3=A.I.R. 1922 Lah. 73.

——S. 59—Interpretation—'in his view.'

The words "in his view" in S. 59 mean "in presence of" or "within sight of" and not "in his opinion." 7 P.L.T. 65=26 Cr. L. J. 1462=89 Ind. Cas. 1030= A.I.R. 1926 Pat. 53.

——S. 59.

Where persons went to their cocoanut tope to see if any theft of toddy was going on and saw a man standing on the ground with a pot of toddy in his hands and two of his confederates climbing the trees, and arrested the man on the ground.

Held, the latter should be deemed to be committing theft "in the view of" his arrestor. The toddy should be regarded to be in process of being removed from the tope. 35 Cal. 361 and 64 I.C. 371, Dist. Failure to hand over the arrested person to a passing beat constable or taking the arrested person to a Chavadi on the way to the Police Station is not necessarily an unnecessary delay vitiating legality of arrest. 81 Ind. Cas. 312=18 M L.W. 818=25 Cr. L. J. 792=A.I.R. 1924 Mad. 384.

——S. 59—Non-compliance.

Where accused suspecting the complainant to have committed an offence under S. 366, I.P. Code, arrested him but instead of taking him to Police Station took him to a Dharmasala where he happened to see a police inspector to whom the complainant was then handed over.

Held, that the accused was not protected by S. 59 and was thus guilty under S. 342, I.P. Code. 98 Ind. Cas. 594=27 Cr. L. J. 1378=8 P.L.T. 204.

——S. 59—Right to arrest—Person who had committed a non-bailable and cognizable offence trying to escape.

When a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who either sees him committing the offence or finds him running away immediately after the commission of the offence would be entitled to arrest him under S. 59 of the Cr. P. Code. I.L.R. (1948) A. 3= 1947 A.W.R. (H.C.) 352=1947 A.L.J. 573=49 Cr. L. J. 62=A.I.R. 1948 All. 103.

——S. 59—Scope—Person in whose view offence is committed—Right to authorize another to act as agent for effecting arrest.

There is no authority for the proposition that a private person, entitled under S. 59 Cr. P. Code, to effect the arrest of a person or persons committing a non-bailable or cognizable offence in his view, can authorize a third person, not so entitled, to act as his agent for effecting the arrest. I.L.R. (1946) Kar. 443=A.I.R. 1947 Sind 107=48 Cr. L.J. 823.

—S. 60—Procedure.

——On a complaint of a limited company in Ahmedabad which charged its commission agents with breach of trust, the commission agent was arrested by C.I.D. Officer, Poona, under S. 61 of Cr. P. Code, on 5th March, 1924. He produced him before the Chief Presidency Magistrate who granted the accused bail and asked him to appear in Ahmedabad Court on 16th March.

Held, that the mere statement of an investigating police officer was not sufficient for an action by the Magistrate who should have asked for the production of a warrant from Ahmedabad and who should have released the prisoner on bail, calling upon him to appear before himself when required. The precautions laid down in these sections seem to be designed to secure that within the 24 hours some Magistrates shall have seisin of what is going on and some knowledge of the nature of the charges againt the accused, however incomplete the information may be. 82 Ind. Cas. 131=28 C.W.N. 850=25 Cr. L.J. 1203=A.I.R. 1924 Cal. 893.

—S. 60—Scope.

The Magistrate cannot delegate responsibility of accepting sureties to another Magistrate unless the law expressly empowers. The very fact that Ss. 60, 76 (1), 85 and 86 were deemed necessary by the Legislature indicates that they are exceptions and are no part of the general law. I.L.R. (1937) Nag. 168=38 Cr. L.J. 663=168 Ind. Cas. 876.

—S. 61—Applicability.

——Section 61 does not apply to the Calcutta Police. A.I.R. 1925 Cal. 587, Foll. 97 Ind. Cas. 945=44 C.L.J. 134=27 Cr. L.J. 1185.

—S. 61—Object.

——Intention of Legislature is that accused should be brought before Magistrate competent to try or commit, with least delay. 81 Ind. Cas. 220=51 Cal. 402=38 C.L.J. 388=25 Cr. L.J. 732=A.I.R. 1924 Cal. 476.

——S. 61—Procedure—Expiry of 15 days.

On the expiry of the period of 15 days allowed under Ss. 61 and 167 the police must either release the accused under S. 167, security being taken if required or the Magistrate must take cognizance on a report under S. 173 if the report according to the Magistrate makes out a **prima facie** case or the Magistrate must release him. 83 Ind. Cas. 628=26 Cr. L.J. 68=28 C.W.N. 490=A.I.R. 1924 Cal. 614.

——S. 62—Forfeiture of property—Murder—Revenge.

Where a murder was committed out of revenge and was not a murder committed in the course of a dacoity, or which had theft as any part of its object, it is not an appropriate case in which a sentence of forfeiture of property should be passed as such a sentence is an appropriate deterrent in cases where theft formed part of the motive. 18 A.L.J. 375=21 Cr. L.J. 401=56 Ind. Cas. 49.

——Ss. 62, 190 (b) and (c) and 191—Chalan.

Police report under S. 190 (**b**) does not necessarily mean a '**chalan**' only, but also includes a report by the Police under S. 62 of the Code. S. 190 (**c**) cannot possibly cover a case of information derived from the Police and a Magistrate is not compelled to proceed under S. 191 and ask the accused whether he consented to be tried by him. 35 P.W.R. Cr. 1909=3 P.R. Cr. 1910=11 Cr L.J. 150=164 P.L.R. 1910=4 Ind. Cas. 1025.

—S. 64:—Ss. 64, 196—S. 196, if controls powers of Magistrate under Code—Person committing offence under S. 171-D, Penal Code in presence of Magistrate—If can be arrested under S. 64—Previous sanction of Local Government, whether necessary to take cognisance of such offence.

Section 196, Criminal P. C., does not control the powers of a Magistrate under the Code, but only prevents a Court from taking cognizance of certain offences without there being a complaint made by order of, or under authority from, the Governor-in-Council, the Local Government or some officer empowered by the Governor-General-in Council in this behalf Therefore, a Magistrate not functioning as a Court but only as a Magistrate acting under S. 64, Criminal P. C., is fully authorized to arrest and to release on bail, a person who has committed an offence in his presence under S. 171-D.I.P.C., and no previous sanction of the Local Government is necessary for the Magistrate to take cognizance of such an offence. The word "offence" used in S. 64, Criminal P. C., is obviously wide enough to include an offence under S. 171-D.I.P.C. A.I.R. 1939 All. 682=1939 A.L.J. 779=1939 A.W.R. 696=41 Cr. L.J. 85=I.L.R. (1939) All. 924=184 Ind. Cas. 662

——ss. 65 and 190 (1) (e)—Arrest of accused under direction of Magistrate—Suit for damages.

On a complaint under S. 448, I.P.C. a Sub-Magistrate went to a temple, where the accused were hiding, and arrested them without making any final order on the occurrence report which he had received the day previous; **Held**, that independently of the occurrence report, the Magistrate's action was justified and he was not liable in an action for damages. 52 Ind. Cas. 609 (Mad.)

—S. 68—Omission to enter in summons full particulars with which accused is charged—Whether of itself vitiates trial.

Mere omission in the summons to enter full particulars of the offence with which the accused is charged does not by itself vitiate the trial, unless the accused is prejudiced by such an omission or by a defect in the proceedings at the trial. Such a defect is cured by S. 537, Criminal P. C. The question whether the accused has been prejudiced or not should be the sole criterion in such case. A.I.R. 1940 Oudh 77=1939 A.W.R. 248=41 Cr. L.J. 92 (2)= 1939 O.W.N. 960=184 Ind. Cas. 742.

—Ss. 68, 537—Summons not containing particulars of offence—Accused is entitled to know what offence he has committed—Prosecution responsible for irregularities—Accused incurring large expenses—Re-trial—Motor Vehicles Act (VIII of 1914), S. 16.

Section 16, Motor Vehicles Act, is a penalty clause and it is the duty of the Court to specify in the summons to the accused alleged to be guilty, what particular rules were contravened by him. A summons issued by a Magisterial Court which does not contain in the form prescribed by statute (S. 68 of the Criminal P. C., read with the form given in Sch. V of the Code), particulars of the place where, the time when, and the nature of the offence charged may be disregarded by the person summoned, and proceedings taken thereon, if objected to, must necessarily be invalid. The accused is entitled under the law to know what offence he has committed and it is the duty of the prosecution to put in the sections of the Rules which the accused was alleged to have contravened. When this is not done, the accused will be prejudiced in his trial. Where the case has been going on since a long time and the accused has already incurred a great deal of expense in defending himself and the prosecution is no doubt responsible for a good many irregularities in the case, a re-trial is not to be ordered. A.I.R. 1934 Oudh 370 =11 O.W.N. 828=35 Cr.L.J. 1161 (2)=150 Ind. Cas. 941.

—S. 68—Contents—Rule imperative.

A summons issued by a Magisterial Court which does not contain in the form prescribed by the statute particulars of the place where, the time when, and the nature of the offence charged, may be disregarded by the person summoned, and proceedings taken thereon, if objected to, must necessarily be invalid. 26 A.L.J. 331=9 A.I. Cr. R. 341=9 L.R.A. Cr. 49 =108 Ind. Cas 230=29 Cr. L.J. 357=A.I.R. 1928 All. 261.

——S. 68—Form—Motor Vehicles Act, Sch. V.

The procedure of issuing summonses by the Magisterial Courts purporting to charge motorists, owners or drivers of offences under the Act without giving the slightest particulars of the offence alleged is not justified by law. S. 68, Cr. P. Code, incorporates the form of summons, which is a statutory form contained in sch. V to the Code, which summons is to be issued to accused persons. 108 Ind. Cas. 230=29 Cr. L.J. 357=9 L.R.A. Cr. 49=9 A.I. Cr. R. 341=26 A.L.J. 331=A.I.R. 1928 All. 261.

——S. 68—Oral prayer—if sufficient.

Under the law a verbal prayer for issue of summons to an accused is sufficient. 33 C.W.N. 446= 56 Cal. 1013=A.I.R. 1929 Cal. 346.

——S. 68—Summons not duly sealed—prosecution for disobedience.

A summons not sealed as required by S. 68 is illegal and prosecution for disobeying such summons is not sustainable. 37 M.L.J. 588=10 L.W. 554=21 Cr. L.J. 800=58 Ind. Cas. 528.

——S. 63—Applicability—Summons in proceedings under S. 488 —Service—Mode of—Service by post—Legality.

S. 68, Cr. P Code, applies not only to summons to accused but also to summons to persons summoned in proceeding, under S. 488, Cr. P. Code, and such summons must therefore be served by a police officer or by an officer of the Court issuing it or other public servant. Service by post registered is not permitted and is invalid. 3 A.I.Cr. D. 505=51 Cr.L.J. 390=A.I.R. 1950 E.P. 20.

——Ss. 68 and 71—Summons—Mode of service.

The law for service of summons in criminal cases is on the same lines as the rules for the service of a summons is a civil case. 20 Cr.L J. 816=53 Ind. Cas. 720.

——S. 69—Scope.

Section 69 (3) provides for the service of summons under S. 136 (4) of the Companies Act. A.I.R. 1944 Pat. 210=46 Cr. L.J. 168=11 B.R. 136=216 Ind. Cas. 312.

——S. 69—Interpretation—Service of sommons—tender of—what amounts to.

Personal service may be made either by delivering or tendering, but the tender must be real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. 107 Ind. Cas. 563=9 A. I. Cr. R. 52=29 Cr.L.J. 263=9 L.R.A.Cr, 1=26 A.L.J. 107=A.I.R. 1928 All. 118.

——Ss. 69, 70—Conviction without proper service of summons.

A summons is not properly served where it is left with the durwan without any attempt being made to find out the accused. A.I.R. 1932 Cal. 62=35 C.W.N. 868=33 Cr. L. J. 264=136 Ind. Cas. 135.

——S. 69—Service of summons—What is.

A mere tender of summons is sufficient to effect service. 40 All. 577=16 A.L.J. 453=19 Cr.L.J. 746=46 Ind. Cas. 522.

——S. 69—Summons—Service of—Substituted service—S. 71, Cr. P. Code.

The procedure, which is provided by S. 71, cannot be made use of unless service in the manner mentioned in both Ss. 69 and 70 cannot be effected by the exercise of due diligence. 43 C.L.J. 113= 27 Cr.L.J. 715=31 C.W.N. 148=94 Ind. Cas. 907= A.I.R. 1926 Cal. 1208.

——S. 70—Summons—Service of.

—Issue of summons effected by serving upon the mother of the accused is not warranted by the Code. 26 P.L.R. 291=26 Cr.L.J. 1393=89 Ind. Cas. 705=A.I.R. 1926 Lah. 50.

——S. 71—Applicability.

—The procedure, which is provided by S. 71, cannot be made use of unless service in the manner mentioned in both Ss. 69 and 70 cannot be effected by the exercise of due diligence. 43 C.L.R. 113= 27 Cr.L.J. 715=31 C.W.N. 148=94 Ind. Cas. 907= A.I.R. 1926 Cal. 1208.

——S. 72—Railway Police—Service of summons on.

—Summons to a Sub-Inspector of Railway police should be served through the Superintendent of Railway Police for the District. 87 Ind. Cas. 421=6 P.L.T. 215=3 Pat. L.R.Cr. 127=26 Cr.L.J. 965=A.I.R. 1925 Pat. 553.

——S. 72—Summons—Police investigation.

S. 72, Cr.P C. applies only to summonses issued by a Court of justice and not to orders of Police officers investigating crime under Chap. XIV. 18 Cr.L.J. 733=40 Ind. Cas. 733.

——S. 75—Ss. 75, 88, 87—Process under Ss. 87 and 83—Parentage of person not mentioned—Person not to be mistaken—Process held not invalid.

Where process issued under Ss. 87 and 88, Criminal P. C., described a person by his name and as resident of a particular village but his parentage was not given:

Held, that though the process was defective to that extent, still as the person could not be mistaken as the other person with the same name was not a resident of the village, the process was not invalid. A.I.R, 1943 Pat. 366=22 Pat. 504=10 B.R. 189=210 Ind. Cas. 124.

——Ss. 75 and 76.

Ss. 75 and 76 of the Cr.P. Code must be read together. S. 76 (1) is permissive. Where in pursuance of a warrant issued with an endorsement for bail to be taken for the appearance of the accused on a particular date, the accused was arrested after the date fixed for his appearance, the direction to take bail lapsed, though the warrant itself did not lapse and the arrest was legal. 13 C.W.N 1091=10 Cr.L J. 479=4 Ind. Cas. 31.

—Ss. 75, 72 (1), 1 (2), 82, 83—Warrant contemplated by S. 75—Code, if provides for issue of warrant to be executed outside British India.

By reading Ss. 72 (1), 1 (2), 82 and 83, Cr.P.C. together it becomes clear and beyond all question that the warrant contemplated in S. 75 is a warrant issued by a Court in British India and that such warrant is executable at any place in British India within or without the local limits of the jurisdiction of the Court issuing the warrant. There is no provision in the Cr P.C., authorising the issue of a warrant to be executed at any place outside British India. A.I.R. 1940 Sind 154=42 Cr.L.J. 49=190 Ind. Cas. 661.

—S. 75—Officer directing issue of warrant—Whether should necessarily sign warrant—Warrant signed by another Magistrate during absence on duty of Magistrate issuing warrant—Resistance—Penal Code (Act XLV of 1860), Ss. 224, 225, 353.

The Presiding Officer who alone can sign a warrant under S. 75, Cr.P.C., is not necessarily the officer who has taken cognizance of the offence. He must therefore, be the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who has presided the Court at the time when cognizance was taken of the offence.

Where a Sub-Divisional Officer receiving information of an alleged offence took cognizance of the offence and directed the issue of a warrant, but after directing issue of the warrant, he went away from the station on duty and the warrant was ultimately signed during his absence by a First Class Magistrate with powers under Ss. 190 (a) and (b), 143, 144 and 192, Cr.P.C. and who performed the functions of the Sub-Divisional officer during his absence:

Held, that the warrant was legal and that resistance to the execution of the warrant constituted an offence under Ss. 224, 225 and 353, I.P.C. A.I.R. 1932 Pat. 175=13 P.L.T. 167=34 Cr.L.J. 297=142 Ind. Cas. 192.

——S. 75—Warrant directed by one officer—Another officer signing warrant where a complaint was filed before the Sub-Divisional Magistrate and he directed the issue of a warrant but it was, however, signed by another first class Deputy Magistrate for Sub-Divisional Officer, the latter being absent on tour.

Held, (Scroope, J. dissenting)—That the Legislature had not intended a delegation of the duty of signing warrants and the warrant, signed as it was by a person who did not direct it, was not valid.

A warrant which is expressed to issue from the Court of the Sub-Divisional Magistrate and signed "for the Sub-Divisional Magistrate" by a Magistrate who himself would have jurisdiction in the matter, is a valid warrant and such an officer is a "presiding officer" for the purposes of S. 75. A.I.R 1932 Pat. 171=13 P.L.T. 135=33 Cr.L.J. 706=138 Ind. Cas. 844.

—S. 75 (2), Magistrate writing to another Magistrate to return warrant unexecuted—Warrant is cancelled.

A warrant is an order addressed to a certain person directing him to arrest the accused and to produce the accused before the Court. The warrant may have a further provision for admitting the accused to bail. But in each case, the warrant is an order directed to some one to arrest a certain accused and bring him before the Court, and the person to whom it is addressed may if he is a Magistrate or Police Officer endorse the warrant to some one serving nnder him. When the Magistrate writes to the District Magistrate in another province asking him to return the warrants unexecuted then it is clear that the warrants are cancelled. Section 75 (2), Cr.P.C., does not require that there should be any formal order on the record, of cancellation. A.I.R. 1940 All. 178=1940 A.L.J. 104=41 Cr.L.J. 500=1940 A.W.R. 79=187 Ind. Cas. 682.

—S. 75—Bail—No proper complaint—issue of non-bailable warrant—legality.

Where in a complaint under S. 124-A. I.P.C., no original or translation of the alleged speech was attached although the Local Government sanction contained extracts, and on application to the Magistrate bail was refused,

Held, that there was no proper complaint and the Magistrate did not direct his mind to question of presence or absence of proper complaint and the order refusing bail was not passed on proper appreciation of the facts and non-bailable warrants should not have been issued. 120 Ind. Cas. 10=30 Cr.L.J. 1129=A.I.R. 1929 Lah. 284.

—S. 75—Penal Code, S. 353—Resistance to warrant.

A warrant signed by a Magistrate who is not the presiding officer within S. 75 of the Cr.P. Code is invalid and resistance to an arrest made under

such warrant is not an offence under S. 353 of the Penal Code 2 Pat. L.J. 487=1 Pat. L.W. 306=(1918) P.H.C.C. 48=18 Cr.L.J. 526=39 Ind. Cas. 494.

—S. 75—Service—After returnable date—if valid.

Service of a warrant even after the passing of its returnable date is valid unless it is cancelled by the Court which issued it or until it is executed. 7 Pat. 478=29 Cr.L.J. 1007=112 Ind. Cas. 223=11 A.I.Cr.R 240=A.I.R. 1929 Pat. 466.

—S 75—Warrant—Appeal against conviction— Departmental enquiry—Madras Act III of 1869:—A Magistrate and Revenue officer has no power to issue a warrant to compel the attendance of a person in a departmental enquiry about a charge of bribery against a Subordinate Magistrate; nor has he any power to order an appellant to appear before a Sub-Magistrate whom he has ordered to hold a further enquiry in the case in which the person had appealed when the fine imposed had already been paid. The pendency of an appeal by the accused would not give the appellate court power to arrest him. (1905) 29 M. 100=3 Cr.L.J. 376.

—Ss. 75, 76:—Warrant of arrest—Resistance— Endorsement as to bail fixing date of appearance—Warrant if remains in force after expiry of date—Lapse of bail—Order:—Ss. 7 and 76, Cr.P.C., should be read together. S. 76 (1) Cr P.C., is permissive. A warrant, on which there is an endorsement for bail to be taken of the appearance of the accused on a certain date. does not lapse on the expiry of that date; after the date only the direction to take bail lapses but the warrant continues in force until it is cancelled by the court which issued it or until it is executed. The arrest of an accused on 29th October, on a warrant issued against him with an endorsement for bail to be taken for his apperance on the 26th October, is not illegal, and the rescuing and escape of the accused from custody are punishable under S. 225 and 224 of the Penal Code. (1909) 13 C.W.N. 1091 =4 Ind. Cas. 31=10 Cr.L.J. 479.

—S. 75—Warrant—No seal—Arrest, if illegal.

The seal of the Court is essential to the validity of a warrant and its absence makes the warrant void. An arrest made in execution of such warrant is not legal. 42 Cal. 708=19 C.W.N. 224=16 Cr.L.J. 336=28 Ind. Cas. 672.

—Ss. 75 and 537—Warrant not signed by Magistrate.

A Magistrate is guilty of gross carelessness in not signing his name in full on a warrant but it is a mere irregularity covered by S. 537. 5 Pat. L.W. 117=3 Pat. L.J. 493=(1918) P.H.C.C. 269=19 Cr. L.J. 747=46 Ind. Cas. 523.

—Ss. 76 and 77—Warrant of arrest—Case pending before Sub-Magistrate.

A bailable warrant should be issued where the accused is alleged to have committed robbery in respect of property which he admittedly claims to be his. (1911) 1 M.W.N. 452=12 Cr.L.J. 430=11. Ind. Cas. 614.

—S. 77—Conditions for entrusting warrants to stranger—Legality of search.

First of all there must be the necessity to arrest and then there must be the necessity for immediate arrest and then there must be the third condition, that no police is immediately available. In the absence of these three conditions a Court is not justified in entrusting a warrant to a forest officer for execution and the endorsement of the warrant in favour of the watcher does not empower the watcher to arrest any person. 51 Mad. 873=1928 M.W.N. 310=28 M.L.W. 141=29 Cr.L.J. 541=109 Ind. Cas. 365=1 M.Cr.C. 115=A.I.R. 1928 Mad. 624=55 M.L.J. 220.

——S. 77—Obstruction—Irregularity in search warrant.

Where the legality of the warrant was not challenged at the time of the search or in the Magistrate's Court on the ground that the search warrant was directed to a certain Thana for execution without specifying name and designation of the Police Officer concerned which search warrant was endorsed by the Police Station Officer to a Police Constable,

Held, the conviction should not be set aside as the accused was not prejudiced by what was at most a clerical error. 86 Ind. Cas. 669=3 Bur. L. J. 182=26 Cr. L. J. 845= A. I. R. 1924 Rang. 383.

——S. 77—Requirements of.

S. 77 does not require that the name and designation of the Police Officer should be inserted in the warrant. **(Mullick and Thornhill, JJ.)** Bankey Behary Singh v. Emperor. 5 Pat. L.W. 117=3 Pat. L. J. 493=(1918) P. H. C. C. 269=19 Cr. L. J. 747=46 Ind. Cas. 523.

——S. 77 and 83—Effect of.

——Section 83, in the case of a warrant to be executed outside the local limits of jurisdiction of the Court issuing it, would override the express direction of S. 77, that a Presidency Magistrate must direct the warrant to a Police Officer. A.I.R. 1940 Bom. 397=42 Bom. L.R. 904=42 Cr. L. J. 205=I.L.R. (1941) Bom. 16=191 Ind. Cas. 605.

——S. 77—Search warrant—To be addressed to a person.

A warrant for search and arrest not addressed to any particular person with authority to make the search and arrest is irregular. A search of the room in charge of a person not mentioned in the warrant is an irregularity. 71 Ind. Cas. 62=25 O. C. 111=9 O. L. J. 667=24 Cr. L. J. 14=A. I. R. 1922 Oudh 224.

——S. 77—Procedure under.

——The procedure on the Sessions Court upholding a sentence of imprisonment is to issue a warrant to the jail under S. 383, Criminal P. C., and where the accused is on bail and is not present the court issues a warrant for his arrest to a Police Officer under S. 77, Cr. P.C. A.I.R. 1940 All. 386=1940 A.W.R. 334=1940 A. L. J. 309=41 Cr. L. J. 741= I. L. R. (1940) All. 507=189 Ind. Cas. 468.

——S. 77. Warrant — Service of — Warrant executed by one other than addressee—legality.

The warrant was addressed to "the bailiff of the Court," whoever that official may be, and was executed by a Naib Nazir and process-servers without any endorsement by the bailiff.
Held, that such service of the warrant was illegal. 59 Ind. Cas. 849=3 L. L. J. 346=22 Cr. L. J. 145=A. I. R. 1921 Lah. 236.

——S. 79—Applicability—Forest Officers.

S. 79 has no application to forest officers and the endorsement of the warrant, even if it be legal, by the foresters in favour of the watcher can confer no power upon the watcher to arrest the person named in the warrant. 51 Mad. 873=1 Mad. Cr. C. 115=109 Ind. Cas. 365=29 Cr. L. J. 541=28 M. L. W. 141=1928. M. W. N. 310=A.I R. 1928 Mad. 624=55 M.L.J. 220.

——S. 79—Warrant under S. 5. Public Gambling Act—Endorsement.

Warrants issued under S. 5, Public Gambling Act may be endorsed in accordance with the provisions of S. 79. A.I.R. 1945 Nag. 216= 1945 N.L.J. 237=I.L.R. (1945) Nag. 649=47 Cr. L.J. 148=221 Ind.Cas. 292.

——S. 79—Warrant for arrest — Endorsement on separate piece of paper, validity of— Resistance to arrest—Offence.

The Resident Magistrate issued a warrant to the Sub-Inspector of Police for the apprehension of the accused and the Sub-Inspector gave the warrant to a mounted constable to arrest the accused. He did not make any endorsement on it but gave a letter to the City Magistrate who forwarded the letter with the words "perused, for favour of service to City Police Inspector." The letter ran thus: "I have the honour to forward herewith per Daryakhan, mounted constable of Police, the accompanying warrant in original and to request that you will be good enough to endorse the same and hand it over to the said mounted constable for the purpose of serving the same, as the accused is known quite well to the said mounted constable who will make special efforts and be able to apprehend the accused."

Held, (Rupchand, A. J. C., contra) —That the meaning of the letter was that the Sub-Inspector showed the constable as the man authorised by him to execute the warrant and the Magistrate was merely to endorse it and hand it over to him for execution, and, therefore, the letter was a sufficient delegation of authority by the Sub-Inspector to the constable to execute the warrant.

Under S. 79, Cr. P. C., it is immaterial whether the authority is on the warrant itself or on a separate piece of paper but so long as the authority is delegated, and the authority is there, it satisfies the requirements of S. 79. A.I.R. 1931 Sind 89=25 Sind L.R. 117 = 32 Cr. L. J. 916=132 Ind. Cas. 465

——S. 80—Prosecution, if must prove that warrant was shown or its substance notified to accused.

There is a presumption that all official acts are properly performed and, therefore, it is not necessary for the prosecution to prove under S. 80, Cr. P. C., that the Police Officer notified the substance of the warrant to the accused or showed him the warrant. A.I.R. 1940 Pesh. 10=41 Cr.L.J. 543=188 Ind. Cas. 78.

——S. 80—Non-compliance.

——A Police Officer who has made an arrest without having observed the provisions of S. 80, may be able to justify his action under the provisions of S. 46 (2). 33 C. W. N. 284=49 C. L. J. 264=116 Ind. Cas. 723=30 Cr. L. J. 703= 56 Cal. 831=13 A. I. Cr. R. 129=A. I. R. 1929 Cal. 174.

——Ss. 80 and 537—Omission to explain warrant to accused.

The omission by the constable to explain to the accused the particulars of the warrant after showing him the warrant would not invalidate the arrest. 5 Pat. L. W. 117=3 Pat. L. J. 493=(1918) P. H. C. C. 269=19 Cr. L. J. 747=46 Ind. Cas. 523.

——S. 82:—Ss. 82, 83—British Baluchistan is part of British India—Warrant issued by Courts there, can be executed in any part of British India—Magistrate exercising jurisdiction in Baluchistan Agency Territories cannot issue warrant for arrest of person in British Baluchistan.

British Baluchistan is part of British India. Therefore, warrants issued by Courts in British Baluchistan can be executed under S. 82, Cr.P.C., at any place in British India. Hence the action of the District Magistrate of Sibi in sending the warrant of arrest of an accused in the District of Nawabshah, under S. 83, is legal.

The Baluchistan Agency Territories are not part of British India, but are areas in which by lease, treaty or otherwise, the Governor—General-in-Council, now to be replaced by the crown representative has acquired jurisdiction. Hence a Magistrate exercising jurisdiction in those places cannot issue a warrant of arrest of a person in British India and require its execution under S. 83. A. I. R. 1941 Sind 20=42 Cr. L. J. 326=I.L.R. (1942) Kar. 247=192 Ind. Cas. 86 (F. B).

[Overrules A.I.R. (Vol 27) 1940 Sind 154=190 Ind. Cas. 661]

—S. 83. See also. CRIMINAL P.C., S. 82.

——S. 83—Exercise of powers under.

The power of directing the arrest of some person at a place outside the local limits of the jurisdiction of a Court, particularly when that place is far removed from the local limits, is one which should be exercised with the utmost circumspection and must be based on substantial reasons. A.I.R. 1940 Bom. 397=42 Bom. L.R. 904=42 Cr. L.J. 205=I.L.R. (1941) Bom. 16= 191 Ind. Cas. 605.

—Ss. 83, 77—S. 83, if overrides S. 77.

Section 83, Criminal P. C., in the case of a warrant to be executed outside the local limits of jurisdiction of the Court issuing it, would override the express direction of S. 77, that a Presidency Magistrate must direct the warrant to a Police Officer. A.I.R. 1940 Bom. 397=44 Bom. L.R. 904=42 Cr. L.J. 205=I.L.R, (1941) Bom. 16=191 Ind. Cas. 605.

——S. 83—Warrant of arrest giving only names of accused addressed for execution to Police Officer who could not be ascertained.

Non-bailable warrants were issued by the Chief Presidency Magistrate of Calcutta on June 25, 1940, stating that the accused stood charged with the offence under S. 392, I.P.C., that is to say, of robbery. The warrants were addressed to the "O/C. concerned" and referred to the accused merely by their names. In the margin of the warrants was a note initialled by the Chief Presidency Magistrate, Calcutta, to this effect; "Forwarded to the Third Presidency Magistrate, Bombay, for favour of execution and return." There was no reference either to the address, description or occupation of the accused:

Held, that warrants must be dealt with strictly, and since the marginal note forwarding the warrants to the Third Presidency Magistrate, Bombay, could have no effect given to it, because there was no such officer as the "Third Presidency Magistrate", the warrants were invalid. They were further invalid because they did not sufficiently specify the persons to be arrested. A.I.R. 1940 Bom. 397=42 Bom. L.R. 904=42 Cr. L.J. 205=I.L.R. (1941) Bom. 16=191 Ind. Cas. 605.

——S. 83—Warrant issued by a court in foreign territory—Execution in India.

Quetta does not form part of British India and consequently a warrant issued by a Court in Quetta cannot be executed in British India. A.I.R. 1940 Pesh. 30=41 Cr. L. J. 857=190 Ind. Cas. 203.

——S.83—District Magistrate of Dhenkanal state cannot issue warrant under S. 83 to Railway Police in charge of railway lands in that State to arrest person alleged to have committed offence in that state—Such arrest is, however, justified by virtue of Notification No. 34 I. B. of January 14, 1937, issued by Governor-General-in-Council.

Dhenkanal State, is a Native State bordering upon the Province of Orissa. Dhenkanal Garh Railway Station is within the State of Dhenkanal but the Dhenkanal State authorities have no jurisdiction within the limits of railway land in that State. The position with regard to railway lands in the State of Dhenkanal is defined by a Notification No. 754 I. B. dated March 28, 1912, issued by the Governor-General-in-Council in exercise of the powers conferred upon him by the Indian (Foreign Jurisdiction) Order in Council 1902. Under the Notification, the laws in force in the District of Cuttack shall be in force in the railway lands situate in the State of Dhenkanal and further the Local Government and officers subordinate to it exercising executive authority in the Cuttack District shall exercise similar authority within the railway lands situate in Dhenkanal State. A Magistrate of a Native State cannot issue a warrant directing the Police or Officials in British India to arrest a person accused of committing a crime within a Native State. Therefore, even if the Criminal P. C., has been adopted by the Dhenkanal State authorities, that would not give the Dhenkanal State authorities a right to issue a warrant and obtain the arrest of a person in the manner directed by S. 83, Criminal P. C. The effect of the adoption of the Criminal P. C., by the Dhenkanal State authorities is to make the provisions of that Code part of the law of Dhenkanal State. It is still a state wholly outside British India and therefore the provisions of S. 83, cannot apply to the State in its relation with British India. An arrest of a person alleged to have committed an offence in the Dhenkanal State, on the Dhenkanal Railway Station by the Government Railway Police in pursuance of a warrant issued by the District Magistrate of Dhenkanal purporting to act under S. 83, cannot be justified under S. 83. The arrest, however, is justified by virtue of Notification No. 34 I. B. of January 14, 1937 by the Governor-General-in-Council in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council 1902. A.I.R. 1939 Pat. 129=19 P.L.T. 909=5 B.R. 491=18 Pat. 121=40 Cr. L.J. 500=180 Ind. Cas. 787.

——Nasirabad lies outside British India and so a warrant of arrest of a person residing in British India cannot be issued by a Nasirabad Magistrate. Such warrant, if issued, cannot be executed in British India and if it is executed, the proceedings can be quashed by the High Court. A.I.R. 1938 Sind 46=39 Cr. L. J. 298=32 S.L.R. 134=173 Ind. Cas. 322.

S. 83—Native State—Person in custody of—If could be directed to be produced.

Political Agent of a Native State cannot be directed by High Court to produce a person in custody in the Native State, as he is not in the vicarious custody of the said person. 119 Ind. Cas. 527=1929 A.L.J. 520=10 L.R.A. Cr. 84=12 A.I. Cr. R. 1=30 Cr. L.J. 1083=A.I.R. 1929 All. 347.

——Ss. 85 and 86—Effect of.

The effect of Ss. 85 and 86 is that the person arrested outside local limits of the jurisdiction of the Court issuing the warrant has to be taken before a Magistrate or Commissioner or District Superintendent of Police, and such Magistrate or Commissioner or District Superintendent of Police has to satisfy himself that the person arrested appears to be the person intended by the Court which issued the warrant, and when so satisfied, he is bound to direct the removal of the arrested person in custody to the Court which issued the warrant. A.I.R. 1940 Bom. 397=42 Bom. L.R. 904=42 Cr. L.J. 205=I.L.R. (1941) Bom. 16=191 Ind. Cas. 605.

——S. 87. See also, CRIMINAL P. C., S. 88.

——Proclamation under — Whether legal evidence of issue of warrant of arrest.

A proclamation issued under S. 87, Criminal P. C., reciting that a warrant of arrest had been issued, is neither legal evidence of the issue of the

warrant and cannot prove the same, nor is it equivalent to notice of its contents either to the public or even to the inhabitants of the locality where it is published. The only evidence permitted by law to prove warrant of arrest is that defined in Ss. 62, 64 and 65 of the Evidence Act namely, either the original order or a certified copy thereof. A.I.R. 1944 P.C. 54=1944 M.W.N. 440=10 B.R. 667=1944 A.W.R. P.C. 40=45 Cr. L. J. 721= 1944 A.L.J. 388=46 Bom.L.R. 844=48 C.W.N. 477= 71 I.A. 83=57 M.L.W. 374=214 Ind. Cas. 1=I.L.R. (1945) Mad. 237=I.L.R. (1944) Kar. P.C. 273= (1944) 1 M.L.J. 515 (P.C.).

——S. 87—Scope—Person taking steps to procure bail.

A man, who files a petition against the order issuing the warrant and takes steps to procure an order of a Superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself in which cases alone action under S. 87 can be taken against him. 67 Ind. Cas. 726=66 P.L.R. 1922=23 Cr. L.J. 454= A.I.R. 1922 Lah. 475.

——S. 87—Procedure under to be followed strictly.

There are three requirements of S. 87 and all of them must be fulfilled. The failure to fulfill any one of these three requirements amounts to failure of justice within the meaning of S. 537. A.I.R. 1942 Lah. 214=44 P.L.R. 300 = 43 Cr. L.J. 791=202 Ind. Cas. 15.

---S. 87—S. 69, Cr. P. Code—Validity of proceedings under.

If there was absence of reasonable diligence in attempting to serve, the substituted service is bad. 69 Ind. Cas. 627 = 6 N.L.J. 63=23 Cr.L.J. 739= A.I.R. 1923 Nag. 55.

——S. 87—Time and place of publication.

Proclamation under S. 87 must be published in the place where the accused resided; and 30 days should be counted from the day of such proclamation. Under S. 87 (3) the the Magistrate must make an endorsement in writing validating the proclamation. 40 P.W.R. Cr. 1916=6 P.R. Cr. 1917=45 P.L.R. 197=17 Cr. L. J. 414=35 Ind. Cas. 974.

——S. 87 (3)—Scope and applicability.

An order of the Court under S. 87 (3), Cr. P. Code, which only states that the proclamation under the section has been duly published but not that it was published on a specified day is defective and cannot, under the circumstances, be considered conclusive evidence that the requirements of S. 87 have been complied with. Moreover, sub-S. (3) can only apply to a proclamation which is otherwise a legal proclamation, and a proclamation wherein the date for the appearance of the offender is fixed less than thirty days from the publication of the proclamation is altogether invalid. I.L.R. (1947) Lah. 615=A.I.R. 1948 Lah. 151=230 Ind. Cas. 404=48 Cr. L.J. 624.

——S. 87, cl. (3)—Applicability.

The provision of 87, cl. (3), Criminal P. C. is one applicable when a statement in writing by the Court specifies the date on which the proclamation was published. Where this is not done, the recording of such an order will not suffice to take the place of direct evidence of publication and service of the proclamation. A.I.R. 1936 Pat. 249=2 B.R 237=17 P.L.T. 81=37 Cr. L.J. 318=160 Ind. Cas. 604.

——S. 87 (3)—Proclamation—Failure to specify date of—Effect.

An order under S. 87 (3) stating that the proclamation was duly published but omitting to specify the date of publication is not conclusive evidence of the fact that the requirements of S. 87 have been complied with. 32 P.R. Cr. 1919=54 Ind. Cas. 994.

——S. 87—Attachment—Death of absconder.

The property of an absconder against whom proceedings under Ss. 87 and 88 of the Cr. P. Code have been taken should be freed from attachment on the death of the absconder. With regard to the ancestral lands in the Punjab it has been settled that all that can be attached in proceeding under Ss. 87 and 88 of Cr. P. Code is the interest of the absconder and that on his death the land must be released in favour of his heirs. 18 P.R. 1908 (F.B.); 52 P.R. 1915 (Cr.) applied. 88 Ind. Cas. 460=7 L.L.J. 540=26 Cr. L.J. 1148=26 P.L. R. 395=26 P.L.R. 831=A.I.R. 1925 Lah. 629.

——S. 87—Penal Code, S. 188.

An attachment could not be made of undivided land of a joint family to which an absconder against whom proclamation and attachment were issued belonged, under S. 87, Cr. P. Code. Therefore no conviction under S. 188, Penal Code could be had against one or the other members of the family who cultivated the lands in spite of an order under S. 87, Cr. P. Code. 2 Pat. L.W. 179=18 Cr. L.J. 1037=42 Ind. Cas. 781.

——Ss. 87 and 88—Proclamation defective—Attachment—Legality.

A proclamation issued under S. 87, Cr. P. Code, in which the time for the appearance of the accused was fixed from the date of the issue of the proclamation and not from the date of its publication and it was within thirty days and not less than thirty days from the date of the publication, is clearly in contravention of that section. Consequently both the proclamation and the attachment issued subsequent to the proclamation are illegal. I.L.R. (1947) Lah. 615=A.I.R. 1948 Lah. 151=230 Ind. Cas. 404=48 Cr. L.J. 624.

——Ss. 87 and 88—Process under S. 88, if can be issued before first issuing process under S.87.

It cannot be said that processes under S. 88 cannot be issued unless processes under S. 87 had been issued first. A.I.R. 1943 Pat. 366=22 Pat. 504=10 B.R. 189=210 Ind. Cas. 124

——Ss. 87 and 88—Issue of processes under Ss. 87 and 88 —Requisites of.

It is not necessary that processes under S. 88 should be delayed till the time fixed in the process under S. 87 has elapsed. But processes under Ss. 87 and 88 cannot be issued unless it is established that a warrant had already been issued against the person wanted and that person was absconding.

Where there was no such warrant issued before the prayer was made under Ss. 87 and 88:

Held, that the processes that were issued were without jurisdiction. A.I.R. 1943 Pat. 366=22 Pat. 504=10 B.R. 189=210 Ind. Cas. 124.

——Ss. 87 and 88—Attachment of property—Proclamation or copy not preserved—Evidence insufficient to show that legal formalities were observed.

The Magistrate in proceeding under S. 87 and S. 88 ought to take particular care to preserve proclamations and the record must be so clear as to satisfy the court that the legal formalities were duly observed. When neither the proclamation nor any copy is forthcoming and the only evidence consists of a statement of one of the accused that a proclamation of some undescribed sort was at some unspecified time issued, the evidence does not sufficiently show that the legal formalities were observed by the court. Before a Cr. Court makes an order confiscating private property the materials on the record must show with certainty, that a proclamation was properly issued. 14 Bom. L.R. 163=13 Cr.L.J. 293=14 Ind. Cas. 757.

——Ss. 87, 88—Attachment in proceedings under Ss. 87, 88—Failure to give notice—Irregularity, if curable by S. 537.

In proceedings under Ss. 87, 88, Criminal P.C., the failure to give the necessary notice does not amount to more than an irregularity which can be cured by an application of S. 537, Criminal P.C. A.I.R. 1934 Lah. 987=36 P.L.R. 262=36 Cr. L.J. 457=16 Lah. 466=153 Ind. Cas. 954.

——Ss. 87 and 89—Proclamation—Order under S. 87 (3)—Absconder, if can contest validity of proclamation.

S. 89 of the Cr.P. Code prescribes a remedy where there is a good and legal publication but offers no facility for the contesting of the legality of the proclamation. Although the petitioner could not contest the legality of the proclamation in his application under S. 89 there is nothing to prevent the Court from considering it in its revisional jurisdiction. An order of the Court under S. 87 (3) of the Code which only states that the proclamation under the section has been duly published cannot, under the circumstances, be considered conclusive evidence that the requirements of S. 87 have been complied with. As the requirements as to publication contained in S. 87 (2) (a) and (c) had not been complied with and as such publication took place less than 30 days from the date fixed for the appearance of the petitioner, the publication was not in accordance with the law and the subsequent proceedings were therefore also invalid. 32 P.R. (Cr) 1919=54 Ind. Cas. 994.

——Ss. 87 and 88—Priority—Seizure of absconder's property—Attachment.

The police seized certain property belonging to two absconding accused but before the property was declared to be at the disposal of the Govt. under S. 88 of the Cr. P. Code the applicant sought to attach the said property in execution of his decree against the said accused.

Held, the Govt. had established no right to the property and the applicant had at the time established a right to have the right, title and interest of the judgment-debtors (the absconders) in it sold by the Civil Court. An order of the District Magistrate refusing to hand over the property to the Civil Court for disposal was wrong. 5 Bur. L. T. 113= 6 L. B.R. 57=13 Cr. L. J. 568=15 Ind. Cas. 984.

——Ss. 87 and 88—Sale of property of absconder—Suit by collaterals—Adverse possession.

Where a person accused of murder, absconded and his land was sold under the provisions of Ss. 87 and 88 of the Cr. P. Code, the sale only transferred the personal rights of the absconder, and the plffs. as the reversioners were entitled to succeed to the property after his death. The vendee's possession did not become adverse to the plffs. till after the death of the original owner and the collaterals' suit was not therefore barred by limitation. 52 P.R.Cr. 1915=256 P.W.R. Cr. 1915=30 Ind. Cas. 71.

——Ss. 87, 88, 89,—Absconding offender—Sale of property of absconder—Illegal sale—Suit to recover property sold from auction-purchaser—Jurisdiction.

Where the property of an absconding offender was attached and sold by a court purporting to act under S. 88 of the Code of Criminal Procedure, and it turned out that the procedure culminating in the sale was irregular and illegal, it was **held** that the civil courts had jurisdiction to entertain a suit by the owner of property so sold to recover the same in the hands of purchaser. 27 A. 572=2 A.L.J. 348=1905 A.W.N. 102.

——Ss. 87, 45—Proclamation under S. 87 issued—Duty of headman of village to report to Police the visits of such person to his village—Failure to report—S. 176, Penal Code Act (45 of 1860).

Where it has been proved by the evidence on the record that a proclamation under S. 87, Criminal P. C., was made in respect of a person in order to find whether the accused (village headman) is guilty under S. 176, I. P. C., read with S. 45 (1) (*b*) of the Criminal P. C., it is necessary to see whether he possessed any information respecting the proclaimed person's passage through or visit to his village. Where it appears that he became aware of such person's visit to the village, but failed to give the required information to the Police, he is liable under S. 176, Penal Code. The fact that the proclamation was not made strictly in accordance with the terms of S. 87, Criminal P. C., does not render such person, a proclaimed offender any the less. A.I.R. 1938 Oudh 80=39 Cr. L. J. 154=1938 O.W.N. 7=172 Ind. Cas. 530.

——Ss. 87, 88—Simultaneous orders under, legality of.

A Magistrate may issue a proclamation under S. 87, Cr. P. C., and an order of attachment under S. 88 at the same time. (1902) 6 C.W.N. 680= 29 Cal. 417.

——S. 88—Attachment under—Applicability of the doctrine of Lis pendens.

The doctrine of *lis pendens* applies not merely to sales by private parties but also to sales through Civil Courts or by Government including revenue sales and sales under S. 88, Cr. P. Code. 116 Ind. Cas. 271=31 Bom. L. R. 345=A.I.R. 1929 Bom. 200.

—S. 88—Warrant of attachment of accused's property, when warrant of his arrest could not be executed, when can be issued.

When the Magistrate is informed that the accused had already left India, the orders for attachment of his property and proclamation are without jurisdiction, unless he is satisfied that the accused was wilfully absconding, knowing of the warrant. A.I.R. 1942 Mad. 289=1941 M.W.N. 763=54 L.W. 478=43 Cr. L.J. 11=197 Ind. Cas. 102.

——S. 88—Attachment—Liability of Secretary of State, Magistrate and Police for mesne profits and damages—Liability of person at whose instance the attachment was made—Act XVIII of 1850—Want of good faith not imputed.

In the case of an attachment under S. 88 of the Criminal Procedure Code, where no want of good faith is imputed, the Magistrate and the Police officer are not liable for damages or mesne profits. Act XVIII of 1850 protects them. The Secretary of State is responsible for damages and mesne profits for the period when the property was at the disposal of Government. The person at whose instance the attachment was made is also liable. 12 Q.B. 871 dis. 12 W.R. 319 followed. Where immoveable property was attached and came to be at the disposal of Government under S. 88 of the Code of Criminal Procedure as belonging to an absconding offender and where, notwithstanding a notice under S. 424 of the Civil Procedure Code served by the real owner of the property, the Collector of the district did not repudiate his connection with the property after due enquiry of title, the real owner is entitled to maintain a suit against the Government and the person at whose instance the criminal proceedings were instituted for recovery of possession of the property with mesne profits and damages done to the property while it was at the disposal of the Government. (1901) 28 C. 540=6 C.W.N. 175.

——S. 88—Attachment—Share of a member of a joint family—Effect.

The attachment under S. 88, of the property of a member of a joint Hindu family who has absconded does not sever his share in the joint family properties. By attaching his property, the Govt. takes the position of the absconder; and it is liable to fluctuations by subsequent births in the family. The undivided interest of a member of an undivided Hindu family who has absconded can be attached under S. 88. The share may be realised by a receiver by a suit for partition or otherwise. 39 Mad. 831=31 M.L.J. 84 and 120=20 M.L.T. 58 and 60=(1916) 2 M.W.N. 88 and 90=4 L.W. 21 and 24=17 Cr.L.J. 296=35 Ind. Cas. 168.

——S. 88—Attachment of property—Rights of Government over the property.

The position of the Government in relation to the property attached under S. 88 is not simply that of an attaching decree-holder. It is at least analogous to that of a receiver in possession and management. The Government has such an interest in the property as to entitle its being made a party to a suit on a mortgage of that property.

Quaere: What is the precise nature of the rights derived by the Government under S. 88, Cl. (7)? Do the properties vest in the Government as owners? Or does the Government become the absolute owner of the income for these properties after the period fixed in that clause? 1930 M.W.N. 1021=A.I.R. 1930 Mad. 1017=129 Ind. Cas. 47=32 M.L.W. 843=60 M.L.J. 72.

——S. 88—Claim to attached property by third person—Practice—Remedy on rejection of claim.

Where property is attached under S. 88 as the property of an absconder and a third person prefers a claim to it as his own, he should be given an opportunity of establishing his right. But where claim is rejected the claimant's only remedy is by way of a civil suit against the Secretary of State and the person at whose instance the attachment was effected. (1910) 1 U.B.R. 66, 12 Cr.L.J. 392=11 Ind. Cas. 256.

——S. 88—Confiscation—Effect of.

On absconding of the plaintiff his property was confiscated and re-granted to defendant No. 1, *held* that unless the plaintiff can show that he has acquired title to the property since the confiscation, he cannot maintain a suit for possession against defendant No. 1. 25 Bom. L.R. 228=A.I.R. 1923 Bom. 198.

——S. 88—Interpretation.—When the title of the Government commences.

The words in S. 88, Cl. 7, " at the disposal of Government " do not imply that from the moment the absconder fails to appear on the date ordered, all his right, title and interest in the property immediately pass over to Government. It has that effect only from the date of attachment. 116 Ind. Cas. 271=31 Bom. L.R. 345=A.I.R. 1929 Bom. 200.

——S. 88—Frames of doorway embedded in the wall—Removal of—Legality.

The doors of a house have never been considered anything else but part of the furniture of the house and movable property, but the frames, if embedded in the walls or floor, are to be considered immovable and accordingly the action of the police officers in digging the walls or floors to remove them does not seem to be technically correct and amounts to serious irregularity in connexion with a house search. 125 Ind. Cas. 784=31 Cr. L.J. 937=1930 Cr. C. 800=A.I.R. 1930 Pat. 387.

——S. 88—Jurisdiction under.

An attachment of property is not authorised in a district other than that of the issuing Magistrate except when the order of attachment has been endorsed by the District Magistrate within whose District the property to be attached is situate, and an attachment made in contravention of this provision is illegal. 123 Ind. Cas. 397=31 Cr. L.J. 494=11 P.L.T. 402=A.I.R. 1930 Pat. 347.

——Ss. 88 and 89—Effect of.

The phrase " within two years from the date of attachment " in S. 89 qualifies not only " appears " but also " proves " connected by the conjunction " and." Within two years, it must be proved that the accused did not abscond or conceal himself to avoid arrest and that he could not attend as he did not know of the proclamation. Simple appearance of the accused, voluntary or compulsory within two years is not sufficient. The absconding accused need not apply personally for the release of his property. Any one can apply on his behalf if other conditions, are satisfied. 15 Bom. L.R. 175=14 Cr. L.J. 237=19 Ind. Cas. 333.

——Ss. 88 and 89—Absconder—Suit for recovery of property.

Ss. 88 and 89, Cr. P.C. debar an absconder from suing for the recovery of his property. (1920) P.H.C.C. 253=1 Pat. L.T. 451=5 Pat. L.J. 321=21 Cr. L.J. 475=56 Ind. Cas. 507.

——Ss. 88, 89—Property of alleged absconding offender attached and sold under an illegal warrant—Suit for recovery of such property.

Held that where the property of an alleged absconding offender is attached and sold by a court purporting

to act under, S. 88 of the Code of Criminal Procedure, and it turns out that the proclamation of the sale was irregular and illegal, there is nothing to bar a suit by the owner of the property so sold to recover such property in the hands of a purchaser. 1904 A.W.N. 159=27 A. 573 (Note).

——S. 88—Revision.

An order under S. 88 is a proceeding within the meaning of S. 435 and is subject to the revisional jurisdiction of the High Court. 76 Ind. Cas. 18=25 Cr. L.J. 82=A.I.R. 1924 Lah. 617.

——Ss. 88, 145—Dispute as to immovable property—Attachment by Magistrate—Interference in revision.

Where a Magistrate considers a case to be one of emergency and orders attachment, the matter being one within his discretion, the action taken by him for maintenance of peace cannot be lightly interfered with.

In a proceeding under S. 145, Cr. P.C., a Magistrate can effect attachment of the property in dispute through the Police and order them to take possession : attachment by prohibitory order is not the only mode of attachment contemplated by the Cr. P.C.

Where a dispute relates not merely to a building but also to the goods and other movable properties within the building, a Magistrate acting under S. 145, Cr. P.C. has power to attach the movable property as well. A.I.R. 1933 Lah. 409=34 P.L.R. 368=34 Cr. L.J. 342=14 Lah. 615=142 Ind. Cas. 207.

——Ss. 88 (6-D),488—One of the co-wives obtaining maintenance order under S. 488—Certain property attached and money deposited in Court—Claim by other co-wife rejected—Suit by her under S. 88 (6-D)—Scope—Secretary of State, if necessary party.

One of the wives got a maintenance order under S. 488, Criminal P.C., and in execution thereof, got certain property attached. The property was sold and money deposited in Court. The claim of the other wife having been rejected, she instituted a suit against the co-wife under S. 88 (6-D), Criminal P.C., with a prayer that the order in the claim proceedings was incorrect :

Held, (*i*) that the mere fact, that on account of the sale of the attached property, the plaintiff asked for a decree for money instead of a declaration, did not take the suit out of the category of the suits contemplated by S. 88 (6-D) ;

(*ii*) that the suit need not have been for a declaration as attached property having been converted into money, the relief that should have been and was in fact claimed on behalf of the plaintiff was for that money itself ;

(*iii*) that the money which had been realised although capable of being realised as fine under S. 488, Cl. (3) was not in fact a fine itself and was not being held by or at the disposal of the Government for its own purposes and, therefore, the Secretary of State was not a necessary party. A.I.R. 1942 Mad. 93=54 L.W. 362=1941 M.W.N. 865=(1941) 2 M.L.J. 510=43 Cr. L.J. 325=198 Ind. Cas. 203.

——S. 88 (6-D)—Suit to establish title to attached property—Claim under sub-s. (6 a) if should first be filed.

Sub-section 6 (*d*) of S. 88, Criminal P.C., does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-section 6 (*a*). A.I.R. 1939 Cal. 746=I.L.R. (1939) 2 Cal. 52=41 Cr. L.J. 134=185 Ind. Cas. 214.

——S. 88—Property attached under S. 88—Person claiming interest in it, if can prefer suit—Decree in such suit before final disposal of property by Government—Property of Hindu attached—Co-parcener's right of maintenance of his deceased widow and unmarried daughter is burden on property—Such interest of widow and daughter, liability to attachment.

There is nothing in S. 88, Criminal P.C., which compels a person who claims an interest in the absconder's property to prefer his claim before the Magistrate, issuing the order for attachment. The right of the aggrieved person to prefer a suit without going to the Magistrate under this section has not been taken away. So long as the property has not been sold by Government or otherwise disposed of, and so long as Government have continued to remain in possession of the attached property, it would be open to any party claiming an interest in it to obtain a decree of a civil Court declaring his right in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, that decree would be binding against Government and the property could be disposed of subject to the rights established under such decree.

Under the Hindu Law, if a co-parcener takes the property of another deceased co-parcener by survivorship, he takes it with the burden of maintaining the widow and unmarried daughters of the deceased co-parcener. It cannot be said that this right of maintenance is merely personal in the sense that it has no reference to the property which he gets by survivorship. It may be that in the technical language it may not fall within the definition of " charge " under S. 100, T.P. Act. This charge is a later creation by statute, but the Hindu law has always regarded the widow's right as a burden on the property. The right of maintenance attaches to the property itself which is taken by survivorship. Such interest is not liable to attachment because, although it may not be a legal charge, Government acting under S. 88, Criminal P.C., are not in the same position as a purchaser for value. The holder of such interest for maintenance amounting as it does to a burden on the property, is entitled as a matter of right to ask the Court to create a formal charge, and that being so, it cannot be attached by Government, who are only concerned with confiscating the absconder's right, title and interest in the property. A.I.R. 1938 Bom. 321=40 Bom. L.R. 422=I.L.R. (1938) Bom. 454 =176 Ind. Cas. 453.

——S. 88—Prior to sale under S. 88, accused mortgaging property—Government can sell only equity of redemption—Suit on mortgage after sale of property by Government.

Property which is sold under S. 88, Criminal P.C. is the property of the accused, and if the accused has, before the sale under S. 88, transferred any interest in the property, that interest cannot obviously be sold. Applying this reasoning, where the accused before sale has mortgaged the property what the Government can sell and could sell is nothing more than the equity of redemption which on that day is in the mortgagor, and Government or its transferee cannot acquire any higher rights than the mortgagor had on that day. The Government by attaching the property does not get any rights in its favour beyond what the section specifically provides. In a suit by the mortgagee for the mortgage decree after the sale of the attached property by Government under S. 88, Criminal P.C., the Government is not a necessary party because on the day of the mortgage suit, the Government had transferred its right and, therefore, the only person who is a necessary party in this mortgage action is, besides the mortgagor, the person who was then in possession of the property as a subsequent purchaser of the equity of redemption, that is to say, the auction-purchaser. A.I.R. 1937 Pat. 642=18 P.L.T. 814 = 4 B.R. 125=172 Ind. Cas. 198.

——Ss. 88, 386—Fine imposed on member of joint Hindu family—Realisation of fine by attachment from joint fund—Crediting of money to Government—Application for refund of money by other members of joint family—Remedy.

Section 386 (2), Cr. P.C., contemplates the summary determination of claims made by a person other than the offender in respect of any property attached and the Local Govt. is empowered to make rules regulating the manner in which the warrants are to be executed and for the summary determination of such claims, and such claims and such procedure are concerned only with the attachment and not with the return of fines after they have been credited to Govt., and the attachment has ceased. The attachment under S. 88 ceased when the absconder surrendered or was arrested and in any case came to an end when the subsequent attachment under S. 386, was effected and the attachment under S. 386, ceased to exist and had no force when the amount of fine was taken out of the sum attached and handed over to the Crown and the remedy of any one aggrieved is not in respect of the attachment. Any right that the claimants have against the Crown will have to be agitated by a regular suit.

The matter is analogous to attachment by a Civil Court pending the determination of a suit. As long as the order of attachment remains in force, proceedings may be taken to set it aside but when the Court directs in the determination of the suit that the property attached is to be handed over to one of the parties, the remedy of any one aggrieved is not in respect of the order of attachment.

Per *Kulwant Sahay, J.* (dessenting)—As the undivided share of a member of a Hindu joint family cannot be attached in execution of a warrant issued under S. 386 (1) (*a*), Cr. P.C., the attachment of the money in realisation of the fine under S. 386 (1) (*a*), Cr.P.C., was illegal. So far as the realisation of fine by attachment under S. 386 (1) (*a*) is concerned, there is no provision for any delay between the attachment and the crediting of the money attached to Govt. It cannot be said that the application cannot be entertained because it has been made after the attached sum has been credited to Govt., and if it is entertained, the Court has jurisdiction to order a refund under S. 423 (1) (*d*) read with S. 439 (1) Cr. P.C.

Per *James, J.*—The claim made under sub-section (2) of S. 386 must be made promptly and can only be entertained so long as the attachment subsists. If such a claim has been preferred while the attachment subsists, the Court must not finally credit the money to Govt. until the claim has been disposed of ; but the summary determination of claim under sub-s. (2) of S. 386 can only be made while the attachment is subsisting. A.I.R. 1934 Pat. 181=15 P.L.T. 57=15 Cr. L.J. 682=13 Pat. 317=148 Ind. Cas. 321.

——Ss. 89 and 439—Absconder—Attachment and sale of property—Sale once effected—Cannot be set aside.

There is no provision of law under which the Chief absconder acting in the exercise of its powers under S. 439, Cr. P.C. can set aside a sale. S. 89 of the Code provides for application by the absconding offender only for restoration of the property attached, and not for claims by third parties to such property. Once the sale of the property has been duly effected, it cannot be set aside even at the instance of the absconder, or any relation of his who may apply for sale to himself. 104 P.L.R. 1911= 13 P.W.R. 1911 Cr.=8 P.R. 1911 Cr.=12 Cr. L.J. 142= 9 Ind. Cas. 826.

——Ss. 89 and 439—Absconder—Forfeiture of property—Application to set aside forfeiture—Proclamation, whether validity can be questioned.

A person applying under S. 89 to set aside an order of forfeiture of his property cannot contest the legality of the proclamation under that section but the High Court can consider it in the exercise of its revisional jurisdiction. 32 P.R. Cr. 1919=54 Ind. Cas. 994.

——S. 89—Applicability—Absconder—Application for restoration of attached property—Revision.

S. 89 applies to a case where the validity of the attachment proceedings is challenged and the absconding person can prove (1) that he was not absconding, (2) that there was no publication at all or that the proclamation was defective, *e.g.*, that no date was specified. Mere omission to affix a copy to the court-house unless it prejudices the accused is an irregularity curable by S. 537. A person aggrieved by an illegal attachment can apply for revision. 39 P.R. 1917 Cr.=48 P.W.R. (1917) Cr. =18 Cr. L.J. 979=42 Ind. Cas. 595.

——S. 89—Application after two years.

An application made after two years for relieving the attached property is out of time. S. 89 is inapplicable where attachment and sale are irregular and invalid. 40 P.W.R. Cr. 1916=6 P.R. Cr. 1917=45 P.L.R. 1917 =17 Cr. L.J. 414=35 Ind. Cas. 974.

——S. 89—Attachment of property—Application for restoration—Limitation.

The purchase " within two years from the date of the attachment " in S. 89 qualifies also the word " proves " which is connected with the word " appears " by the conjunction and under S. 89, it is necessary that the proof that the accused person had not absconded should be offered within two years from the date of attachment and it is not enough to show that the accused appeared voluntarily or was apprehended or brought before the court within that period. The section requires proof that the offender did not abscond or conceal himself for the purpose of avoiding arrest, and that he had not such notice of the proclamation as to enable him to attend in time. It is not necessary that the absconding accused should himself personally apply for the restoration of his property but any one on his behalf may apply if it satisfies the other requirements of this section. 15 Bom. L.R. 175=14 Cr. L.J. 237=19 Ind. Cas. 333.

——S. 89—Illegal attachment—Limitation of two years—If applicable.

Where land has been attached under S. 88 without a warrant, the High Court would interfere under inherent powers to set right the irregularity though not according to S. 89. 27 Cr. L.J. 1025=8 L.L.J. 608=27 P.L.R. 825=96 Ind. Cas. 977=A.I.R. 1926 Lah. 662.

——S. 89—Application for restoration—Necessary facts.

It is only when the applicant for restoration of property shows both that he had not absconded and that he had not proper notice, that the property can be restored. 8 L.L.J. 608=27 Cr. L.J. 1025=27 P.L.R. 825=96 Ind. Cas. 977=A.I.R. 1926 Lah. 662.

——S. 89—Limitation—How applicable.

It is not only necessary to make the petition but also to prove the necessary facts within the period of two years. 8 Lah. L. J. 608=27 Cr. L.J. 1025=27 P.L.R. 825= 96 Ind. Cas. 977=A.I.R. 1926 Lah. 662.

——S. 89—Restoration—No civil remedy.

A " proclaimed " person, whose immovable property has been attached and sold by a Criminal Court in proceeding under Ss. 87 and 88, Cr. P. Code, has no right to maintain an ordinary civil action for the restoration of the property sold, even though the procedure laid down for issuing the proclamation and attachment have not been strictly followed. 39 P.R. 1917; 32 P. R. 1919 and A.I.R. 1926 Lah. 662, Rel. on. A civil suit for the purpose of setting aside such a sale is impliedly barred by the provisions of Cr. P. Code. 111 Ind. Cas. 508=10 Lah. 338=A.I.R. 1928 Lah. 562.

——S. 89—What can be restored under.

What can be restored under S. 89 is the nett proceeds

of the sale and not the property. 73 Ind. Cas. 269= 24 Cr. L.J. 573=A.I.R. 1924 Lah. 420.

——S. 89—Restoration of attached property—Conditions for—Burden of proof.

Under S. 89, Cr. P.C., before the property under attachment, which is at the disposal of the Provincial Govt. under S. 88 (7) can be delivered to the proclaimed person, it is absolutely necessary for him to prove that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein. The burden of proof lies upon him and not upon the Crown :

Held, on facts that the conduct of the accused against whom a proclamation had been issued under Ss. 87 and 88, Cr. P.C., led to the inference that he did not abscond or conceal himself and was entitled to restoration of his property. A.I.R. 1943 Oudh 325=1943 A.W.R.C.C. 54=1943 O.W.N. 269=44 Cr. L.J. 804=19 Luck. 149 =209 Ind. Cas. 28.

——Ss. 89, 87—Proclamation issued by Magistrate's predecessor under S. 87, invalid—Magistrate's jurisdiction to interfere under S. 89.

The fact that a proclamation under S. 87, issued by the Magistrate's predecessor was not valid does not give the Magistrate jurisdiction to interfere which he can do only within the four corners of S. 89. A.I.R. 1942 Lah. 214= 44 P.L.R. 300=43 Cr. L.J. 791=202 Ind. Cas. 15.

——Ss. 89, 87—Orders under interference in revision by High Court.

Application purporting to be under S. 89—Magistrate finding that proclamation issued by another Magistrate was invalid but declining to interfere on ground of want of jurisdiction under S. 89—Decision upheld by Sessions Judge :

Held, that the High Court can, in revision, consider the legality of original proceedings. A.I.R. 1942 Lah. 214 =44 P.L.R. 300=43 Cr. L.J. 791=202 Ind. Cas. 15.

——S. 89—Absconder—Attachment of property—Absconder acquitted—Property, when can be released.

Section 89, Cr. P.C., lays down that before release the person suspected of absconding must prove that he did not abscond and that he did not have notice of proclamation. Before becoming entitled to the release of attached property, he should prove these two facts. Where these conditions are not satisfied, the land concerned will remain the property of the Government. 165 Ind. Cas. 602=38 Cr. L.J. 99.

——S. 89—Absconding accused—Attachment of property—When can be released.

Where in the case of an absconding accused, the Court has taken proceedings under Ss. 87 and 88, Cr. P.C., the only way the accused can proceed to obtain the release of his property under the Cr. P.C. is by an application under S. 89. A Magistrate has no jurisdiction to set aside the order of attachment whether irregular or not except by virtue of this section. He has no inherent jurisdiction to set aside an order passed by another Magistrate or even by himself even if that order was irregular or illegal. The accused has to prove, in order to have an order of attachment set aside, that he had not " absconded or concealed for the purpose of avoiding execution of the warrant " and that he had no proper notice of the proclamation. Where he has not proved the first of these essentials, he cannot have the attachment set aside. A.I.R. 1934 Lah. 987=36 P.L.R. 262=36 Cr. L.J. 457=16 L. 466=153 Ind. Cas. 954.

——Ss. 90, 76—Whether warrant issued under S. 90 to person charged with bailable offence must contain endorsement under S. 76.

The terms 'bailable warrant' and 'non-bailable warrant' are nowhere employed in the Cr. P.C. There are bailable offences and non-bailable offences. There is nothing in the Code anywhere which says that a warrant issued under S. 90, to a person who is charged with a bailable offence must contain an endorsement under S. 76. Whether such a direction should be given or not is entirely in the discretion of the Court. A.I.R. 1939 All. 156= 1938 A.L.J. 1229=40 Cr. L.J. 283=I.L.R. (1939) All. 272=1939 A.W.R. 63=179 Ind. Cas. 899.

——Ss. 90, 87 and 88—Issue of warrant without proof of service of summons—Proclamation—Attachment of accused's property—Effect.

In a case in which according to the fourth schedule of the Code, the Magistrate shall ordinarily issue a summons and such a process was, as a matter of fact issued, he cannot subsequently order the issue of a warrant, under S. 90 (*b*), Cr. P. Code, unless he first records his reasons for considering that the accused had been duly served and that in spite of such service, he had failed to appear without reasonable excuse. Before issuing a warrant for the arrest of the accused, the Magistrate must come to the conclusion that the accused, after being duly served, had deliberately disobeyed the summons or that he was keeping out of the way to evade its service. A proclamation and an order of attachment of accused's property. issued without the execution of such a warrant are illegal. 5 N.L.R. 125=10 Cr. L.J. 306=3 Ind. Cas. 575.

——Ss. 90 and 514—Offence under S. 498, I.P.C.—Warrant issued for woman enticed away—Reasons—Bond executed by surety—Forfeiture.

In a case under S. 498, I.P.C., a Magistrate can issue a warrant for the attendance of the woman alleged to have been enticed away after recording proper reasons under S. 90 of the Cr. P. Code. If the Magistrate fails to record the reasons, the warrant is illegal and a bond given by a surety for the woman's attendance is of no force and cannot be legally forfeited for non-appearance of the woman. 7 P.W.R. Cr. 1918=50 P.L.R. 1918=19 Cr. L.J. 443=44 Ind. Cas. 971.

——S. 90—Jurisdiction of Magistrate—Drawing warrant—Co-conspirator standing alone.

Where two persons were tried for murder but acquitted, and it was alleged that they together with another were co-conspirators, a warrant can be issued against that other, though the others were acquitted. 41 Cal. 754= 18 C.W.N. 580=15 Cr. L.J. 402=23 Ind. Cas. 1002.

——S. 90—Warrant—Issue of in the first instance—Reasons not recorded in writing—Adoption of printed form whether sufficient.

The issue of a warrant in the first instance without any reasons being recorded, is illegal ; resistance to such a warrant is not an offence. The language of S. 90 is imperative and requires a Court issuing a warrant in the first instance to record its reasons ; the adoption of stereotyped printed form is not a sufficient compliance with the requirements of the section. 38 Cal. 789=15 C.W.N. 1001= 15 C.L.J. 186=12 Cr. L.J. 409=11 Ind. Cas. 593.

——S. 90—Legality of warrant issued without reasons—S. 555, C.P. Code—Scope of.

Per *Curiam*—Where the warrant is good and valid on the face of it, and it is sufficient to inform the person, against whom it is issued, of the reason for its issue, the Magistrate is justified in issuing the warrant on the materials before him, and such a warrant would not be invalid merely by reason of the fact that the Magistrate did not record in writing on the order-sheet of the case the reason for its issue which might be the same as that which he had stated in the warrant itself. 38 Cal. 789, Cons. S. 555 deals with the form of the warrant itself and nothing more, and the words of S. 555 are not intended to supersede the provisions of S. 90. The words " After recording his reasons in writing " in S. 90, are not imperative but directory. Magistrates should record their reasons specifically in writing before issuing a warrant and

should not be satisfied with signing their names to warrants in the form given in the schedule.

Chatterjee, J.—The mere signing of the warrant which states that 'the Court has reason to believe', is not sufficient compliance with the law. A warrant issued by a Court without recording its reasons in writing is an illegal process. The words "after recording its reasons in writing" show that it must be done before issuing the warrant. The Legislature had some object in making the provision. The objects are, first to insure deliberation on the part of the Magistrate before issuing the warrant, and, secondly, that the person to whom the warrant is issued may know the reasons why it is issued so that such person may come before a higher Court and show that it has been wrongly issued. The question of inconvenience or consequences should be considered not only with reference to the person executing the process, but also with reference to the person who is to be affected by the process and for whose benefit the provision is made. In cases affecting the liberty of the subject there is weighty authority for holding, that even in matters of form, every form and every step in the process be followed with extreme precision. 6 Q.B.D. 376, Foll. 27 C.W.N. 857=38 C.L.J. 77=75 Ind. Cas. 129=24 Cr. L.J. 881=51 Cal. 1=A.I.R. 1924 Cal. 1 (F.B.).

——S. 90—Failure to record—Irregularity.

In a prosecution under S. 498, I.P. Code, the Magistrate issued a warrant in the first instance for arrest of the abducted woman on the application of the complainant that she would escape, without recording reasons for doing so. *Held*, the omission of the Magistrate to record the reasons for the issue of a warrant in the first instance amounted to a mere irregularity and not to an illegality and persons who forcibly rescued the woman from the custody of the constable who had arrested her under the warrant were guilty. 18 A.L.J. 1149=22 Cr. L.J. 111=59 Ind. Cas. 415=L.R. 2 A. (Cr.) 14.

——S. 90—Warrant of arrest for witness—Failure to record reasons therefor—Illegality—Irregularity.

In a prosecution under S. 498, I.P.C., the Magistrate issued a warrant in the first instance for arrest of the abducted woman on the application of the complainant that she would escape, without recording reasons for doing so. *Held*, the omission of the Magistrate to record the reasons for the issue of a warrant in the first instance amounted to a mere irregularity and not to an illegality and persons who forcibly rescued the woman from the custody of the constable who had arrested her under the warrant were guilty. 18 A.L.J. 1149=59 Ind. Cas. 415=22 Cr. L.J. 111.

——S. 90—Warrant under—Person arrested under—Order directing release and delivery to particular person or to his nominee—Legality.

See Cr. P. CODE, S. 499. 49 Cr. L.J. 1.

——S. 90—Warrant without reasons given—Invalid.

It is a necessary preliminary for a warrant issued under S. 90 that reasons should be given in writing. 38 Mad. 1088=17 Cr. L.J. 132=33 Ind. Cas. 308.

——S. 91—Magistrate, if can go to house of persons and ask them to execute personal bond under S. 91.

Section 91, Cr.P.C., is only applicable to persons who are present in Court and cannot authorise the Magistrates to go to the houses of persons and compel them to execute bonds for appearance in Court nor could he lawfully proceed to try the case unless he had issued a process as required by S. 204, Cr. P.C. 163 Ind. Cas. 413=18 N.L.J. 320=37 Cr. L.J. 837.

——Ss. 91 and 92—Bond for appearance—Magistrate's powers.

A Magistrate can demand a bond for appearance and the accused must obey the terms of the bond and appear and answer the charge even though ultimately it turns that the accused was not at all guilty. 17 A.L.J. 503=20 Cr. L.J. 384=50 Ind. Cas. 992.

——S. 91—Forfeiture.

Surety's liability to produce accused to answer one charge does not extend to producing the accused to answer charges for other offences. 76 Ind. Cas. 227=25 Cr. L.J. 131=A.I.R. 1924 Lah. 622.

——S. 91—Procedure.

A Magistrate, being of opinion that there was reason to believe that an important witness in a case pending before him might be kept out of the way by interested persons, took a bond from a Mukhtear, by which the Mukhtear undertook to produce the said witness whenever called upon during the pendency of the case.—*Held*, that such a bond was not open to objection upon the ground that no security for her appearance had been taken from the witness herself. 1901 A.W.N. 53.

——S. 91—Surety not to be rejected on police report—Not to be rejected on police report.

When sureties are offered, it is the duty of the court to accept them, unless it is satisfied that they are not proper persons. They should not be rejected on police report. 68 Ind. Cas. 35=20 A.L.J. 760=23 Cr. L.J. 499=A.I.R. 1922 All. 541.

——S. 91—Surety bond—For production before police—Void.

A surety bond for the production of any person before the Police taken by the Police Officer is void *ab initio*. 25 Cr. L.J. 712=81 Ind. Cas. 200=A.I.R. 1925 Lah. 152.

——S. 92—Witnesses, bound over, not appearing—It is for Court to take action.

Where the witnesses who were bound over fail to appear, it is for the Court to take action on the breach of the Court's order, and not for the complainant. A.I.R. 1938 Nag. 103=39 Cr. L.J. 62=172 Ind. Cas. 113.

——S. 94

Synopsis.

(*See also S.* 96).

1. **Scope and applicability.**
2. **Issuing search warrant under.**
3. **Exempted Category.**

1. Applicability and Scope.

——S. 94—Inspection of documents—Right of accused.

Denial to the accused of an opportunity to inspect certain documents on the ground of privilege was held to be a case of handicap to the accused. A.I.R. 1946 All. 227=1945 A.W.R. (H.C.) 298 (2)=227 Ind. Cas. 269=47 Cr. L.J. 1041.

——S. 94—Verbal order under Legality.

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all—Other methods of performance are necessarily forbidden. Under S. 94, no discretion is vested in a Police Officer to issue a written order and he cannot demand the production of books in any manner that he likes, for example, verbally. A.I.R. 1943 Lah. 28=44 P.L.R. 549=44 Cr. L.J. 301=I.L.R. (1943) Lah. 805=204 Ind. Cas. 535 (D.B.).

——S. 94—Civil Court acting under Sec. 476, Cr.P.C., applicability.

When a Civil Court conducts an inquiry under S. 476, it has no jurisdiction to act under S. 94. A.I.R. 1942 Nag. 73=1942 N.L.J. 188=I.L.R. (1942) Nag. 667=200 Ind. Cas. 68 (F.B.).

——Ss. 94, 155, 165—Combined effect of Ss. 94, 155 and 165—Authority to Police Officer to investi.

gate one case—Books seized not demanded for that case—He cannot investigate another non-cognizable offence under that authority—He cannot exercise powers under S. 94 and S. 165, for the other case.

The combined effect of Ss. 94, 155 and 165, Cr. P. C., is that without an order of a competent Magistrate, a Police Officer cannot investigate a non-cognizable case and further that even if he is so authorised, he has to observe the formalities as laid down in Ss. 94 and 165, before he can compel the production of any document or seize any incriminating article. Where the Magistrate has authorised a Police Officer to investigate the case against *G* but the books seized were not demanded in connection with that case, then, under this authority, he cannot investigate a separate non-cognizable case in which he could require the production of books and unless he is so authorised, he cannot use any powers which are vested in an officer in charge of a Police Station or in a Police Officer making an investigation as contemplated in Ss. 94 and 165, Cr. P. C. The seizure is, therefore, unauthorised and obviously illegal. A.I.R. 1943 Lah. 28=44 P.L.R. 549=44 Cr. L.J. 301=I.L.R. (1943) Lah. 805=204 Ind. Cas. 535.

——S. 94—Application for production of document—Court, when can order production—Such order, if involves obligation on Court to give inspection of all books produced to complainant—Question of inspection should be considered at later stages either at trial or inquiry or on special application.

When an application is made to a Court or to a Police Officer in the *mofussil* under S. 94, Cr. P.C., for production of documents, the Court is bound to consider whether there is a *prima facie* case for supposing that the documents are relevant. If he thinks they are, then he can order production and of course, his decision may be influenced by a desire to prevent the books being taken away or tampered with. But such an order for production does not involve an obligation on the Court to give inspection of all the books produced, to the complainant, though the Court has power to order such inspection. The Magistrate must consider that question at a later stage of the proceeding, either at the trial or inquiry, or on a special application, at which he can hear the accused as well as the complainant, and he should only order inspection of those books which the complainant satisfies him, are really relevant. A.I.R. 1941 Bom. 259=43 Bom. L.R. 523=42 Cr. L.J. 831=I.L.R. (1941) Bom. 492=196 Ind. Cas. 267 (F.B.).

[Overrules.—Decision of Broomfield and N. J. Wadia JJ. in 39 Bom. L.R. 1187=A.I.R. 1938 Bom. 33.]

——S. 94—Principle governing exercise of powers under S. 94.

The discretion under S. 94, Cr. P.C., must be exercised judicially, in such a way as not to conflict with the policy of the Legislature as disclosed in S. 162 of the Code and in Ss. 123 to 125, Evidence Act. Statements made to the Police are in their nature confidential and S. 162 of the Code illustrates the limited purposes for which their production should be required. It is necessary also to bear in mind, that under S. 125, Evidence Act, a Police Officer cannot be compelled to say whence he got any information as to the commission of any offence. No exception can be made in favour of a statement made by the informant. A.I.R. 1940 Bom. 361=42 Bom. L.R. 787=42 Cr. L.J. 58=I.L.R. (1940) Bom. 768=190 Ind. Cas. 779.

——S. 94—Order for production of document—Court if must give inspection—Order under S. 94, Cr. P. C. directing inspection of books—Bank, if can object—Powers of Court in matter of granting inspection—*Prima facie* relevancy of books must be established.

Obiter: There is no justification whatever for the suggestion that when a Magistrate makes an order for production under S. 94, Cr. P.C., which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents, production of which is ordered, must necessarily follow: Usually, inspection should only be given of particular documents shown to be relevant, and not of documents, in bulk and the party producing the documents in compliance with the order of the Court is not precluded from objecting to their subsequent inspection. A.I.R. 1938 Bom. 33 =39 Bom. L.R. 1187=39 Cr. L.J. 207=I.L.R. (1938) Bom. 119=172 Ind. Cas. 684 (S.B.).

——S. 94—Production of documents—Discretion of Court.

Section 94, Cr. P.C., applies to all cases including summons cases and gives the Magistrate discretion about the production of documents. When the discretion has been used judicially, the High Court will not interfere. A.I.R. 1936 Nag. 250=38 Cr. L.J. 482=I.L.R. (1937) Nag. 165=167 Ind. Cas. 860.

——Ss. 94, 257—Court's power in using machinery provided by S. 94, if controlled by S. 257—Ss. 94 and 257, whether antagonistic—Scope of.

Per *Full Bench*—Sections 257 and 94, Criminal P.C., are not antagonistic; they are interdependent. Secton 94, Criminal P.C., affords any party to an inquiry, trial or other proceedings under the Code, the facility of having documents and things produced at any stage of such enquiry, trial or proceeding. The facility is restricted. The restriction lies in the fact that the necessity or desirability of the production must be shown to the satisfaction of the Court. Section 257, Criminal P.C., gives an accused person a right, subject to another, but lesser restriction, to claim the same facility. This restriction consists in the accused having to satisfy the Court that his demand is not made for the purpose of vexation or delay or for defeating the ends of justice. A.I.R. 1935 Sind 13=36 Cr. L.J. 581=29 Sind L.R. 92=154 Ind. Cas. 762 (F.B.).

——S. 94—Courts' jurisdiction to order production of document, whether includes right to allow inspection.

The jurisdiction of the Court to order the production of a document or thing carries with it the jurisdiction to allow the right of inspection. A.I.R. 1935 Sind 13=36 Cr. L.J. 581=29 Sind L.R. 92=154 Ind. Cas. 762 (F.B.).

——Ss. 94, 517, 561-A—Search warrant, when can be ordered—Discretion of Court not absolute—Accused forging signature of complainant on cheque and depositing money in bank—Money, if can be attached from the bank.

Although the language of S. 94, is very wide, the Court's discretion under it is not absolute. The Court's discretion must be exercised judicially. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced, and that is the primary object of these provisions. Some things not necessary for evidentiary purposes may also come within them if there is any direct connection between the thing and the subject-matter of the proceeding, for instance, if the thing forms part of the proceeds of an offence. There is nothing to prevent an order being made under S. 94, for the production of a thing in anticipation of an order to be made under S. 517 at the conclusion of the trial, and there may be cases in which it is very proper to make such an order. But before doing so, the Court ought to consider the nature of the order which it will be in position to make under S. 517. It would be futile to order the production of a thing, not required

as evidence for the purposes of the inquiry or trial itself, if the only order which the Court can make with respect to it will be that it should be returned to the person producing it.

The accused was charged with stealing a blank cheque and forging the signature of the complainant after making it out for Rs. 6,000. The cheque was cashed in notes of Rs. 1,000 each and they were subsequently converted into notes of Rs. 100 each and he deposited Rs. 5,000 in the savings bank account of a bank. Shortly after, he withdrew Rs. 1,000 from the bank. The Magistrate issued a search warrant and recovered Rs. 4,000 from the bank.

Held, that neither the accused nor the complainant through the accused had any right to any particular sum of money lying in the bank. The accused had a credit for Rs. 4,000, on actionable claim for that amount; that claim could be proved but it could not be produced in Court. The money was no part of the proceeds of the offence and had no real connection with the subject-matter of the charge. Consequently, the search warrant should be quashed and the money returned to the bank. A.I.R. 1934 Bom. 74=36 Bom. L.R. 88=58 Bom. 152=35 Cr. L.J. 1028=149 Ind. Cas. 1005.

——Ss. 94 and 162.

The provisions of S. 162, Criminal P. C. do not apply to the statements recorded by Excise Inspector at his enquiry which is neither an inquiry nor a judicial proceeding within the meaning of S. 4, cls. (*k*) and (*m*) of the Criminal P.C. But accused is entitled for original statements under S. 145 of Evidence Act and they can be sent for under S. 94, Criminal P.C. 1933 M.W.N. 1270.

——Ss. 94 and 95.

The order to the police by the Magistrate to take possession of the account books of the firm was illegal; if their production was necessary, the Magistrate should have issued either a summons to produce, under S. 94 or a search warrant under S.96. 38 Cal. 68=13 C.L.J. 43=11 Cr. L.J. 525=7 Ind. Cas. 747.

——S. 94—Calling for inquest report.

In a murder case the accused has a right to a copy of the statement made by the witnesses at the inquest inquiry. Even if the inquest report is not in Court, S. 94 of the Cr. P. Code empowers the Magistrate to call for its production by the police. 85 Ind. Cas. 42=20 M.L.W. 745=26 Cr. L.J. 426=A.I.R. 1925 Mad. 424.

——Ss. 94, 105, 165—"Court"—Magistrate when a Court.

If there are no proceedings pending before him, a Magistrate cannot be said to be acting as a "Court" within the meaning of S. 94 of the Code of Criminal Procedure (Act V of 1898), and cannot, therefore, direct search to be made in his presence pursuant to S. 105 of that Code. S. 165 of the Criminal Procedure Code does not authorise a search for the purpose of discovering arms generally. 12 C.W.N. 973=8 C.L.J. 75.

——S. 94—Process for production of documents—Applicability to an accused person.

The provisions of S. 94, Cr. P. C., cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document. 12 C.W.N. 1016=8 C.L.J. 320.

2. Search Warrant.

——Ss. 94 and 165—Scope.

S. 165 does not authorise a general search. It speaks of specific document or thing which may be the subject of a summons under S. 94 and does not refer to stolen articles or incriminating articles in the possession of an accused person. It therefore does not authorise search of stolen property in the house of absconding offender. 38 Cal. 304=15 C.W.N.343=13 C.L.J.639=12 Cr. L.J.8=9 Ind. Cas. 64.

——S. 94—Inspection of Books—Search warrant—Magistrate.

It is not open to a Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject-matter of the charge at the offices of the accused's lawyers. (1903) 5 Bom. L.R. 978.

——Ss. 94 and 165—Applicability to accused persons—Search for specific stolen property after arrest.

The powers under Ss. 94 and 165 of the Code extend to accused persons. A Police Officer is empowered to search an accused's house even after his arrest for specific stolen property under S. 165 of the Code, though a general search of the house for stolen property may not be authorised by law. 41 Cal. 261=17 C.W.N. 1209=14 Cr. L.J. 405=20 Ind. Cas. 229.

——S. 94—Search warrant—Search—Magistrate.

S. 94 of the Cr. P. C. deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution. The question whether the production of a particular document or book is necessary or desirable for the purposes of any trial is one which must be decided by the Magistrate before he orders the production, and in determining that question he has to exercise his discretion judicially in the sense that he must satisfy himself that the document or book has a bearing upon, and is relevant to the case. When he has so satisfied himself, his jurisdiction to order its production comes into play and that carries with it the jurisdiction to allow the prosecution the right of inspection. (1903) 5 Bom. L.R. 980.

——Ss. 94, 96, 190 (c), 537—Search warrant, under S. 96—Magistrate's jurisdiction to issue—Cognizance of an offence under S. 193 (c)—Information, nature of, upon which cognizance could be taken—Record of the information—How much should be recorded.

The District Magistrate on receiving information of the commission of an offence cannot issue a search warrant under S. 96, para (1) Cr. P.C. before he has acted judicially upon the information so received. 22 B. at p. 949 foll. To justify a Magistrate in taking cognizance of an offence under S. 190 (*c*), Cr. P.C., upon information received from any person other than a Police Officer, the information need not contain all the allegations necessary to be proved to establish the offence; it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter. What allegations or how much of the information should be recorded by the Magistrate in such a case it is difficult to lay down in general terms; but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a *prima facie* case has been made out the High Court will not interfere with the Magistrate's action in taking cognizance under S. 190 (*c*). S. 537, Cr. P.C., cannot give legal effect to a defective warrant. (1908) 12 C.W.N. 1075=35 C. 1076.

——S. 94—Summons to produce documents—Propriety of.

The Chief Presidency Magistrate of Calcutta issued a search warrant in execution of which the books of the petitioner's firm were taken by the police in their custody. The Magistrate's order was set aside by the High Court in revision and thereupon the Magistrate issued a notice on the petitioner to take delivery of the books personally or by agent. The books were made over to the petitioner's agent and simultaneously a notice under S. 94 was served on the petitioner's agent and the books were re-taken. *Held*, that the order under S. 94, Cr. P.C. was proper. 47 Cal. 647=24 C.W.N. 410=31 C.L.J. 188=57 Ind. Cas. 97=21 Cr. L.J. 577.

——S. 94—Summons—Non-production—Incriminating document.

During the pendency of an appeal against an order refusing sanction to prosecute defts. For perjury and forgery the defts. with the leave of the Court withdrew the account books and when required to produce them failed to do so. *Held*, that defts. were not in the position of accused persons and were therefore bound to produce the book although it might incriminate them. 4 Pat. L.W. 65=19 Cr. L.J. 217=43 Ind. Cas. 793.

——S. 94—Summons to produce document—Incriminating nature.

Under S. 94 of the Cr. P. Code a Magistrate can issue summons to an accused person to produce a document or other thing, the production of which might tend to incriminate him. 15 C. 109, Foll. ; 12 C.W.N. 1016, Not foll. 37 Mad. 112=13 Cr. L.J. 493=15 Ind. Cas. 493.

3. Exemptions.

——S. 94—Commercial concerns, if entitled to protection.

Commercial concerns are entitled to protection from disclosure of matters which have nothing to do with the case before the Court, which disclosure may be detrimental generally to their interests and may therefore, be used by the persons accused as a lever to secure withdrawal of the prosecution. A.I.R. 1943 Sind 51=I.L.R. (1942) Kar. 292=44 Cr. L.J. 324=205 Ind. Cas. 107.

——S. 94—Scope—Document must be *prima facie* relevant evidence in the case.

Section 94, Cr. P.C., gives power to the Court to require the production of documents when it considers their production necessary or desirable for purposes of investigation, and if documents are considered necessary or desirable for that purpose, before an order under this section can be made, it must appear, at least *prima facie* that they are likely to be relevant evidence in the case.

If the nature of the documents asked for is such that in the circumstances of the case, their relevance, at least *prima facie*, speaks for itself, it is not necessary for the accused, seeking production, to state explicitly the purpose for which they required them or to elaborate in their application what in fact was obvious. But where the relevancy of the documents asked for does not speak for itself, and the application itself discloses no grounds why production of document is necessary or desirable, it is the duty of the Magistrate to consider whether their production was necessary or desirable, and it is not open to him to evade his responsibility on the plea that he might have to hear the nature of the defence which the accused might make. A.I.R. 1943 Sind 51=I.L.R. (1942) Kar. 292=44 Cr. L.J. 324=205 Ind. Cas. 107.

——S. 94 (3)—Documents protected under S. 126—Evidence Act (I of 1872), whether exempted under S. 94 (3).

Clause 3 of S. 94, Cr. P.C., does not exempt documents protected under S. 126, Evidence Act, and the production of such documents is incumbent under S. 162, Evidence Act, notwithstanding any objection which there may be to the production or admissibility. A.I.R. 1939 Mad. 914 = 50 L.W. 428=(1939) 2 M.L.J.=634 (1939) M.W.N. 1127=41 Cr. L.J. 186=185 Ind. Cas. 419.

——S. 94 and Banker's Book Evidence Act, S. 5—if conflicting.

Prosecution against auditors of a Bank—Allegations of false statements made in the balance sheet of the Bank —Summons against Managing Director for production of documents and book—Certain documents held as relevant—Complainant was entitled to the inspection of those documents—There was no conflict between the provisions of S. 94, Cr. P.C. and Bankers' Books Evidence Act, Ss. 5 and 6. I.L.R. (1938) Bom. 31.

——S. 94—Lien—Solicitor's general lien—Order under S. 94, for production of documents—Solicitor's general lien, if good answer.

A Solicitor's lien is a right exercisable against the client, and gives the Solicitor no higher right against third persons than the client himself possesses. Thus, notwithstanding the lien, the Solicitor can be compelled to produce the papers in his possession if his client would have been bound to produce them.

Therefore, a Solicitor's general lien upon documents is no answer to an order made under S. 94, Cr. P.C. Where for the purpose of substantiating the charge under S. 497, I.P.C., against the accused, it is necessary that the Crown should use the documents as evidence against the accused, the Court is entitled under S. 94, Cr. P.C., to issue a summons for the production of any such document necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under the Code as provided by that section. Such an order can be made by the Court summoning the complainant to produce such documents, these documents being the property of the complainant. If, therefore, the complainant can be ordered by the Court to produce documents belonging to him, similarly his Solicitor or Attorney may be ordered to produce them if they are in his possession, and this, regardless of whether he has a lien upon them or not. (1936) 163 Ind. Cas. 224=39 C.W.N. 917 =62 C. 1037=37 Cr. L.J. 825.

——Ss. 94 and 96.

Income-tax returns and statements—Power of police to order their production during investigation—Issue of search-warrant by Magistrate—Legality. *See* Income Tax Act, S. 54. A.I.R. 1950 E.P. 306=52 P.L.R. 229 (F.B.).

——S. 95—Search—Finding of articles after fruitless search, value of as against accused.

Accused when pointed out in bazaar by his co-accused was not searched. He was driven on the ekka to the Deputy Superintendent's, where he was searched, and nothing incriminating was found. When the party came away from the Deputy Superintendent it was decided to leave the ekka. Two coats belonging to the two constables had been spread on the ekka and the four men had sat on them the two prisoners, unhandcuffed, sitting between the constables. When the coats were removed from the ekka, three ornaments, two being basibunds, *i.e.*, articles of some size, were found concealed beneath. The evidence of finding was hopelessly contradictory.

Held, that accused's costume was such that concealment of these articles must have been difficult. It must also have been difficult for them to put them under the coats upon which the four men were sitting. 73 Ind. Cas. 62=21 A.L.J. 143=45 All. 300=4 L. R. A. Cr. 13 =24 Cr. L.J. 526=A.I.R. 1923 All. 352.

——S. 96.

Synopsis.

(*See also S.* 94).

1. **Applicability and Scope.**
2. **Search warrant—Duty of Court.**

1. Applicability and Scope.

(*See also S.* 94).

——S. 96—Defence—Rights of accused—Right of inspection.

Neither the Criminal P.C. nor the High Court (Mad.) Rules contain any provision as to the right of inspection by the accused of the records in the custody of the Court in which he is being tried. Permission will be refused if the object is to fish for information. If there are documents relied upon by the accused to dislodge the prosecution case or to build up his order, he will have to take out a

[illegible]

S. 96 *Discretion of police subordinate to Magistrate. Obstruction of investigation, if unjustified.*

[illegible]

S. 96 *Complainant not recognized.*

[illegible]

S. 96 *Interpretation. If could be allowed.*

[illegible]

S. 96 *"Person" meaning of. Powers of Magistrate. Discretion in possession of warrant.*

[illegible]

S. 96 *Procedure. Illegal warrant. Effect of.*

[illegible]

S. 96 *Search warrant can void.*

[illegible]

Ss. 96, 165, 165A *Search. Police officer. Powers and duties of. S. 1.*

[illegible]

(1898) 36 C. 433=13 C.W.N. 438=9 C.L.J. 286=4 Bom. Cr. 436.

S. 96 *Search warrant. Copy right. Production of infringing books, etc.*

A Magistrate has power under S. 96, Cr. P. Code to issue a search warrant for the production of copies of the infringing book, pamela, plates printed, and all the materials together with letters with reference to the book for the purpose of making an enquiry under S. 53 of the Copyright Act. If a person against whom such a search warrant is issued proves the due steps thereof and after an undertaking not to sell copies of the infringing books but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of the warrant notwithstanding the fact of the institution of a suit to produce the copies in Court. 47 Cal. 108=24 C.L.J. 381=1 Ind. Cas. 1000.

Ss. 96 and 165 *Search Warrant when issued.*

A Magistrate can only act under S. 165, when he is competent to issue a search warrant and for this issue a search warrant under S. 96 where acting as a "Court". 36 C. 433=13 C.W.N. 438=9 C.L.J. 286=4 Bom. Cr. 436.

S. 96 *Search warrant. Conditions must be strictly adhered to.*

[illegible]

Ss. 96 and 165.

[illegible]

S. 96 *Search warrant. Enquiry about to be made. Proceedings not pending. Warrant, if can be issued. Warrant on behalf of Customs Authorities. Issue of warrant. Sea Customs Act. Powers of warrant. Sea Customs Act 1878, S. 167 (2).*

[illegible]

The provisions of a box of which the petitioners were deprived by order of the Chief Presidency Magistrate on August 1, 1925, and a large number of books and files belonging to the firm were seized and brought over to the Customs Authorities. A warrant was issued under S. 96 of the Criminal P.C., on the strength of a letter addressed to the Chief Presidency Magistrate by the Collector of Customs, Bombay. The letter was received by a Customs officer in the Magistrate and the officer was requested to exhibit affirmation before whom it was issued.

Held, that the persons which the Customs Authorities were seeking were not things or documents under the Criminal P.C., the issue of the warrant was not justified by the terms of S. 96 [illegible] of the Criminal P.C., and that all possession of the documents had been obtained by illegal means, the documents should be returned to the petitioners.

Although the first two clauses of S. 96 [illegible] Criminal P.C., relate back to S. 94, cl. (1) does not and is subject

dent of the provisions of S.94. A.I.R. 1934 Bom. 104=36 Bom. L.R. 96=35 Cr. L.J. 1024=149 Ind. Cas. 1021.

——S. 96 (1)—Issue of warrant in anticipation of inquiry or trial.

For a Magistrate to use his powers under S. 96 (1) (3) it is not necessary that there should be an inquiry, trial or other proceeding pending at the time the search warrant was issued and a Magistrate can use his powers under this clause in anticipation of such inquiry or trial. A.I.R. 1940 Cal. 97=I.L.R. (1940) 1 Cal. 231=44 C.W.N. 82=41 Cr. L.J. 329=186 Ind. Cas. 486.

——S. 96 (1) (3)—S. 96 (1) (3), if empowers issue of warrant to help investigation by Police or Customs officers.

Clause 3 of S.96 (1), Criminal P.C. has nothing whatsoever to do with an investigation. It does not provide for any step to be taken in aid of an investigation but it provides for something which the Magistrate may do for the purpose of serving an inquiry, trial or other proceeding under the Code. Clause 3 of S. 96 (1) does not empower a Magistrate to issue a warrant to help the investigation by the Police and the Customs Authorities. A.I.R. 1940 Cal. 97=44 C.W.N. 82=41 Cr. L.J. 329=I.L.R. (1940) 1 Cal. 231=186 Ind. Cas 436.

——S. 96 (1)—Warrant, if can be issued when proceedings are in contemplation.

A warrant can be issued not only in proceedings already started but also when proceedings are in contemplation. A.I.R. 1937 Rang. 206 (207)=38 Cr. L.J. 983=170 Ind. Cas. 870.

——S. 96 (1).

Where an Inspector is conducting an investigation under S. 156, Criminal P.C., and not an enquiry, the issue of a search warrant in general terms and not for search of particular document or things, is illegal under S. 96 (1). A.I.R. 1937 Rang. 206=38 Cr. L.J. 983=170 Ind Cas. 870.

——S. 96.

Warrant issued under S.96—The presumption of common gaming house referred to in S.6 of the Madras Gaming Act does not apply. A.I.R. 1935 Mad. 648=1934 M.W.N. 1170=68 M.L.J. 421=36 Cr. L.J. 799=41 M.L.W. 679=155 Ind. Cas. 496.

——S. 96—Madras Gaming Act, 1930, Ss. 5, 6—Defects in warrant—Remarks in judgment supplying defects.

The remarks of a Magistrate which are intended to supply the omission or defects found in a warrant and to vary its terms are not admissible as evidence. The warrant is to be in writing and must contain all the matters that the law requires to be stated therein. A.I.R. 1935 Mad. 648=1934 M.W.N. 1170=68 M.L.J. 421=36 Cr. L.J. 799=41 M.L.W. 679=155 Ind. Cas. 496.

——S. 96 (3)—General Search warrant—No pending enquiry or trial—Effect of.

On the application of an officer specially appointed to detect munitions scandals, to the effect that the books and accounts of the petitioner's firm were necessary for the purpose of the said investigation and the Magistrate issued a general search warrant in respect of the books and documents. *Held*, that there was no enquiry or trial or other proceedings under the code and there were no materials before the Magistrate on which he could decide and that the search warrant was illegal. (*Per Newbould, J.*) When the law requires the sanction of a Magistrate before the issue of a search warrant, it means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply because the Police officer asks him to do so. 47 Cal. 597=24 C.W.N. 403=31 C.L.J. 345=21 Cr. L.J. 313=55 Ind. Cas. 473.

2. Search warrant—Duty of Court.

——S. 96—Search warrant, issue of—Duty of Court.

The cost of issuing a search warrant being a judicial act, Magistrate must weigh the circumstances before issuing it. A mere statement in an affidavit that in the opinion of the deponent a summons may not have the desired effect, is not sufficient to justify the issue of a warrant. (1917) M.W.N. 494=6 L.W. 287=18 Cr. L.J. 837=41. Ind. Cas. 661.

——S. 96 (1)—Search warrant, when should be issued—Duty of Magistrate in this respect.

A search warrant is not to be issued automatically or for the mere asking. It can only be issued when the Court considers that the purposes of an enquiry would be served. The Magistrate must apply his judicial mind to the question and must satisfy himself that the issue of the warrant is necessary and that the requirements of the law for the issue of the warrant are present. He must see whether there are sufficient materials before him to justify the drastic action which he is being invited to take. When it appears that a Magistrate has not applied his mind in this way and when it appears that action has been taken on insufficient material, the High Court will always interfere. A.I.R. 1940 Cal. 97=I.L.R. (1940) 1 Cal. 231=41 Cr. L.J. 329=44 C.W.N. 82=186 Ind. Cas. 486.

——S. 96—Duty of Court.

Before issuing a search warrant the court must consider whether a summons to produce would not have the desired effect. The court must appreciate the seriousness of the step. Issue of a search warrant without examination of the complainant is at least irregular. The statement of a counsel appearing for the complainant is not information on which a Magistrate is entitled to issue a search warrant. 8 A.L.J. 517=12 Cr. L.J. 175=9 Ind. Cas. 991.

——S. 96—General search warrant—Issue of, when justifiable.

Per Choudhuri, J.—An order under S.96, Cr. P.C. cannot be made to further a police investigation which may or may not result in an enquiry, but the section refers to an enquiry now being made or about to be made. *Per Newbould, J.*—There is a difference between investigation that is being made and an enquiry about to be made. A Magistrate can under S.96 issue a search warrant before proceedings about an enquiry about to be made are begun. 24 C.W.N. 405=31 C.L.J. 267=57 Ind. Cas. 93=21 Cr. L.J. 573.

——S.96—Search warrant—Issue of—Legality.

Where a search warrant is issued upon an application in which certain offences are disclosed as having been committed by the accused after cognizance of those offences has been taken by the Magistrate, he is quite within his power in issuing search warrant under S. 96. 49 C.L.J. 164=33 C.W.N. 369=116 Ind. Cas. 721=30 Cr. L.J. 705=A.I.R. 1929 Cal. 176.

——S. 96—General search warrant—When justified.

If a Magistrate issues search-warrant proceeding merely on the suspicions as regards the nature of a person's business and the assurance given by the police that a general search is necessary, such order is illegal. 121 Ind. Cas. 499=1929 Cr. C. 565=31 Cr. L.J. 272=A.I.R. 1929 Lah. 837.

——S. 96 (1)—Issue of search warrant—Legality.

The Magistrate has no authority to issue a search warrant merely on the complainant's application and the reason that the accused will not produce the goods on summons is not a sufficient reason. 12 P. W.R. 1916 Cr. =17 Cr. L.J. 60=32 Ind. Cas. 652.

——S. 96.—Search warrant—Issue of—Discretion.

The first para of S 96, Cr. P.C., requires as a condition precedent to the issue of a search warrant that the court

must have reason to believe that the person against whom the search warrant is issued is not likely to produce the document or thing in his possession as required by a summons or order under S.94 or a requisition under S.95 (1) of the code served upon him or that he is not likely to produce it should such summons or order or requisition be served. (1903) 5 Bom. L.R. 1032.

——Ss. 96 and 98—Search warrant—Object of—Theft case.

The object of a search warrant in a theft case is to secure identification of the property for the purpose of the trial and to ascertain if it is really in the possession of the accused or not; delay in the issue thereof defeats the purpose for which it is issued. 22 C.W.N. 719=19 Cr. L.J. 707=46 Ind. Cas. 291.

——Ss. 96 and 105—Search warrant—Power of District Magistrate when not sitting as a court—General search.

The word " Court " in S. 96 Cr. P.C. includes " Magistrate " and a Magistrate is perfectly within his jurisdiction in directing a search to be made in his presence, not merely when actually sitting as a court, but in view of any enquiry about to be made by him. Where it appeared that a serious riot had been committed within the jurisdiction of a District Magistrate and it was his duty to inquire into the offence and he accordingly searched the respondent's cutcheries for arms. *Held*, that under Ss. 96 and 105 Cr. P.C. he was authorised so to do. 39 Cal.953 =39 I.A. 163=(1912) M.W.N. 760=12 M.L.T. 171=10 A.L.J. 193=16 C.L.J. 231=16 C.W.N. 865=23 M.L.J. 32=14 Bom. L.R. 717=13 Cr. L.J. 693=16 Ind. Cas. 501 (P.C.). On Appeal from 36 Cal. 433=13 C.W.N. 458 =9 C.L.J. 298=2 Ind. Cas. 436. See also 12 C.W.N. 973=8 C.L.J. 75.

——S. 96—Search warrant, scope and object of—Penal Code, Ss. 482 and 486.

The power of issuing a search warrant is not to be used for giving complainants an opportunity of fishing for evidence. The warrant is intended for use in respect of documents believed to exist, which must be clearly specified in the warrant, and before issuing it the Magistrate must have before him some information or evidence that the documents are necessary or desirable for the purposes of the inquiry before him. To issue a search warrant for the search of a man's house and for the production of all papers and books in it for the purposes of an inquiry as to whether he had used or sold articles with a Counterfeit Trade Mark, is a gross perversion of the law. 9 L.B.R. 45=10 Bur. L.T. 216=17 Cr. L.J. 543=36 Ind. Cas. 591.

——S. 98—Search warrant—Necessity.

Search warrant under S. 98 is necessary for a general search for stolen property in the house of an absconding offender. 38 Cal. 304=15 C.W.N. 343=13 C.L.J. 639= 12 Cr. L.J. 8=9 Ind. Cas. 64.

——S. 98—Special warrant—Endorsement illegal.

The special warrant when issued authorizes the officer or officers named therein to do all the things that are detailed in the warrant. It cannot be endorsed over to any other police-officer of similar rank. The only person who can execute such a warrant is the officer who is named in the warrant. 116 Ind. Cas. 251=53 Bom. 367=31 Bom. L.R. 158=30 Cr. L.J. 595=12 A.I. Cr. R. 466=A.I.R. 1929 Bom. 157.

——S. 99-A, scope of—Conditions of applicablity.

In order to make S. 99-A, applicable, two things are necessary : (1) promotion of feeling of enmity or hatred and (2) between different classes of the subjects. Everything done which may have a remote bearing on promoting feelings of hatred or enmity would not be an offence. There should either be the intention to promote such feelings or such feelings should be promoted as a result of such publications. Again feelings of enmity and hatred should be aroused between two classes of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two groups opposed to each other. A vague, indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately, although it is not necessary that the classes should be so distinct and separate as to make it easy to put an individual in one class or the other. The section does not contemplate the penalising of political doctrines, even though of the extreme kind like communism, but merely such writings as directly promote feelings of hatred or enmity. A.I.R. 1936 All. 561=1936 A.L.J. 786=1936 A.W.R. 638=37 Cr. L.J. 943=I.L.R. (1937) All. 69=164 Ind. Cas. 253 (S.B.).

——S. 99—Arrest by police officer—Resistance to—Legality—Right of private defence.

No one has a right of private defence against the act of a police officer in arresting him, under colour of his office, though such act is not strictly justified by law. 229 Ind. Cas. 611=A.I.R. 1948 Cal. 95=48 Cr. L.J. 464.

——S.99-A—Advertisements.

Document though advertisement can be forcfeited under S. 99-A—However, advertisement of forthcoming book unless seditious by itself cannot be forfeited because it is intimately associated with seditious book. 1930 A.L.J. 713=A.I.R. 1930 All. 401=125 Ind. Cas. 470=52 All. 775 (F.B.).

——S. 99-A—Justfication.

In order to justify forfeiture under S.99-A it is necessary for the Government to satisfy the Court that on the evidence produced by the prosecution a conviction could have been had under S. 153-A, I.P.C. 9 Lah. 663=29 P.L.R. 385=29 Cr.L.J. 899=111 Ind Cas. 659=11 A.I. Cr. R. 120=A.I.R. 1928 Lah. 245 (S.B.).

——S. 99-A—Translation of original book written by non-Indians—Book directed against supposed capitalists who exploit the working classes—Original authors not having His Majesty or British Government in India in mind.

It cannot be laid down as any general proposition that translations should be permissible when the originals are not prescribed. Translations in Indian vernaculars may become accessible to a very large population and the danger arising therefrom may be immensely greater, calling for the intervention of the Government. The Courts are not concerned with the policy underlying such forfeitures. The sole consideration is whether the books contain any objectionable matter referred to in S.99-A, Criminal P.C.

Where the authors of the original books did not have His Majesty the King-Emperor of the Government established by law in British India particularly in mind and were attempting to deal with certain supposed conditions prevailing in the entire world, it is very difficult to hold that these books bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards His Majesty or the Government established by law in British India. It is possible that such writings may have the remote effect of causing some disaffection. But it cannot be said that there was any such intention directly implied. When they seem to be directed against supposed capitalists who exploit the working classes, the translation cannot be brought within the scope of S. 99-A. A.I.R. 1936 All. 561=1936 A.W.R. 638=1936 A.L.J. 786=37 Cri. L.J. 943=I.L.R. (1937) All. 69=164 Ind. Cas. 253 (S.B.).

——S. 99-A—Powers under, are in public interest.

When the Government acts under S.99-A, Criminal P.C., and suppresses a publication, it does so in the public interest and it is not concerned with the intention of the author of the publication. The powers given to the Government by S. 99-A were clearly for the purpose of enabling the Government to take steps to avoid trouble which

such publication might possibly cause. A.I.R. (Vol. 23) 1936 All. 314 = 58 All. 849 = 1936 A.L.J. 165 = 1936 A.W.R. 227=37 Cr. L.J. 599=162 Ind. Cas. 507 (S.B.).

——S.99-A—Scope of S. 99-A, is wider than S. 153-A, Penal Code (Act XLV of 1860).

The scope of S. 99-A, Cr. P.C., is wider than that of S. 153-A, I.P.C., because " intention " falls short of "attempt " and has in addition been made an alternative ground. A.I.R. 1936 All. 314=1936 A.L.J. 165=1936 A.W.R. 227=37 Cr. L.J. 599=58 All. 849=162 Ind.Cas. 507 (S.B.).

——S. 99-B—Burden of proof.

Where an application is made under S.99, I.P. Code, to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of S.153-A, I.P.C., it is for the applicant to convince the Court that for the reasons he gives the order is a wrong order. 49 All. 856=A.I.R. 1927 All. 649 (S.B.).

——S. 99-B—Order of forfeiture of publication sought to be set aside—Burden of proof—Who should open the case.

The language of S.99-B, Cr. P.C., is very clear, and it allows the applicant to have the order set aside by the High Court on the ground that the book in respect of which the local Government's order was made did not contain any seditious matter or other matters referred to therein. There is nothing in the framework of the section or its language which would suggest that the intitial burden of proof is on the Government and that, therefore, the Crown counsel must open the case and support the order of the Local Government and then have the final right of reply. On the other hand, the language clearly indicates that it is the applicant who has to make out a case in his favour. Consequently it is the right of the applicant to open the case. A.I.R. 1936 All. 314=58 All. 849=1936 A.L.J. 165=1936 A.W.R. 227=37 Cr. L.J. 599= 162 Ind. Cas. 507 (S.B.).

——S.99-D—Special Bench not satisfied that book is objectionable—Passage capable of two interpretations—Order of forfeiture.

The language of S.99-D, Cr. P.C. makes it perfectly clear that if the Special Bench is not satisfied that the book contained objectionable matter, it shall set aside the order of forfeiture. It would, therefore, follow that even where a passage is open to two interpretations and the matter is in doubt, the Bench would not be satisfied that the matter is objectionable, and must, therefore, set aside the order of forfeiture. A.I.R. 1936 All. 314=1936 A.W.R. 227=37 Cr L.J. 599=1936 A.L.J. 165=58 All. 849=162 Ind.Cas. 507 (S.B.).

——S. 99-D—Meaning.

The explanation of S. 99-D is that if the High Court is left in doubt after hearing the application it should set aside the order, which may be said to be contrary to the ordinary practice in an appeal in a civil suit. 49 All. 856=A.I.R. 1927 All. 649 (S.B.).

——S. 99-D—Burden of proof.

It is manifestly most convenient that Government Advocate should begin and state the case in support of the Local Government. But where both parties have been heard fully the question of *onus* is of very little or no practical importance. 1930 A.L.J. 713=A.I.R. 1930 All. 401=125 Ind. Cas. 470=52 All. 775 (F.B.).

——S. 99-D—Point in issue.

When an application is made to the High Court under S. 99-B in respect of a document, the High Court is precluded by S. 99-D from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and come within the mischief aimed at by S. 124-A. 47 All. 298=23 A.L.J. 1 =26 Cr. L.J. 679=6 L.R.A.Cr. 65=86 Ind. Cas. 55 =A.I.R. 1925 All. 195 (F.B.).

——S. 99-D—Several books published—Whole lot should be looked into.

Where the applicant is alleged to have published a series of books, the whole series must be looked to, to determine whether the passages contained therein are seditious. 47 All. 298=23 A.L.J. 1=26 Cr. L.J. 679= 6 L.R.A.Cr. 65=86 Ind. Cas. 55=A.I.R. 1925 All. 195 (F.B.).

——S. 99-D—Two views possible—Benefit to applicant.

Where a document admits of two reasonably possible views the applicant must have the benefit of that which is most favourable to him. 1930 A.L.J. 713=A.I.R. 1930 All. 401=125 Ind. Cas. 470=52 All. 775 (F.B.).

——S. 99-F—Procedure under—Costs.

The proceedings under S. 99-F are *sui generis* but the particular exclusion by S. 99-F of the practice in suits and the very provisions for an order for the payment of costs suggest that regard is intended to be had to the practice in civil miscellaneous proceedings. It is therefore reasonable that the cost of the other side so far as it may be found to have been reasonably incurred should be paid by the person to whose action the incurring of those costs was due. 1930 A.L.J. 713=A.I.R. 1930 All. 401=125 Ind. Cas. 470=52 All. 775 (F.B.).

——S. 100—Jurisdiction to issue warrant under—Prerequisites. 47 Cr. L.J. 76=221 Ind. Cas. 6=1945 A.W.R. (C.C.) 9 (1)=1945 O.W.N. 19=A.I.R. 1945 Oudh 170.

——S. 100—Illegal detention—Condition precedent for issue of warrant under.

Section 100 requires that the Magistrate must have reason to believe, before issuing the warrant, that the person for whom the warrants are sought was being confined under circumstances which would amount to offence. A.I.R. 1945 Oudh 170=1945 O.W.N. (C.C.) 19=47 Cr. L.J. 76=1945 A.W.R. (C.C.) 9 (1)=221 Ind. Cas. 6.

——S. 100—Basis of.

A Magistrate can issue a warrant under S. 100 merely upon an application of a complainant. Otherwise it would necessitate the Magistrate almost in every case to try out a case before he could determine the question whether it was a *bona fide* application that was being made to him. 30 Cr. L.J. 175=11 P.L.T. 31=12 A.I.Cr. R. 24=113 Ind. Cas. 578=A.I.R. 1928 Pat. 550.

——S. 100—Child—Order for removal—Health and safety.

On an application for recovery of a child by its adoptive mother from the natural father, the health or safety of the child in his being allowed to live with his natural parents, should be a paramount consideration for the Court. 24 C.W.N. 104=29 C.L.J. 603=20 Cr. L.J. 722 =52 Ind. Cas. 889.

——S. 100—Complaint against husband for keeping wife in confinement—Procedure.

The Magistrate taking cognizance of the case on a complaint against a husband for keeping his wife in confinement, is not justified in passing a hasty order; he must hear both sides and after making necessary inquiry he should pass such order as may seem right. If he finds the confinement proved, he should let the wife go and warn the husband. If he finds otherwise he should advise the wife to go home with her husband warning the husband at the same time against using any coercion in taking the wife with him. 29 P.W.R. 1910 Cr.=11 Cr. L.J. 450=7 Ind. Cas. 354.

——S. 100

Offence under S. 363, Penal Code, committed—Sub-Inspector during investigation going to petitioner's house and asking him to produce girl and person suspected to have kidnapped her—Petitioner denying persence of

such persons—Sub-Inspector having no warrant under S. 100, seeking to search house—Assault on Sub-Inspector.

Held, that as the Sub-Inspector was investigating the offence under S. 363, Penal Code, which is cognizable, he could arrest the petitioner without having the warrant of arrest under S. 100, Cr. P.C. A.I.R. 1942 Pat. 281=43 Cr. L.J. 279=8 B.R. 307=197 Ind. Cas. 827.

——S. 100—Complaint by person against certain persons under S. 497, Penal Code (Act XLV of 1860), that they were carrying on intrigue with his wife—Wife living in her mother's house—No allegation that wife was confined under circumstances amounting to offence—Issues of warrant for wife's arrest under S. 100.

A person lodged a complaint against four persons charging them with an offence under S. 497, Penal Code. The gist of the complaint was that they were carrying on an intrigue with his wife. The information before the Magistrate was that the wife was living in her mother's house, and there was not even a suggestion in the complaint that she was being detained by her mother against her will. On receipt of that complaint, the Magistrate issued a warrant under S. 100, Cr. P.C., against the wife and when she had been arrested under that warrant, he proceeded to make an order consigning her to a certain *Ashram* :

Held, that there was no allegation in the complaint that the woman was confined under circumstances in which that confinement would amount to an offence. Without such an allegation in the complaint, there was no jurisdiction to issue a warrant under S. 100 and the subsequent order directing what amounted to detention in custody of the person arrested under that warrant was clearly also without jurisdiction. A.I.R. 1938 Cal. 704=40 Cr. L.J. 58=43 C.W.N. 363=178 Ind. Cas. 405.

——S. 100—"So confined" in S. 100, scope of—Police Officer executing search warrant, whether should look to its legality—Constables executing warrant under colour of office and in good faith—Technical flaw in warrant—Persons against whom it was issued whether have right of private defence.

The words "so confined" in S. 100, Cr. P.C., should be taken in the context in which they occur, and should be taken to imply "believed to be so confined". The section, which in this respect is not happily worded, lays down that it is for the Magistrate to find whether there are reasons for believing that any person is in wrongful confinement ; and if he is so satisfied and issues a search warrant, the Police Officer, to whom the warrant is addressed, has merely to execute it according to its tenor. He must search for the person believed by the Magistrate to be unlawfully detained. The Officer charged with the execution of the warrant is not expected to disregard the finding of the Magistrate, and all that he is to do is to search for the person in question and to take him to the Magistrate. A.I.R. 1936 All. 306=1936 A.W.R. 223=1936 A.L.J. 468=37 Cr. L.J. 548=162 Ind. Cas. 339.

——S. 100—Deputation—Special warrant.

An officer to whom a search warrant was issued under S. 100 to search a house of a particular person to find out a woman alleged to be detained there endorsed it on to another officer stating that the officer to whom he endorsed it might execute the warrant if the person was confined outside.

Held, that there was no justification for the police officer to do so. 30 Cr. L.J. 175=11 P.L.T. 31=12 A.I. Cr. R. 24=113 Ind. Cas. 578=A.I.R. 1928 Pat. 550.

——S. 100—Place—Obiter.

It is not illegal for a Magistrate to issue a warrant under S. 100 without confining to it any particular place. 30 Cr. L.J. 175=11 P.L.T. 31=12 A.I. Cr. R. 24=113 Ind. Cas. 578=A.I.R. 1928 Pat. 550.

——Ss. 100 and 96—Warrant—Adoption of form under S. 96—Legality of.

There being no prescribed form of warrant under S. 100, the Magistrate who issued it adopted a form under S. 96 to the provisions of S. 100, by altering the figures and also by drawing up the warrant in terms required by S. 100. *Held*, that the warrant was perfectly legal. It is immaterial what form is used provided that the substance of the warrant complies with the requirements of S. 100. 45 Cal. 905=28 C.L.J. 304=20 Cr. L.J. 47=48 Ind. Cas. 687.

——Ss. 100 and 552 and Penal Code (Act XLV of 1860) Ss. 147 and 832—Warrant—Destruction by accused—Presumption of legality.

Where a warrant was issued under S. 100 on an application made under S. 532, but the accused snatched it and tore it away, *Held*, that the warrant must be presumed to contain what is stated in S. 100. 39 Cal. 403=16 C.W.N. 336=13 Cr. L.J. 186=13 Ind. Cas. 1002.

——S. 101—Exercise of power under—Search warrant.

Search warrants are always open to very serious objections and very great particularity is justly required by law in cases where they are authorized before the privacy of a man's premises is allowed to be invaded by the minister of the law. 53 Cal. 718=30 C.W.N. 713=27 Cr. L.J. 920=96 Ind. Cas. 264=A.I.R. 1926 Cal. 966.

——S. 101—Police officer—Warrant under S. 6 of the Burma Gambling Act—Endorsement of.

A police officer to whom a warrant under S. 6 of the Burma Gambling Act has been directed, has no power to endorse the warrant to any other officer. S. 101 of the Cr. P. Code does not apply to warrants under the Gambling Act. 12 Bur. L.T. 165=21 Cr. L.J. 9=54 Ind. Cas. 57.

——S. 102.

Applicability—Apprehension of murderer bolting himself in a house—Entry by police into house—Duty to effect search publicly. I.L.R. (1946) Mad. 510=1945 M.W.N. 556=58 M.L.W. 491=A.I.R. 1945 Mad. 523=(1945) 2 M.L.J. 249.

——S. 102—Applicability—Bengal Excise Act.

Ss. 102 and 103, Cr. P. Code, do not apply to the search made under the Bengal Excise Act. 54 Cal. 601=31 C.W.N. 667=102 Ind. Cas. 547=28 Cr. L.J. 579=8 A.I. Cr. R. 114=A.I.R. 1927 Cal. 527.

——S. 102—Case of murder—General investigation—Formalities.

Section 102 relates to search warrants issued under S. 96 or 98, that is to say, formal searches. In an emergency in a case of investigation of the alleged murder, when the Police are not going in for the purpose of a search for any specified object but for a general investigation, there is no provision in the Code which imposes on them the duty of searching respectable citizens or themselves before the public, before commencing the search. A.I.R. 1945 Mad. 523=(1945) 2 M.L.J. 249=1945 M.W.N. 556=58 Mad. L.W. 491.

——S.102—Proceeding—Criminal case, if a proceeding.

A criminal case is a "proceeding" within the meaning of S. 102 and the burden of proof in such a proceeding lies on the prosecution, for the simple reason that if neither the prosecution nor the defence leads evidence the accused is entitled to be acquitted. A.I.R. 1941 All. 402=1941 A.W.R. (H.C.) 320=43 Cr. L.J. 177=1941 A.L.J. 619=I.L.R. (1941) All. 843=197 Ind. Cas. 525 (F.B.).

——Ss. 102 and 103—"Occupant of the place" explained.

The words " occupant of the place " in S. 103 of the Code do not cover any person who may happen to be there at the time but only apply to a person residing in o being in charge of the place. 41 Cal. 350=18 C.W.N. 498=15 Cr. L.J. 385=23 Ind. Cas. 985.

S. 103—Synopsis.

1. **Absence of occupant.**
2. **Applicability and scope.**
3. **Evidence.**
4. **Irregularity.**
5. **Panchas.**
6. **Respectable witnesses.**
7. **Search-Formalities.**
8. **Miscellaneous.**

1. Absence of Occupant.

——Ss. 103 and 1—Absence of Occupant—Penal Code (Act XLV of 1860), S. 338—Search—Duty of Police to permit occupant to attend—Police excluding occupant—Resistance and hurt to Police—Offence.

In conducting a search, the Police are bound to allow the occupant of the place to attend during the search.

Where the Police refuse to allow the occupant to enter the house which is being searched and be present at the time of the search, the Police cannot be said to be acting in the discharge of their duty and if the occupant causes hurt to a Police Officer in attempting to enter into his house on physical resistance being offered by the latter, the occupant is not guilty of an offence under S. 332, Penal Code, or under any other section of the Code. A.I.R. 1932 All. 449=34 Cr. L.J. 439=1932 A.L.J. 530=142 Ind. Cas. 790.

——S. 103—Absence of accused.

It is not necessary that the person whose premises are searched must be present at the search. 46 C.L.J. 368=29 Cr. L.J. 49=106 Ind. Cas. 545=9 A.I.Cr.R. 228=A.I.R. 1928 Cal. 27 (F.B.).

——S. 103 (2)—Search—Right of occupant to be present—Omission—If irregularity substantial.

The occupant of a place searched has a right to be present at the search, and where he is denied this right, the violation is not one merely of technicality but of substance so that the accused can ask the court to consider and scrutinise the evidence so formed carefully. 18 C.W.N. 498=41 C. 350=15 Cr. L.J. 385=23 Ind. Cas. 985.

2. Applicability and Scope.

——S. 103—Applicability and Scope—Technical objections.

Where a search is genuine technical objections should not be allowed to prevail. A.I.R. 1942 Oudh 221=1941 O.W.N. 1369=1941 A.W.R. (C.C.) 402=43 Cr. L.J. 416=17 Luck. 516=198 Ind. Cas. 714.

——S. 103—Search of persons.

Section 103, Criminal P.C., is inapplicable to searches of persons. A.I.R. 1941 Rang. 333=43 Cr. L.J. 217=1941 Rang. 552=197 Ind. Cas. 580.

——S. 103—Applicability and scope.

Section 103 does not apply to searches made under the Public Gambling Act. A.I.R. 1937 Nag. 251=38 Cr. L.J. 702=169 Ind. Cas. 42.

——S. 103. A search under the Gambling Act is not covered by the provisions of S. 103. A.I.R. 1934 Oudh 90=35 Cr. L.J. 397=11 O.W.N. 62=9 Luck. 355=147 Ind. Cas. 317.

——S. 103—Excise raid—Search—Duty to search constable and search witnesses, object and importance of the rule—Penal Code (Act XLV of 1860), S. 71—U.P. Excise Act (IV of 1910), S. 60 (b) (f)—Separate sentences under, legality of.

The rule that the constables and the search witnesses should be searched before they enter the premises to be searched ought never to be neglected.

Failure to carry out this rule must give to the defence a very strong argument against conviction. It is also in the interests of the public that this necessary rule should be strictly complied with.

Where an informer, as in the case under the Excise Act, obtains a substantial reward for information leading to a conviction, there is a very great temptation for him, acting in conjunction with the police constables, to plant in the house of a suspected person excisable articles in order that he may obtain the reward.

It is unreasonable, when a man is found guilty of the major offence of illicitly manufacturing excisable articles, that he should also be severely punished for keeping in his possession materials for manufacturing those articles and for possessing them. The one offence includes all the others. A.I.R. 1933 All. 438=34 Cr. L.J. 641=55 All. 557=1933 A.L.J. 746=143 Ind. Cas. 781.

——S. 103—Whether applies to search of persons.

Section 103, Criminal P.C., refers only to the search of places and not of persons. An officer intending to search the person of a suspect cannot issue an order in writing to any inhabitants of the locality directing them to remain at a place until the suspect arrived. A.I.R. 1933 Nag. 99=29 N.L.R. 67=34 Cr. L.J. 721=144 Ind. Cas. 240.

——S. 103—Applicability—U.P. Gambling Act, S. 103.

Where a warrant has been issued for search under S. 5. Gambling Act, S. 103, Cr. P. Code, is not applicable. A.I.R. 1922 Lah. 458, Foll. 120 Ind. Cas. 266=31 Cr. L.J. 35=1930 A.L.J. 229=13 A.I.Cr.R. 138=11 L.R.A.Cr. 21=1929 Cr. C. 665=A.I.R. 1929 All. 937.

——S. 103—Applicability—Opium Act, Ss. 14, 15.

The provisions of S. 103 of the Cr. P. Code, are applicable to searches made under S. 14 of the Opium Act, but not to searches in an open place under the provisions of S. 15. 100 Ind. Cas. 980=7 A.I.Cr.R. 549=6 Bur. L.J. 11=28 Cr. L.J. 372=A.I.R. 1927 Rang. 170.

——S. 103—Applicability—Gambling Act, S. 103.

A search conducted after the issue of a warrant under S. 5 of Act III of 1867 is not a search under Chapter VII of the Cr. P. Code, and S. 103, Cr. P. Code, can have no application. 68 Ind. Cas. 845=3 Lah. 359=23 Cr. L.J. 621=A.I.R. 1922 Lah. 458.

——S. 103—Discovery of articles—Whether can be proved—Illegal possession of articles—Conviction, if proper—Opium Act (I of 1878), S.9 (a)—Dangerous Drugs Act (II of 1930), S. 14 (a).

Where as a result of an irregular search, certain articles are found, the fact that the articles were found can nevertheless be proved and if the possession of the articles is found to be illegal, a conviction must follow.

Too much weight should not be given to technical points in the trial of a criminal case when those technicalities can in no way cause a failure of justice. A.I.R. 1933 Rang. 146=11 Rang. 107=34 Cr. L.J. 652=143 Ind. Cas. 824.

3. Evidence.

——Ss. 103 and 165—Search—Presence of witnesses—Object—Scope and applicability of S. 165.

Presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles but their attendance at the search is not always essential in order to enable evidence as to the search to be given.

Where it is alleged and proved that the articles were produced by the accused himself, Section 165 does not apply. That section is meant to be used where a search

warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it. Where the section does apply, proof of the search might be inadmissible for other reasons, but there would be no necessity to call either of the witnesses to the search having regard to the express terms of S. 103 (2). A.I.R. 1946 P.C. 16=1945 M.W.N. 778=12 B.R. 280=59 L.W. 9=47 Cr. L.J. 489=1946 A.L.J. 29 (2)=(1945) 2 M.L.J. 486=222 Ind. Cas. 273=50 C.W.N. 145=72 I.A. 305. (P.C.).

——S. 103—Accused signing search list having endorsement to effect that certain thing was found in his possession.

It is doubtful how far an admission by an accused by merely signing the search list containing an endorsement to the effect that a certain thing was found in his possession, could be legal proof in a criminal trial. The mere signing by the accused, who was not present at the search of this document, does not, at the most, show more than that the particular thing was found at his house. A.I.R. 1938 All. 513=1938 A.W.R. 453=1938 A.L.J. 649=39 Cr. L.J. 925=I.L.R. (1938) All. 776=177 Ind. Cas. 462.

——S. 103—Every process in conduct of search must be witnessed by respectable witnesses—Evidence of search, if can be given irrespective of evidence of search list.

According to the well-known principles of jurisprudence, the requirements of a statute must be strictly observed and complied with before the liberty of the subject can be taken away by sending him to jail or by exacting a fine from him. Where no order in writing is issued by the officer concerned under S. 103, Criminal P. C., to attend and witness a search, no person is bound by law to render assistance to him in making the search. It will be unreasonable to hold that if person who is not bound by law to do a certain act voluntarily agrees to do it, he will be deemed to have made himself subject to any criminal liability that may attach to the non-performance of the act. Criminal liability is the creation of statute and cannot be created by agreement. If, therefore, the witnesses attend and witness a search on a verbal request of the officer concerned but refuse to sign the search list, they are not guilty of an offence under S. 187, Penal Code, as they are not bound to sign it.

Section 103, Cr. P.C., enacts that searches must be conducted with all due care, that there must be respectable persons present at them to bear testimony to the fact that the manner of the search was above board. Every process in the conduct of the search must, therefore, be witnessed by such witnesses.

Where a search has been conducted under S. 103, Cr.P.C., evidence can be given regarding things and the places in which they were found irrespective of the evidence of the list which the law directs to be drawn up relating to the particulars of the property found and the provisions of the Evi. Act do not prevent the adoption of this course. A search cannot be made in writing and the observations of physical facts must always and can be allowed to be proved by oral testimony in Courts. A.I.R. 1938 Pat. 403=19 P.L.T. 461=4 B.R. 772=39 Cr. L.J. 796=17 Pat. 632=176 Ind. Cas. 787 (F.B.).

——S. 103—Conviction under S. 9 (a), Opium Act (I of 1878), set aside in appeal on ground that search witnesses did not substantiate evidence of Excise Officers—Evidence of officers substantiated by documentary evidence—Provisions of S. 103 are meant for greater certainty and security.

The provisions of S. 103 of the Cr. P.C. are enacted for greater certainty and security and not because the statements of certain officers can, under no circumstances, be accepted.

The accused was convicted under S. 9 (*a*) of the Opium Act and sentenced to suffer three months' rigorous imprisonment and to pay a fine of Rs. 200, in default, to suffer further two months' imprisonment. On appeal the Additional Sessions Judge acquitted her, his main reason being that the evidence of the three witnesses who were called to witness the search did not substantiate the evidence of the Excise Officers, and that in view of the provisions of S. 103, Cr. P.C. their statements must be believed in preference to those of the searching officers :

Held, that the two Excise Officers should not be disbelieved when their evidence was supported by such distinct documentary corroboration. Moreover, the three witnesses had not been able to explain why they, presumably intelligent persons, should have signed documents without knowing what the contents were. The evidence of this type should not be preferred to that of the officers. A.I.R. 1936 Rang. 15=37 Cr. L.J. 331=160 Ind. Cas. 816.

——S. 103—Search lists—Prosecution's duty to prove case with regard to different items severally.

When in a case there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property of different groups thereof mentioned in a search list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search lists refer. If that procedure is adopted, there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches. A.I.R. 1935 Cal. 184=39 C.W.N. 368=36 Cr. L.J. 808=62 Cal. 572=155 Ind. Cas. 687 (F.B.).

——S. 103—Identification by witnesses—Giving of exhibit numbers.

When the articles in an exhibit list are each of a different kind, it might be excusable to refer to the article by describing its kind such as a jacket, a shirt, a shawl; but where there are four white short sleeve shirts and three other shirts, the nelgect by the Court to mention which particular shirt is meant by the witness who says : "I identify the exhibit white short sleeve shirt, or I identify the exhibit shirt" is quite inexcusable. The Court should give exhibit numbers to articles identified. A.I.R. 1934 Rang. 80=35 Cr. L.J. 994=149 Ind. Cas. 31.

——S. 103 (2)—Search witnesses when to be called—Omission to call.

Under S. 103 (2), Cr. P. C., search witnesses are not to be called except on the special summons of the Court. The Statute lays it upon the prosecution to explain why it desires the search witnesses to be called and does not lay it upon the prosecution to explain why it does not call the search witnesses. A.I.R. 1933 Pat. 100=13 P.L.T. 702=11 Pat. 807=34 Cr. L.J. 427=142 Ind. Cas. 841 (2).

——S. 103—Search witness—Duty of prosecution to produce.

The search lists and the search witnesses should invariably be produced by the prosecution, and they will be guilty of suppression of material evidence if they do not produce the same, although the prosecution can prove the recovery of the incriminating article by other evidence as well. A.I.R. 1932 All. 185=1932 A.L.J. 104=33 Cr. L.J. 943=140 Ind. Cas. 246.

——S. 103—Evidence—Witnesses for search.

It is not the duty of the prosecution to put every search witness into the witness-box. The discretion is left to the Court to require or not the attendance of such witnesses. 46 C.L.J. 368=29 Cr. L.J. 49=106 Ind. Cas. 545=9 A.I.Cr.R. 228=A.I.R. 1928 Cal. 27 (F.B.).

——**S. 103—Proof of search list.**

The fact that the inhabitants of the locality whose signatures appear on the list prepared by the police at the time of the search had not been examined in the case would not render the search itself illegal. If the list cannot be proved, the contents of the list can be proved by other evidence. 28 Cr. L.J. 17=99 Ind. Cas. 49 =A.I.R. 1927 Lah. 149.

——**S. 103—Evidence got by illegal search.**

The evidence got by illegal search is not to be discarded but may be considered. 10 S.L.R. 137= 18 Cr. L.J. 49=37 Ind. Cas. 33.

——**Ss. 103 and 165—Evidence Act, S. 91—Search list—Parol evidence of the contents.**

S. 91 Evidence Act, does not apply to the case of a search list prepared under S. 103, Cr. P. Code. When a search has been conducted under S. 103, Cr. P. Code, evidence can be given regarding the things seized during the search and the places in which they were found, in addition to the search list. If the narrative of an extrinsic fact is reduced to writing, it may be proved by parol evidence, though such writing is required by law. 34 M. 349=21 M.L.J. 281=8 M.L.T. 451=11 Cr. L.J. 576 =8 Ind. Cas. 178 (F.B.). See also 33 Mad. 413= 9 M.L.T. 135=11 Cr. L.J. 716=8 Ind. Cas. 809.

——**S. 103—Failure to call witnesses—Illegality of search.**

Failure to call witnesses in strict accordance with the provisions of S. 103 does not make the search illegal. 23 M.L.J. 445=(1912) M.W.N. 1111=13 Cr. L.J. 763= 17 Ind. Cas. 75.

4. Irregularity.

——**S. 103—Irregularity in search—Proceedings, if invalidated.**

Irregularity in the search does not necessarily invalidate the proceedings. It always affords ground for scrutiny, and if, after careful scrutiny, the Court comes to the conclusion that an excisable article was recovered from the possession of the accused, then the conviction is a sound one. A.I.R. 1941 Rang. 333=1941 Rang. L.R. 552=43 Cr. L.J. 217=197 Ind. Cas. 580.

——**S. 103.**

Failure to comply with the provisions regulting searches may cast doubt upon the *bona fides* of the officers conducting the search. But when once the evidence has been believed, it is obviously no defence to say that the evidence was obtained in an irregular manner. The accused is not entitled to acquittal on the mere fact that the search witnesses did not come from the same locality. A.I.R. 1940 Cal. 85=I.L.R. (1939) 1 Cal. 210=41 Cr. L.J. 316=186 Ind. Cas. 471.

——**S. 103—Dangerous Drugs Act (II of 1930), S. 20 —Accused searched away from town—Inspector taking only one witness with him—Irregularity, if bar to conviction.**

The search of the accused was made on a metalled road and nowhere near a town, and so it was obviously impossible to obtain as witnesses any person from the immediate vicinity. The Excise Inspector, however, had taken a physician with him :

Held, that in the light of S. 103, Cr. P.C., he ought to have taken some other person in addition but an irregularity of this sort was no bar to the conviction if the Court were satisfied that the smuggled article was in fact found in the possession of the accused. A.I.R. 1934 All. 873= 36 Cr. L.J. 362=57 All. 256=153 Ind. Cas. 472.

——**S. 103.**

Persons who make a search illegally, render themselves liable to be sued for damages, but their illegal action does not affect the question whether the person whose property was illegally searched has committed an offence under the Opium Act. A.I.R. 1934 Rang. 83=148 Ind. Cas. 1045 (1).

——**S. 103.**

The fact that one of the *panchas* witnessing the search stated that he was of opinion that the bottles recovered from one of the huts did not smell of liquor and the accused was not there at the time when the search was going to be made would not mean that the search was vitiated by any of the irregularities which go to vitiate the conduct of the search under S. 103, Cr. P. C. A.I.R. 1934 Bom. 16=35 Bom. L.R. 1065=35 Cr. L.J. 523=147 Ind. Cas. 1003.

——**S. 103—Irregular search—Value of.**

When a search is conducted irregularly it will merely go to the weight which the jury will attach to the finding the property but will not make it inadmissible in evidence. A.I.R. 1933 Cal. 187=34 Cr. L.J. 369 (2)= 142 Ind. Cas. 639.

——**S. 103.**

A person convicted under S. 19 (*f*), Arms Act, cannot be acquitted simply because the search was not conducted in strict compliance with the provisions of S. 103, Cr P.C. A.I.R. 1931 Oudh 115=8 O.W.N. 128=32 Cr. L.J. 699=6 Luck. 472=131 Ind. Cas. 441.

5. Panchas.

——**S. 103—Panchas—Should be present throughout the search.**

Both the letter and the spirit of S. 103, namely, the provisions that the panchas are to attend and witness the search, and that the search shall be made in their presence, require that the panchas should actually accompany the persons making the search and should be actual witnesses to the fact of the finding of the property. It is not a sufficient compliance with this section that the panchas should merely be summoned and kept present outside a building while the search is being carried on within it, and then called in to see what has been found. 125 Ind. Cas. 713=54 Bom. 471=31 Cr. L.J. 927=32 Bom. L.R. 344=A.I.R. 1930 Bom. 169.

——**S. 103—Panchnama—Panchnama can be used only to refresh panch's memory—Police Officer cannot bring** *panchnama* **on record in his evidence-in-chief—Police holding** *panchnama* **but not offering to call** *panch*—**Adverse inference.**

The panchnama is merely a record of what a *panch* sees, and the only use to which it can properly be put is that when the *panch* goes into the witness-box and swears as to what he saw, the *panchnama* can be used as a contemporary record to refersh his memory. But a Police Officer is not entitled to give evidence of what the *panch* told him that he saw, and that is what is it comes to if a Police Officer is allowed to put in the *panchnama*. A Police witness may state that he held a *panchnama* and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the Police hold a *panchnama*, and do not offer to call the *panch*, an inference may be drawn against them from the fact that the *panch* is not submitted for cross-examination. The putting in of a *panchnama* without calling *panch* is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused because it enables the Police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination. A.I.R. 1941 Bom. 149 =43 Bom. L.R. 163=42 Cr. L.J. 556=194 Ind. Cas. 326.

——**S. 103**—*Panchnama*—**Identification parade—Police relying on** *panchnama* **must call** *panch* **to prove it—Object of calling** *panch* **witness.**

If the Police relied on a *panchnama*, they must call a *panch* to prove it ; the practice of allowing a *panchnama* to be put in by a Police witness is wrong. The object of having *panch* witnesses is to provide evidence which is independent of the Police. In searches under Chap.

VII, Criminal P.C. or the City of Bombay Police Act, it is necessary to call *panchas*, but S. 103 (2) of the Code provides that they need not be called as witnesses unless they are specially summoned. That does not mean that the *panchnama* can be used if no *panch* is called apart from searches. It is, of course, not a rule of law or practice that Police evidence must be corroborated ; but in case of an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable to have some independent evidence that the parade was properly and fairly held. A.I.R. 1941 Bom. 149=43 Bom. L.R. 163=42 Cr. L.J. 556=194 Ind. Cas. 326.

——Ss. 103, 165—*Panchnama* containing confession —Admissibility—Mode of proof—Evidence Act (I of 1872), Ss. 26, 159, 161.

Although an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by the law, is itself a relevant fact, yet where *panchnamas* contain a confession which is not admissible in evidence on account of S. 26, Evi. Act, the proper way of dealing with *panchnama* containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his memory. If he finds in it anything of which evidence can lawfully be given, he may give such evidence in the ordinary way ; but the document itself should be excluded. A.I.R. 1933 Sind 220=34 Cr. L.J. 848=144 Ind. Cas. 772.

——S. 103—Search by Police—Local *panchas*, if necessary—Irregularity—If can be cured under S. 537.

In a search under S. 103, Cr. P.C., the fact that the *panchas* were not local people is an irregularity which can be cured under S. 537. A.I.R. 1932 Bom. 610=34 Bom. L.R. 901=33 Cr. L.J. 733=139 Ind. Cas. 281.

——S. 103—One witness coming from immediate neighbourhood and others from some little distance.

It is true that S. 103, Cr. P.C., directs that the officer making the search shall take with him two respectable persons "of the locality". It is, however, clear that, as far as the word " locality " goes at any rate this provision must be regarded as directory rather than mandatory. If, therefore, it is found that only one witness came from the immediate neighbourhood, and the other came from some little distance, it cannot be held that the search is on that account illegal. A.I.R. 1941 Lah. 297=I.L.R. (1941) Lah. 370=43 P.L.R. 536=42 Cr. L.J. 812=196 Ind. Cas. 106.

——S. 103—Same persons as search witnesses.

It is objectionable to be calling the same persons to witness searches. A.I.R. 1941 Rang. 333=1941 Rang. L.R. 552=43 Cr. L.J. 217=197 Ind. Cas. 580.

——S. 103 and Bombay Abkari Act, S. 43.

The mere fact that the panchas are not present throughout a search under Bombay Abkari Act, S. 43 (1) (*a*), and do not witness every detail of it is not sufficient in itself to vitiate the conviction, especially where the accused is himself present at the search, and it is open to the Court to find the fact of possession of an offending article proved, provided that on a consideration of all the evidence in the case it is satisfied that the fact has been proved beyond reasonable doubt. 41 Cal. 350 ; A.I.R. 1925 All. 434 and A.I.R. 1926 All. 188, Foll. 125 Ind. Cas. 713=54 Bom. 471=31 Cr. L.J. 927=32 Bom. L.R. 344=A.I.R. 1930 Bom. 169.

6. Respectable Witnesses.

——S. 103—Search witnesses—Duty of Police —Witnesses not respectable inhabitants.

Though under S. 103, Cr. P.C., it is the duty of the prosecution to see that the search witnesses are respectable inhabitants of the locality, it cannot be laid down as an inflexible rule that in cases where the search witnesses do not satisfy the provisions of S. 103, Cr. P.C. the whole proceedings should be quashed. Each case must be decided upon its own facts and circumstances and, if there is the slightest apprehension that the accused might have been the victim of a piece of chicanery or sharp practice on the part of any member of the raiding party, a Court of Justice must give him the full benefit of it and set aside his conviction. It must, however, appear from the record that injustice has, very likely, been done to the accused by the non-compliance of the provisions of S. 103, Cr. P.C. A.I.R. 1933 Lah. 809=34 Cr. L.J. 723=34 P.L.R. 689=144 Ind. Cas. 290.

——S. 103—" Respectable witness " who is.

Respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability, provided he is not disreputable in any way, that is, if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits. Being a prosecution witness is not sufficient to deprive one of one's title to respectability. A.I.R. 1936 All. 707=1936 A.L.J. 958=37 Cr. L.J. 1108=1936 A.W.R. 731=165 Ind. Cas. 25.

——S. 103.

A person having suffered conviction for forgery and robbery is altogether unsuitable as a search witness. Where the Sub-Inspector takes with him such a person as a search witness and he is put forward as search witness, the action of the Sub-Inspector suggests that it is not a genuine case even if all suggestions for defence have not been established, especially when the Sub-Inspector was a subject of adverse comment by High Court in a previous case, along with the brother of such a search witness. A.I.R. 1935 All. 520=36 Cr. L.J. 551=1935 A.W.R. 313=154 Ind. Cas. 635.

——S. 103—House search—Witnesses to be of respectable status—Object of the legislature.

The intention of the legislature in S. 103 is to protect the person whose house is searched and to give confidence to the neighbours. The persons called in at the time of the search should be of some standing whose words can be believed, and not necessarily those living within a stone's throw of the house to be searched. The stress is on the word ' respectable ' and not on the word ' locality ' in sub-section 1. 18 Cr. L.J. 1009=42 Ind. Cas. 753.

——S. 103.

Where a Police Officer, in view of the attitude of the men who had assembled on the scene did not serve upon them or upon any other person of the *basti* a notice under S. 103, Cr. P.C., asking them to witness the search but asked two other respectable persons who had come with him from another village to act as search witnesses :

Held, that the failure of the Police Officer in the circumstances to secure search witnesses from the locality was no more than an irregularity and did not by itself entitle the accused to resist the search. In S. 103, the emphasis is on ' respectable', not on ' locality'. A.I.R. 1932 Pat. 66=10 Pat. 821=13 P.L.T. 62=33 Cr. L.J. 233=136 Ind. Cas. 60.

——S. 103—Search witnesses previous convicts and one of them having civil suit against accused.

On a search of the house of the accused by Excise Officer, a quantity of illicit liquor and materials for illicit distillation were recovered from the house. There were serious discrepancies in the evidence given by the two search witnesses and the search witnesses had been previously convicted of criminal offences and one of them had a civil suit against the accused :

Held, that the search was conducted in a manner

which amounted to violation of the law. A.I.R. 1938 Cal. 701=40 Cr. L.J. 52=178 Ind. Cas. 409.

——S. 103—Search witnesses not coming from vicinity.

The mere fact that the witnesses present at the time of the search of the accused's house and deposing that the opium was found therein did not come from the immediate vicinity, could not justify the Court in rejecting the evidence that the opium was found in the accused's house at the time of the search. A.I.R. 1937 Rang. 434 =39 Cr. L.J. 278 (2)=173 Ind. Cas. 27.

——S. 103—Search witnesses to be selected—Qualification—Inference.

Where respectable persons can be found in the neighbourhood, and the Police Officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward. A.I.R. 1934 All. 374=36 Cr. L.J. 742=155 Ind. Cas. 406.

——S. 103—Search—*Mashirs*—Qualifications, necessary.

In a search under S. 103, Cr. P.C., it is immaterial from what quarters *mashirs* are drawn so long as they are respectable men. The word "locality" in S. 103, Criminal P. C., does not mean the same quarter of the town as the place which is searched. The stress is on the word "respectable" and not on the word "locality" in sub-s. (1), S. 103, Criminal P. C. A.I.R. 1934 Sind 159=28 S.L.R. 41=36 Cr. L.J. 704=154 Ind. Cas. 1038.

——S. 103—Persons having acted as witness in previous house search.

The evidence of a person cannot be distrusted solely on the ground that on a previous occasion, he had acted as a witness in a house search. A.I.R. 1933 Nag. 99 =29 N.L.R. 67=34 Cr. L.J. 721=144 Ind. Cas. 240.

——S. 103—Dismissed constable, whether 'respectable' person.

A dismissed constable is not a respectable inhabitant of the locality within the meaning of S. 103, Criminal P. C. A.I.R. 1931 Lah. 408=32 Cr. L.J. 818=132 Ind. Cas. 185.

——S. 103.

Respectable persons not available at the time—Search conducted with persons available—Evidence to support conviction ample—Conviction is not bad. 92 Ind. Cas. 441=24 A.L.J. 173=27 Cr. L.J. 265=6 L.R.A.Cr. 203=A.I.R. 1926 All. 188.

——S. 103—Respectable witnesses not available.

The failure to call respectable inhabitants of the locality to witness a search does not render it illegal, especially when a satisfactory explanation therefor is furnished. The object of the legislature is requiring the presence of witnesses is to guard against possible chicanery and unfair dealing. 91 Ind. Cas. 249=27 Cr. L.J. 73 (Lah.).

——S. 103—From whom to be selected.

The provision that the witnesses of the search should be inhabitants of the locality is intended to operate in favour of the accused and in a densely populated town means persons in the immediate vicinity. 86 Ind. Cas. 415=26 Cr. L.J. 827=4 Bur. L.J. 2=A.I.R. 1925 Rang. 205.

——S. 103—Respectable inhabitants.

The words 'respectable inhabitants' in S. 103, Cr. P.C. do not include ward-headman and block-elders appointed by the D.C. 4 Bur. L.T. 91=12 Cr. L.J. 251=10 Ind. Cas. 796.

——S. 103—Witnesses to search—Respectable inhabitants—Burma Gambling Act, S. 7.

Ward-headmen in towns other than Rangoon are competent witnesses of searches under S. 103 of the Code. It is beyond the province of the judiciary to construe the word "respectable" in the section as respectable and independent or unconnected with the Police. 7 Bur. L.T. 143=8 L.B.R. 38=15 Cr. L.J. 441=24 Ind. Cas. 321.

7. Search —formalities to be observed.

——S. 103—Duty cast on the officer conducting the search—Search not in accordance with law—Effect.

S. 103 of the Cr. P. Code casts an obligation on the officer who is in charge of the conduct of a search to associate with himself "two or more respectable inhabitants of the locality" before undertaking or executing the search. Where neither of the two witnesses to the search belong to the locality and one is found to belong to the opposite faction, the search cannot be said to be a good one with the result that any prosecution that may be based upon it would not be sustainable. I.L.R. (1947) All. 370=230 Ind. Cas. 321=48 Cr. L.J. 611= 1947 A.L.W. 88=1947 A. Cr. C. 43=1947 A.L.J. 248= 1947 A.W.R. (H.C.) 59=A.I.R. 1947 A. 165.

——S. 103—Departure from provisions of—Reasons for—Duty of prosecution to explain.

Where the salutary provisions of S. 103, Cr. P. Code, intended for the protection of the interests of the accused are not complied with and are departed from, the burden lies upon the prosecution to explain the circumstances which made it impossible to comply with those provisions. When the prosecution fails to discharge that onus and there is no evidence to prove why local witnesses were not available, the search must be held to be illegal. 1950 A.L.J. 216=1950 A.W.R. 404=A.I.R. 1950 All. 147= 51 Cr. L. J. 456.

——S. 103 (2)—Search—Procedure.

The procedure prescribed by the section should be strictly followed in conducting searches. 8 Bur. L.T. 131=16 Cr. L.J. 264=28 Ind. Cas. 152.

——Ss. 103 and 165.

Search—Presence of witnesses—Object of—Applicability and object of S. 165. 72 I.A. 305=I.L.R. (1946) Lah. 1=1946 A.W.R. (P.C.) 10=12 B.R. 280=48 Bom. L.R. 132=1946 O.A. (P.C.) 10=1946 A.I. Cr. D. 16=1946 P.W.N. 25=47 Cr. L.J. 489=222 Ind. Cas. 273=1945 M.W.N. 778=59 L.W. 9=50 C.W.N. 145= 1946 A.L.J. 29 (2)=A.I.R. 1946 P.C. 16=(1945) 2 M.L.J. 486 (P.C.).

——S. 103—Search not in accordance with law—No search witness of the locality.

Where no attempt is made to have respectable witnesses of the locality for a search it would not be a search conducted in the manner provided by law. I.L.R. (1949) A. 658=1949 A.W.R. 13=1949 A.L.J. 60=A.I.R. 1949 A. 291=50 Cr. L.J. 498.

——S. 103—Search—Witnesses—Weight due to the evidence of.

A court is not bound to accept as true the evidence of witnesses called in under S. 103 to witness a search, if it can be shown to be false. 16 A.L.J. 721=19 Cr. L.J. 949=47 Ind. Cas. 801.

——S. 103—Search—Police Officer—Explosives Act—Rules under.

Where a search was conducted, not under the Cr. P. Code, but under R. 32 of the Govt. rules under the Explosives Act, 1884, and at the search, Police Officers of superior rank were present, including the Supdt. of Police himself; *held*, that the proceedings were legally conducted; unless it appears that proceedings wrongly held, have in fact, occasioned a failure of justice, they ought not to be set aside. 39 Cal. 119=13 Cr. L.J. 433=15 Ind. Cas. 65.

——S. 103—Search list—Oral evidence—Evidence Act, S. 91.

A search list is not evidence of the facts stated therein ; therefore S. 91 of the Evidence Act does not apply and oral evidence may be given as to what took place at the time of search. The informalities in the manner in which a search is conducted may affect the weight of the evidence given, but they do not preclude the admission of oral evidence. 33 Mad. 413=9 M.L.T. 135=11 Cr. L.J. 716=8 Ind. Cas. 809.

——S. 103—Search list—Contents of.

External evidence is admissible to prove the contents of a search list. 33 Mad. 416=7 M.L.T. 362=11 Cr. L.J. 136=5 Ind. Cas. 438.

——S. 103.—U.P. Excise Act, S. 53—Formalities essential.

Where the officer making the search does not record the grounds of his belief that the house of the accused contained prohibited liquor, as required by S. 53, Excise Act, and does not conduct the search in presence of two or more respectable inhabitants of the locality, the search is irregular. Any officer authorized by law to make a search ought to exercise the very greatest caution in fulfilling the formalities required by law for making a search and providing every possible safeguard so as not to allow any handle for adverse criticism. 120 Ind. Cas. 204=31 Cr. L.J. 10=1929 Cr. C. 493=11 L.R.A. Cr. 18=13 A.I.Cr. R. 131=A.I.R. 1929 All. 901.

——S. 103—Witnesses helping the search—Gambling Act, S. 7.

The object of the section is to ensure that searches are conducted fairly and squarely and that there is no " planting " of articles by the police. Therefore, where, before entering, the witnesses are given an opportunity of satisfying themselves that the police had nothing on their persons, the mere fact that the witnesses actually helped the police in making the search will not make the search one in contravention of S. 103 so as to destroy the presumption under S. 7 Gambling Act. 103 Ind. Cas. 557=5 Rang. 291=28 Cr. L.J. 701=8 A.I.Cr.R. 391=A.I.R. 1927 Rang. 241.

——S. 103—Non-compliance with provisions—Evidence discovered by search—Admissibility and value.

Although a search is illegal by reason of non-compliance with the provisions of S. 103, Cr. P. Code, the evidence discovered by the search is not inadmissible. What would otherwise be relevant will not become irrelevant or inadmissible because it was discovered in the course of an illegal search. It will however be reasonable to view with more than ordinary caution the evidence of those persons who have made the illegal search. 37 C. 467 foll. ; I.L.R. (1947) 1 Cal. 439.

——S. 103—Addition of new items.

Under S. 103, Cr. P. Code, a Police Officer should not add new items to a search list after it has been signed by witnesses but his doing so would not invalidate the search. 7 Bur. L.T. 163=7 L.B.R. 275=15 Cr. L.J. 523=24 Ind. Cas. 835.

——S. 103—Discrepancies.

Two of the witnesses present at the search stated that the articles produced, viz., silver *bank* and *band* were produced from a *tind*, but a third witness stated that the *tind* contained a silver *bank*, and made no mention of the other articles. No explanation was even suggested as to how the other article came to be there.

Held, that the circumstances under which these things were produced were not altogether beyond suspicion. 77 Ind. Cas. 895=5 Lah. L.J. 572=25 Cr. L.J. 495=A.I.R. 1923 Lah. 683.

8. Miscellaneous.

——S. 103—Object—Compliance with provisions essential.

The object of the section is presumably to obtain as reliable evidence as possible of the search and exclude the possibility of any concoction or malpractice of any kind. It is incumbent upon the police to try to comply with the provisions of the section. There is no harm in the police officer who makes the search being called as witness at the trial but such officer cannot be deemed to be an entirely satisfactory witness for the purposes of proving the search. 50 C.L.J. 518=1930 Cr. C. 141=A.I.R. 1930 Cal. 141=124 Ind. Cas. 486.

——S. 103—Non-compliance—Evidence unsatisfactory—Effect of.

Where the failure to comply with the provisions of S. 103 leave the evidence in an unsatisfactory condition, so that there is reasonable doubt as to whether the offending articles were really in the possession of the accused, the conviction ought not to be sustained. 32 Bom. L.R. 344=A.I.R. 1930 Bom. 169=125 Ind. Cas. 713=54 Bom. 471.

——S. 103—Locality, meaning of.

The word " locality " used in S. 103, Criminal P. C., is a comprehensive word, and may well include villages within three or four miles of the village where the search is to be conducted. A.I.R. 1931 Oudh 115=8 O.W.N. 128=32 Cr. L.J. 699=6 Luck. 472=131 Ind. Cas. 441.

——S. 103—" Locality "—Meaning of.

" Locality " in S. 103 does not mean the same quarter of the town as the place which is searched. 4 Bur. L.T. 222=12 Cr. L.J. 479=12 Ind. Cas. 87.

——Ss. 104, 517—Impounding of a Hundi by a Magistrate not seized of the case.

A District Magistrate could not impound, under S. 104, Cr. P.C., any document which had been produced in a pending case before a Subordinate Magistrate. (1904) 1 A.L.J. 607.

Chapter VIII—General.

——Chaps. VIII, XII—Proceedings under Chap. VIII instituted by one Magistrate—His successor, if can keep them pending and institute proceedings under Chap. XII.

Where one Magistrate has instituted proceedings under Chap. VIII, Criminal P. C., his successor can order these proceedings to be kept pending and institute proceedings under Chap. XII which he considers more appropriate to the facts and circumstances of the case as they exist at the time when he makes the order. In this matter, the discretion of the Magistrate is not restricted. A.I.R. 1936 Sind 147=29 S.L.R. 443=37 Cr. L.J. 1036=164 Ind. Cas. 942.

——Ch. VIII, (Ss. 106 to 126)—Object.

Object of Chapter VIII is partially served even when an accused is on bail for a long time. 83 Ind. Cas. 883=17 S.L.R. 160=26 Cr. L.J. 179=A.I.R. 1924 Sind 120.

——Ch. VIII, (Ss. 106 to 126)—Proceedings—Inquiries and not trials.

A proceeding in which a person is called on to give security is not a trial but an " inquiry " which includes every inquiry other than a trial conducted by a Magistrate or Court under the Crim. Pro. Code. Proceedings under Chap. VIII are " inquiries " and not " trials". The person called on to give securities is not an accused person. The expression " accused " is nowhere defined in the Code, and nowhere in Chap. VIII is the person, called on to give securities either under Ss. 106-110, referred to as an accused person. 81 Ind. Cas. 909=50 Cal. 985=25 Cr. L.J. 1085=A.I.R. 1924 Cal. 392.

—Proceedings under Chap. VIII should be taken with care and caution only when the public interest compels. A.I.R. 1936 Sind 243=38 Cr. L.J. 117=30 S.L.R. 368=165 Ind. Cas. 950.

—Chapter VIII of Criminal P. C. is not covered by S. 250 of the same Code. A.I.R. 1935 Lah. 29.

——**Ch. VIII, (Ss. 106 to 126)—Arrest.**

The mere fact there is an intention to act under Ch. 8 by the police does not grant to the accused persons immunity from preliminary arrest. 94 Ind. Cas. 404=20 S.L.R. 85=27 Cr. L.J. 628=A.I.R. 1926 Sind 190.

——**Ch. VIII, (Ss. 106 to 126)—Bail.**

Refusal of bail is contrary to the spirit of the provision of Ch. 8. The object of this chapter is to prevent a suspect from committing offences and to allay public apprehensions, and that object is sufficiently attained by requiring him to find sureties. 96 Ind. Cas. 391=20 S.L.R. 122=27 Cr. L.J. 935=A.I.R. 1926 Sind 288.

——**Ch. VIII, (Ss. 106 to 126)—Cross-examination—Liberty to reserve.**

Per *Suhrawardy, J.*—When an accused is proceeded against, appears and prays for information about the evidence which the Crown proposes to adduce against him, it should be supplied or so much of it as praticable. This may be done in two ways. He may be given sufficient information of the evidence to be called or he may be allowed to reserve cross-examination till he has full information about the case against him. Denial of either is to prejudice him materially notwithstanding S. 256. 33 C.W.N. 852=1929 Cr. C. 387=A.I.R. 1929 Cal. 739.

——**Ch. VIII, (Ss. 106 to 126)—Evidence.**

Inquiries under Chap. 8 are governed by the ordinary rules of evidence, and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under S. 110. 12 A.L.J. 937, Foll.101 Ind. Cas. 886=25 A.L.J. 393=8 L.R.A. Cr. 53=7 A.I.Cr. R. 353=28 Cr. L.J. 502=A.I.R. 1927 All. 394.

——**Ch. VIII, (Ss. 106 to 126)—Measure of security.**

The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not permissible to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail. Demanding security having a certain pecuniary status is not unreasonable. 83 Ind. Cas. 883=17 S.L.R. 160=26 Cr. L.J. 179=A.I.R. 1924 Sind 120.

——**Proceedings under—Accused's right to have witnesses examined at Government expense.**

Ordinarily a person proceeded against under Chap. VIII, Criminal P.C., and ordered to give security for good behaviour is entitled to have his witnesses summoned at Government expense as in warrant cases and though a Magistrate has power to depart from the usual practice, he should do so only when there are strong and cogent reasons for making the departure from the usual rule. A.I.R. 1932 Lah. 577=33 Cr. L.J. 679=33 P.L.R. 742=138 Ind. Cas. 765.

——**S. 106.**

Synopsis.

1. Applicability and scope.
2. Appellate Court—Powers of.
3. Essentials to be proved.
4. Evidence required.
5. Forfeiture of Bond.
6. Grounds for action under.
7. Interpretation of terms.
8. Notice to accused.
9. Order under specific cases.
10. Powers and duty of Court.
11. Revision—interference in.
12. Surety's liability.
13. Time—Computation of.
14. Quantum of punishment.

1. Applicability and Scope.

——**S. 106—Applicability of.**

The expression "breach of peace" implies some offence against the public, 8 O.L.J. 318, Foll. Where in the case of an offence under S. 325, I.P.C., the circumstances did not show that there was any likelihood of a breach of the peace in the sense of its being an offence against the public; *held*, S. 105 could not be applied. 72 Ind. Cas. 955=24 Cr. L.J. 491=A.I.R. 1923 Oudh 37.

——**S. 106—Applicability—No breach of peace.**

Section 106, Criminal Procedure Code, can only be apllied when the person concerned has been convicted of an offence involving a breach of the peace, *i.e.*, the offence must be one of which a breach of the peace is in law a necessary ingredient. It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement. 71 Ind. Cas. 879=24 Cr. L.J. 271=A.I.R. 1924 Lah. 311.

——**S. 106—No breach of peace apart from the offence.**

The section applies when the offence amounts to or constitutes a breach of the peace, the question to be answered in each case, is does the offence brought home to the individual necessarily include or imply a breach of the peace or does it constitute or amount to a breach of the peace. If it does, the section applies. Apart from the offence, there need not ensue a breach of the peace when breach of the peace is a component part or an ingredient of the offence. 81 Ind. Cas. 920=47 Mad. 846=20 M.L.W. 481=25 Cr. L.J. 1096=A.I.R. 1924 Mad. 808=47 M.L.J. 232.

——**S. 106—"Other offences involving breach of peace", interpretation of.**

The words "other offences involving a breach of the peace" in S. 106, Criminal P.C., refer to the actual definition of an offence in the substantive law, that is to say, the commission or intention to commit a breach of the peace must be one of the elements which would go to make up the offence. A.I.R. 1939 Cal. 484=69 C.L.J. 565=43 C.W.N. 867=40 Cr. L.J. 836=I.L.R. (1939) 2 Cal. 261=183 Ind. Cas. 672.

——**S. 106—Conviction under S. 504, Penal Code, whether ground for ordering security—'Offence involving breach of the peace', meaning of.**

An offence under S. 504 I.P.C., cannot be said to be one "involving a breach of the peace", and if a conviction takes place under that section and no other section an order under S. 106, Cr. P.C., cannot properly be made.

The words "involving a breach of the peace" in the section require that a breach of the peace should be an ingredient of the offence proved, and before the section can be put in force, there must be a finding that a breach of the peace has occurred. A.I.R. 1932 Oudh 33=8 O.W.N. 1286=33 Cr. L.J. 193=7 Luck. 573=135 Ind. Cas. 691.

——**S. 106.—'Offences involving breach of the peace,' meaning of.**

The words "offences involving a breach of the peace" in S. 106, Cr. P.C., include not only offences of which a breach of the peace is a necessary ingredient and in which a breach of the peace has actually occurred but include also cases of offences in which an evident intention to commit a breach of the peace is expressly found. A.I.R. 1931 Cal. 645=59 Cal. 659=35 C.W.N. 1150=33 Cr. L.J. 82=134 Ind. Cas. 1187.

——**S. 106—Conviction for offence under S. 479, Penal Code—'Offence involving breach of peace', meaning of.**

An order under S. 106, Cr. P.C., can be passed against a person convicted of an offence which does not necessarily involve a breach of the peace, if there is an express finding by the Court that the offence did, in fact, involve a breach

of the peace. A.I.R. 1930 Cal. 646=34 C.W.N. 988=32 Cr. L.J. 828=132 Ind. Cas. 96.

——S. 106—Accused convicted under S. 447, Penal Code—No finding that there actually was breach of peace.

The words 'involving a breach of the peace' in S.106, Cr. P.C., require that a breach of the peace should be an ingredient of the offence proved, and before the section can be put in force, there must be a finding that a breach of the peace has occurred.

Where, therefore, an accused is convicted of an offence under S. 447, Penal Code, but there is no finding that there actually was a breach of peace, the accused cannot be bound over under S.106, Criminal P.C. A.I.R. 1939 Oudh 45=1938 O.W.N. 1361=40 Cr. L.J. 183=1939 A.W.R. 11=1939 O.L.R. 19=14 Luck. 360=179 Ind. Cas. 269.

——S. 106—Security, if can be taken from person convicted under S. 426, Penal Code.

Security under S.106, Cr. P.C., cannot legally be taken from a person who has been convicted under S. 426,Penal Code, as the offence of mischief does not involve breach of the peace. A.I.R. 1939 Oudh 38=1938 A.W.R. 126=1938 O.W.N. 1127=40 Cr. L.J. 138=178 Ind. Cas. 665.

——S. 106.

Section 106 should be very sparingly invoked where the offence committed is a petty one such as an offence under S. 3 (12) Mad. Towns Nuisance Act. A.I.R. 1938 Mad. 795=1938 M.W.N. 588=(1938) 2 M.L.J. 152=48 L.W. 138=40 Cr. L.J. 165=179 Ind. Cas. 169.

——S. 106—Conviction under S. 149 and also under Ss. 147 and 323, Penal Code.

Where an accused is convicted by virtue of S. 149, Penal Code, an order for security under S. 106, Criminal P.C., against him is bad. But where the accused is also convicted under Ss. 147 and 323, Penal Code, both of which involve a breach of the peace, even though an order under S. 106, Criminal P.C., cannot be passed owing to the accused's conviction under S. 325 read with S. 149, Penal Code, yet such an order can properly be made owing to his conviction under Ss. 147 and 323. Section 106 as amended by Act XVIII of 1923, no doubt excludes S. 149 as well as some other sections of Chap. VIII of the Penal Code, from its operation but it not only does not exclude S. 147 but is applicable to "other offences involving a breach of the peace". A.I.R. 1938 Oudh 95=1938 O.W.N. 218=39 Cr. L.J. 341=173 Ind. Cas. 386.

——S. 106—Using abusive language and being disorderly at railway station.

Using abusive language and being generally disorderly at a railway station amounts to a breach of the peace. A.I.R. 1936 All. 140=1936 A.L.J. 82=1936 A.W.R. 195 (1)=37 Cr. L.J. 385=160 Ind. Cas. 1088.

——S. 106.

An order under S. 106 is to be based upon actual facts proved or admitted in the case. Past conduct of person to be bound over is not relevant. 1936 M.W.N. 237.

——S. 106. Insult with intent to provoke a breach of peace cannot be an offence involving a breach of the peace. 1935 M.W.N. 823.

——S. 106.

If a person is convicted under S. 323. I.P.C., which necessarily is an offence involving breach of peace, no further finding is necessary for an order under S. 106. Cr. P.C., 1934 M.W.N. 562.

——S. 106.

Section 106 should not be applied when the conviction is under S. 323, Cr. P.C. 1934 M.W.N. 248.

——S. 106—Arms—Lathies.

"Lathies" are "arms" within S. 106. 17 Cr. L.J. 313=35 Ind. Cas. 489.

——S. 106—Breach of the peace, necessity for—Breach imminent, but avoided by the other party.

S. 106 of the Code of Criminal Procedure may apply to a case in which armed men are assembled with the intention of committing a breach of the peace, but no breach of the peace occurs because the assembly does not go so far. (1900) 5 C.W.N. 250.

——S. 106—Conviction of offence under S. 504, I.P.C.—Other offence involving a breach of the peace.

A breach of the peace or probability of a breach of the peace is an ingredient of the offence under S. 504 of the Penal Code. The words 'other offences involving a breach of the peace' cover two classes of cases; the first where there actually has been a breach of the peace, the other class where the definition of the offence involves a breach of the peace. The phrase includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. 43 Bom. 554=21 Bom. L.R. 270=20 Cr. L.J. 543=51 Ind. Cas. 783.

——S. 106—Conviction by Second Class Magistrate—Appellate Court, if can demand security for keeping the peace.

An Appellate Court on hearing an appeal from a conviction by a Second Class Magistrate can direct the accused to execute a bond for keeping the peace. 15 Cr. L.J. 192=22 Ind. Cas. 768.

——Ss. 106 and 349—Conviction by Third Class Magistrate—Recommendation to First Class Magistrate for taking security.

An order of a Sub-Divisional Magistrate to bind the accused under S. 106 Cr. P. Code, on the submission of record to him by a Third Class Magistrate and on his recommendation is without jurisdiction. The conviction however by the Third Class Magistrate and on appeal were good. 11 Cr. L.J. 170=5 Ind. Cas. 576.

——S. 106—Conviction for theft—No finding of any unlawful assembly or of any offence within S. 106—Order under S. 105—Legality of—Evidence of such offence.

Where a person is only convicted of theft and there is no finding that he committed an offence contemplated by S. 106, Cr. P.C., although there may be evidence to that effect, any order made under S. 106 is made without jurisdiction. (1902) 6 C.W.N. 678=29 Cal. 393.

2. Appellate Court—Powers of.

——S. 106—Appellate Court—Powers of.

The Court of appeal has powers to pass an order under S. 106, even where the trial Court had no such powers. 2 P.L.J. 21, Foll. 97 Ind. Cas. 424=27 Cr. L.J. 1112=7 A.I. Cr. R. 136=A.I.R. 1927 Pat. 37.

——S. 106.

An appellate Court cannot exercise the power given by S. 107 (3) where the conviction has not been by a Court specified in sub-section (1). 72 Ind. Cas. 68=24 Cr. L.J. 308=A.I.R. 1924 Cal. 540.

——S. 106.

The power conferred on an appellate Court by clause (3) of S. 106, Cr.P. Code, is not limited by the fact that the Court whose decision is under appeal has no power to direct security to be taken. 81 Ind. Cas. 145=19 N.L.R. 154=25 Cr. L.J. 657=A.I.R. 1924 Nag. 49.

——S. 106.

An order under the section by an Appellate Court in appeal from an order of a second class Magistrate is illegal and *ultra vires*. 67 Ind. Cas. 729=23 Cr. L.J. 457=A.I.R. 1923 Lah. 91.

——S. 106—No breach of peace.

The Appellate Court is wrong in directing accused to enter into a bond under S. 106, Cr. P.C., when there is no finding that any breach of peace occurred. 76 Ind. Cas. 966=30 M.L.T. 348=25 Cr. L.J. 294=A.I.R. 1923 Mad. 133.

——S. 106—Appellate Court—Powers of.

Under S. 106 (3) the Appellate Court can order security to be furnished even though the original trial Court from whose decision the appeal was heard could not have done so. 60 Ind. Cas. 998=43 All. 372=19 A.L.J. 123=22 Cr. L.J. 310=A.I.R. 1921 All. 217.

——S. 106.

A Second Class Magistrate tried and convicted four persons of causing hurt in the course of an assault. The conviction was upheld in appeal, but accused were further directed to give security under S. 106, Criminal Procedure Code: *Held*, in revision that even when the case is tried by a Magistrate of the second or third class who could not himself have required security a Court of appeal or revision has power to require security under S. 106, Criminal Procedure Code. 60 Ind. Cas. 676=23 O.C. 380=22 Cr. L.J. 276.

——S. 106—Appellate Court.

In an appeal from the judgment of a Subordinate Magistrate, the Magistrate hearing that appeal, cannot call upon the accused to furnish security to keep the peace. 6 M.L.T. 238=10 Cr. L.J. 289=3 Ind. Cas. 434.

——S. 106—Appellate Court—Demand of security.

An Appellate Court is not competent to require security while hearing an appeal from a conviction by a second or third class Magistrate. 5 P.R. 1918 Cr.=135 P.L.R. 1918=19 Cr. L.J. 336=44 Ind. Cas. 352.

——S. 106—Appellate Court's power to bind down.

An accused can be bound down under S. 106 by an Appellate Court affirming the conviction and sentence awarded by the lower Court, in spite of the latter Court not being competent to so bind down. 18 Cr. L.J. 118=(1917) P.H.C.C. 57=2 Pat. L.J. 21=3 Pat. L.W. 250=37 Ind. Cas. 470.

——S. 106—Appellate Court's power to bind over—Conviction for an offence—Offence involving a breach of the peace.

A breach of the peace should be an ingredient of the offence proved; and before the section can be put in operation there must be a finding that a breach of the peace has occurred; and the conviction should be by a court named in the section. An appellate court can pass an order under the section only under circumstances under which an original court could have passed it, *i.e.*, it could do only that which an original court could and should have done. (1905) 29 M. 190. See also 7 C.L.J. 602=12 C.W.N. 752=35 C. 443.

——S. 106, 423 Cl. (d).

Where an appellate court reverses the conviction, it has also power under S. 423 (*d*) to cancel an order passed on the accused by the lower court for security to keep the peace. (1902) 6 C.W.N. 422=30 C. 101.

——Ss. 106, 435 and 439—Order under—Whether can be made in appeal.

If the convicting court is not empowered to pass order under S. 106, the appellate Magistrate cannot pass such an order in appeal. 7 M.L.T. 104=11 Cr. L.J. 251=5 Ind. Cas. 807.

——S. 106—Order by District Magistrate.

An order passed by a District Magistrate under S. 106 when not trying the case as a Court of appeal is without jurisdiction. 16 A. L.J. 536=19 Cr. L.J. 732=46 Ind. Cas. 412.

——S. 106—Powers of Court—Appellate Court.

Sub-section (1) of S. 106 does not control or limit the powers conferred on an appellate Court or revisional Courts by sub-S. (3) of the same section, and, therefore, it has power to require bonds under S. 106, even although the actual order is not made at the time of passing sentence, or rather confirming the sentence that has been already passed by the Magistrate. 33 Bom. 33, Rel. on.

There is nothing in sub-S. (3), S. 106, to limit the time when the order can be made by the appellate Court. 30 Bom. L.R. 373=10 A.I. Cr.R. 211=29 Cr. L.J. 502=109 Ind. Cas. 230=A.I.R. 1928 Bom. 134.

——S. 106 (2)—Appellate Court, if can order the accused to furnish security.

An Appellate Court confirming the sentence of the lower Court cannot order the accused to furnish security under S. 106 (3) of the Code. 8 M.L.T. 291=11 Cr. L.J. 640=8 Ind. Cas. 392.

——S. 106 (2)—Appellate Court.

The appellate Court can act in appeals from cases under S. 106 (3) only when the lower Court had power to take security. 7 P.R. 1909 Cr.=21 P.W.R. 1909 Cr.=10 Cr. L.J. 309=3 Ind. Cas. 577.

——S. 106 (1) and (3)—Conviction by Second or Third Class Magistrate—Power of Appellate Court—Bond to keep the peace.

An Appellate Court has jurisdiction to order a person to execute a bond to keep the peace, where he is convicted of any offence mentioned in S. 106 (1) by a Second or Third class Magistrate. The words "under this section" in S. 106 (3) have reference to the powers given by the section and not to the Court by which these powers are first exercised. 37 Mad. 153=14 M.L.T. 235=(1913) M.W.N. 769=25 M.L.J. 403=14 Cr. L.J. 574=21 Ind. Cas. 174.

——S. 106 (3)—Conviction under S. 147, I.P.C.—Power to require security—Appellate Court.

In a case under S. 147, I.P.C. an Appellate Court is expressly empowered to pass an order under S. 106 (3) Cr.P.C., requiring security to keep the peace from the appellants. The making of such an order does not amount to enhancing the sentences. 20 Cr. L.J. 760=53 Ind. Cas. 488.

——S. 106 (3)—Appellate Court—Powers of.

An Appellate Court cannot exercise the powers given by S. 106 (3) of the Cr. P. Code, where the conviction has not been by a court specified in sub-sec. (1) of the section. 19 Cr. L.J. 220=43 Ind. Cas. 796.

——S. 106 (3)—Appellate Court—Bond for keeping peace—Power to order.

Under S. 106 (3) Cr. P. Code, the Appellate Court may pass an order directing execution of a bond for keeping the peace though the Original Court had no power to require such bond. 14 Cr. L.J. 592=16 O.C. 281=21 Ind. Cas. 384.

——S. 106 (3)—Appeal Court, jurisdiction of.

An order for security under S. 10 (3) of the Criminal Procedure Code, 1898, may be made in appeal, whether the original court has such jurisdiction to pass such order or not. The word "also" in the section plainly implies that the order may be independently made by an appellate Court or by a court in revision, as well as by the original Court specified in the first clause; and it is not implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. 10 Bom. L.R. 759=33 B. 33=1 Ind. Cas. 454=8 Cr.L.J. 267.

——S. 106—Cl. (3)—Order by appellate court—Jurisdiction of original Court—Limitation on Appellate Court's power—I.P.C. (Act XLV of 1860), S. 71—Connection of several offences.

An Appellate Court is entitled to order an appellant to furnish security to be of good behaviour under S. 106 of the Code of the Criminal Procedure and the power of the Appellate Court under Cl. (3) of that section is not

limited in any way by the powers of the original Court which tried the case. 33 B.33 foll. A Magistrate of the second class convicted the accused under several sections and sentenced him to several terms amounting to 9 months. *Held*, that S. 71, I.P.C. did not apply, and the Magistrate was empowered to pass separate sentences for different offences. 9 A. 645 foll. (1910) 7 A.L.J. 910=33 All. 48 =7 Ind. Cas. 412.

3. Essentials to be proved.

——S. 106—Essentials—Breach of peace—Order of binding over is justified only if in the assault or hurt, breach of peace is involved.

Under S.106 an order binding over an accused person can only be passed when in a case of causing simple hurt or assault a breach of the peace is involved. No hard and fast rules can be laid down ; but in the absence of a finding that the assault which took place involved breach of the peace or public tranquillity, the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down. No one goes to assault his personal friends, so that the mere fact of the assault necessarily involves the finding directly or indirectly that the parties are on bad terms. 89 Ind. Cas. 1025=23 A.L.J. 1053= 26 Cr. L.J. 1457=A.I.R. 1926 All. 144.

——S. 106—Essentials—Breach of peace.

Unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence committed did in fact involve a breach of the peace for proceedings under S. 106. 1930 Cr. C. 1068=34 C.W.N. 988=A.I.R. 1930 Cal. 646. In order to support an order under S. 106 the Court must, as a condition precedent, show some grounds for requiring the security. The fact that the accused have been convicted of an offence involving a breach of the peace is not alone sufficient to pass an order under S.106. 97 Ind. Cas. 424=27 Cr. L.J. 1112=7 A.I. Cr. R. 136 =A.I.R. 1927 Pat. 37.

—In the absence of a finding that there is a likelihood of a breach of the peace, an order under S. 106 cannot be passed. 81 Ind. Cas. 888=25 Cr. L.J. 1064=A.I.R. 1925 Nag. 36.

——S. 106—Offence should involve breach of peace.

The words " offence involving a breach of the peace " mean an offence in which a breach of the peace is an ingredient and not merely an offence provoking or likely to lead to breach of the peace. 63 Ind. Cas. 869=2 Lah. 279=93 P.L.R. 1921=22 Cr. L.J. 709=A.I.R. 1921 Lah. 96.

——Section 106, Criminal P.C., makes it clear that an assault is [an] offence involving a breach of the peace. A.I.R. 1938 Mad. 615=47 L.W. 640=1938 M.W.N. 601 =39 Cr. L.J. 816=176 Ind. Cas. 815.

——S. 106 (2)—Essentials—Rioting—Conviction—Confirmation by District Magistrate—Direction that particular person should be surety.

A District Magistrate has no jurisdiction in affirming a conviction for a riot to order the accused to give security for good behaviour nor has he jurisdiction to order that a particular individual should be surety. 16 A.L.J. 280= 19 Cr. L.J. 439=44 Ind. Cas. 967.

——S. 106—Order for security to keep the peace—Magistrate to record finding before invoking section.

Where the offences of which a person is convicted do not in themselves, and apart from any other incidents, come within the terms of S. 106, the Magistrate should have recorded a clear finding as to the facts which in his opinion made the section applicable. 26 C. 756 followed. (1902) 30 C. 93.=6 C.W.N. 471.

——S. 106—Order for security to keep the peace on conviction—Essentials of.

In order that a person may be ordered to give security to keep the peace on conviction for an offence, it is necessary that the offence for which the man was convicted should involve a breach of the peace. *Quaere*:—Whether it will be legal to order security in case where there is an express finding that there was no breach of the peace ? (1902) 26 M. 469=2 weir 48.

4. Evidence required.

——S. 106—Legal evidence only should be considered.

In deciding whether an order under S.106, Cr. P.C., should be passed or not, the Magistrate must consider only legal evidence. He should not act on statements made by the prosecution from the bar. A.I.R. 1943 Mad. 169 = (1942) 2 M.L.J. 613=55 M.L.W. 746=1942 M.W.N. 760 (2)=44 Cr. L.J. 321=205 Ind. Cas. 56.

——S. 106—Rules of evidence.

Enquiries under Chap. VIII of the Code are governed by the ordinary rules of evidence . The test of the admissibility of evidence of general opinion is whether it is the general opinion of a considerable number of persons and not merely the repetition of what one or two persons said to the witness. Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community to which the witness belongs or his personal opinion. A witness may be examined and cross-examined and if he gives his own opinion he may be asked about the grounds of his opinion and also the names of persons who have spoken against his character. 12 A.L.J. 937= 15 Cr. L.J. 705=26 Ind. Cas. 153.

——Ss. 106 and 439—Findings necessary for.

When the findings of the lower Courts do not sufficiently and clearly show that the acts of which the accused were convicted under S. 143, I.P.C., necessarily involve a breach of the peace or any evident intention of committing the same, the High Court in revision would set aside an order under S. 106, Cr.P.C., binding down the accused to keep the peace. 43 Cal. 671=20 C.W.N. 197=23 C.L.J.108= 17 Cr. L.J. 241=34 Ind. Cas. 961.

——S. 106—Evidence required.

Inquiries under Chap. VIII are governed by the ordinary rules of evidence, and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under S. 110 (12 A.L.J. 937, Foll.) 101 Ind. Cas. 886=25 A.L.J. 393=8 L.R.A. Cr. 53=7 A.I. Cr. R. 353=28 Cr. L.J. 502=A.I.R. 1927 All. 394.

——S. 106—Express finding by Court—If could be interfered with.

Unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence committed did in fact involve a breach of the peace for proceeding under S. 106. Where the conviction was one under S. 379, I.P.C., and there was an express finding that the offence involved a breach of the peace, *held* that the order under S. 106 was valid in law. 34 C.W.N. 988=1930 Cr. C.1068=A.I.R. 1930 Cal. 646.

5. Forfeiture Bond.

——Bond executed for keeping peace by accused—Accused committing offence under S. 323, Penal Code.

When an accused has been ordered to execute a bond with sureties for keeping peace and the bond is so executed and the accused subsequently commits an offence under S. 323, I.P.C., there is a breach of peace which entitles the Magistrate to forfeit the bond and the sureties. A.I.R. 1938 Oudh 195=1938 O.W.N. 676=39 Cr. L.J. 831= 176 Ind. Cas. 948.

——Ss. 106, 226 and 354.

Persons ordered to give security for good behaviour or

to keep the peace are not persons accused of an offence, but it is doubtful whether they are accused persons within the meaning of the Code. 7 M.L.T. 104=11 Cr. L.J. 251=5 Ind. Cas. 809.

——S. 106—Security bond.

The Code does not provide for the bare renewal of a bond. If the original security is forfeited owing to breach of conditions, there must be fresh proceedings against the person to demand fresh security. 7 M.L.T. 90=11 Cr. L.J. 244=5 Ind. Cas. 761.

6. Ground for action under.

——S. 106—Order under, when can be passed—Conviction under S. 323, Penal Code, set aside and one under S. 342, Penal Code, maintained.

One has to see not whether on the facts, the persons against whom an order under S. 106, Cr. P.C., is passed did commit a breach of the peace but whether they were convicted of an offence which necessarily involves breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the case, but which, in other circumstances, does not necessarily involve a breach of the peace, an order under S. 106 of the Cr. P.C., cannot be passed, Where the Judge has set aside the conviction under S. 323, I.P.C., leaving only the conviction under S. 342, I.P.C., an order under S. 106, Cr. P.C., cannot be passed. A.I.R. 1940 Oudh 323 =1940 O.W.N. 423=1940 A.W.R. 218=41 Cr. L.J. 505=187 Ind. Cas. 808.

——Acquittal of a person charged with offence—Effect.

It is not correct to take into account the fact that an accused person has been tried for an offence when he has been acquitted of the charge. The acquittal clears the conduct of the person and he cannot be judicially considered guilty. A.I.R. 1935 Pesh. 158=159 Ind. Cas. 97.

——S.106—Offences of assault and causing hurt—'Assault or other offence involving breach of the peace', interpretation of—Penal Code, S.323.

The offences of assault and of causing hurt necessarily involve a breach of the peace within the meaning of S. 106, Cr. P.C. Consequently, if a Magistrate finds that an offence of causing simple hurt has been committed it is not necessary for him to come to a separate finding that a breach of the peace was involved.

The Court is not, however, bound to take security from a person convicted of an offence which imvolves a breach of the peace. The Court must be of opinion that it is necessary to require such person to execute a bond for keeping the peace. Although the law does not provide that the Court shall record its reasons for forming that opinion, yet it is desirable for the Court to do so in order that an Appellate Court may be in possession of the reasons if they are not apparent on the face of the record.

The words " assault or other offence involving a breach of the peace" in S. 106, Cr. P.C., mean that an assault involves a breach of the peace. A.I.R. 1933 All. 609=34 Cr. L.J. 859=(1933) A.L.J. 1345=55 All. 850=144 Ind. Cas. 954 (2).

——S. 106—Forming unlawful assembly to overawe people—'Breach of peace'—Order under S. 106.

To form an unlawful assembly and by means of that unlawful assembly to overawe and intimidate other persons, preventing them from doing what they are legally entitled to do and compelling them to abandon their property which they are entitled to keep, does actually amount to a breach of the peace of a most serious nature within the meaning of S. 106, Cr. P.C. A.I.R. 1931 Pat. 337=32 Cr. L.J. 739=12 P.L.T. 556=131 Ind. Cas. 539.

——S. 106—Offence involving breach of the peace—Grounds of action.

In all ordinary cases of conviction under S. 323, Penal Code, there is a conviction for an offence involving a breach of the peace, and the desirablility of taking security must depend upon how far the circumstances indicate that if such a breach of the peace is likely to recur. 116 Ind. Cas. 789=51 All. 540=1929 A.L.J. 340=10 L.R.A. Cr. 57=11 A.I. Cr.R. 402=30 Cr. L.J. 686=A.I.R. 1929 All.349.

——S. 106—Rioting—Conviction binding over—legality.

Where the accused were convicted of rioting, *held* that it was right to have them bound over for a period of one year. 1929 M.W.N. 583.

——S. 106—Finding as to breach of the peace.

Where a person has been convicted under S. 323, an order under S.106 can only be passed when there is a finding that in causing the simple hurt a breach of the peace was involved. 99 Ind. Cas. 120=49 All. 131=8 L.R.A. Cr. 9=28 Cr. L.J. 88=7 A.I. Cr.R. 127=A.I.R. 1927 All. 157.

——S. 106 and I.P.C., S. 143 or 427—Effect.

No order under S.106 can be passed upon conviction of an offence under S.143 or S.427, I.P.C. 99 Ind. Cas. 348=8 L.R.A. Cr. 11=28 Cr. L.J. 140=7 A.I. Cr.R. 130=A.I.R. 1927 All. 136.

——S. 106—S. 452, I.P.C.

The offence under S.452 is not one involving breach of the peace and security cannot be demanded for keeping the peace under S. 106. 94 Ind. Cas. 139=27 Cr. L.J. 571=A.I.R. 1926 Lah. 675.

——S. 106—Offence of trespass—Action under—if justified.

Trespassing in man's house for the purpose of causing him injury is such an offence as to involve breach of the peace within S.106, Cr. P.C., and when conviction is made under S. 452, I.P.C., an order under S. 106, Cr. P.C., can be properly passed against the accused. 42 All. 345 Foll. 89 Ind. Cas. 1030=26 Cr. L.J. 1462=A.I.R. 1925 Lah. 621.

——S. 106—Section of the I.P.C. read with S. 149—Change in the Law.

The amendment to Section 106 by the Act XVIII of 1923 has made an order under Section 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with Section 149. The amendment is not very happily worded for it speaks of an offence punishable under Section 149. No offence is punishable under Section 149 alone; there must be some substantive offence charged to be read with Section 149. Where the accused were convicted under Section 325 read with Section 149 :

Held, that under Section 106, as it now stands, an order cannot be passed against them. 85 Ind. Cas. 42=3 Pat. 870=6 P.L.T. 330=26 Cr. L.J. 426=A.I.R. 1925 Pat. 117.

——S. 106—No finding as to breach of peace—Effect on order.

Where there was no express finding that there was an apprehension of a breach of the peace and the accused were convicted of an offence of assault but Magistrate had also expressed an opinion to the effect that the accused persons appeared to be very troublesome:

Held, that there was no legal flaw in the judgement and order under S. 106 was justified. 81 Ind. Cas. 442=46 All. 105=4 L.R.A. Cr. 259=25 Cr. L.J. 906=A.I.R. 1924 All. 306.

——S. 106—Wrongful confinement—Offence of—Action under S. 106—Justified.

Wrongful confinement does not *per se* import breach of the peace but if the offenders using violence seize another and tie his hands it clearly involves breach of the peace and would come under S. 106. 81 Ind. Cas. 920 =47 Mad. 846=20 M.L.W. 481=25 Cr. L.J. 1096=A.I.R. 1924 Mad. 808=47 M.L.J. 232.

——**S.106—Finding as to breach of peace—In future—Action under.**

To justify an order for security under section 106 there must be an express finding to the effect that the act involved a breach of the peace or an evident intention of committing the same or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case. The word 'involve' connotes the inclusion not only of a necessary but also of a probable future circumstance, antecedent condition or consequence. (26 C. 576; 33 A. 771, Foll.) 75 Ind. Cas. 983=25 Cr. L.J. 71=A.I.R. 1924 Nag. 118.

——**S. 106 and S. 323, I.P.C.—Effect.**

Since an attack in a public place involves a breach of the peace, an order requiring security under S. 106 is proper against a person convicted under S. 323, Penal Code, for striking with a lathi and kicking and cuffing another in an open public place. 72 Ind. Cas. 79=24 Cr. L.J. 319=A.I.R. 1924 Oudh 233.

——**S. 106.**

There is nothing to prevent a Magistrate from taking security from persons who have been convicted under S. 323, I.P.C., to keep the peace under S. 106. 63 Ind. Cas. 460=19 A.L.J. 856=22 Cr. L.J. 668=A.I.R. 1921 All.35.

——**S. 106 and Ss. 143 and 297, I.P.C.**

An order cannot be passed under S. 106, Cr.P. Code, on a conviction for an offence under S.143 or S.297, Penal Code, as that offence does not necessarily involve the use of force. (35 Cal. 315 and 26 Mad. 469, Foll.). 63 Ind. Cas. 869=2 Lah. 279=93 P.L.R. 1921=22 Cr. L.J. 709=A.I.R. 1921 Lah. 96.

——**S. 106.**

An offence under S. 325, I.P.C., involves the use of criminal force and is, in that sense, an assault, but the word "assault" as used in S. 106 of the Cr. P. Code, refers to offence of assault as defined in S. 351, I.P.C. and is made punishable by S. 352. An offence under S. 325 does not always involve the breach of the peace. 71 Ind. Cas. 691=24 Cr. L.J. 227=8 O.L.J. 318=A.I.R. 1921 Oudh 140.

——**S. 106—Land dispute—Order binding down persons convicted of rioting—Property—Penal Code Act, S. 147.**

Where on the complainant trying to take possession of land in the occupation of the accused, the accused used more force than was necessary to prevent the complainant's party from doing so:—*Held*, that although the accused were rightly convicted of the offence for rioting under S. 147, Indian Penal Code, they should not be bound down under S.106, Cr. P.C., to keep the peace as that would have the effect of preventing the accused from resisting any further attempt by the complainant to take possession of the land. (1907) 11 C.W.N. 840.

7. Interpretation of terms.

——**S.106—Expression "Offences involving breach of peace," meaning of—Conviction of accused under S.294, Penal Code—Order under S. 106 when can be made.**

The expression "offences involving a breach of the peace" in S. 106, Cr. P.C., means offences in which the commission of a breach of the peace is a necessary ingredient, or offence, the commission of which has actually led to a breach of the peace (irrespective of the party by which that breach is committed). It is impossible to construe the word 'involve' as equivalent to the words 'likely to lead to'. The mere use of abusive language in a public place is not of itself a breach of the peace, though, of course, it is likely to lead to one. The word 'peace' is used as a synonym for security rather than for tranquillity. Where therefore an accused person is convicted of an offence under S.294, I.P.C., an order under S. 106 cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse. A.I.R. 1940 Rang. 50=41 Cr. L.J. 421=1940 Rang. LR. 256=187 Ind. Cas. 149.

——**S. 106—Interpretation—'Offences involving breach of the peace'.**

The expression "offences involving a breach of the peace" in S.106, Cr.P.C., means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. *Held*, that S.504, I.P.C. does not necessarily involve a breach of the peace and that an order under S. 106, Cr. P.C. cannot follow a conviction under S. 504, I.P.C. 1930 Cr. C. 1097=A.I.R. 1930 Cal. 802=34 C.W.N. 651.

——**S. 106—'Other offences', etc., S.323, I.P.Code.**

The words "assault or other offences involving a breach of the peace" clearly include the offences of causing hurt under S. 323, I.P.C. and a person convicted under that section can be ordered to find security for keeping the peace under S. 106. 3 O.W.N. (Sup.) 311=99 Ind. Cas. 352=28 Cr. L.J. 144=A.I.R. 1927 Oudh 101.

——**S. 106—Other offences.**

The offences intended by "other offence" are those *ejusdem generis* with the offences against public tranquillity and of assault which are mentioned in the section. 81 Ind. Cas. 920=47 Mad. 846=20 M.L.W. 481=25 Cr. L.J. 1096=A.I.R. 1924 Mad. 808=47 M.L.J. 232.

——**S. 106—'Other offences' finding as to breach of peace.**

The expression "Other offences involving a breach of the peace" would embrace offences *ejusdem generis* with the offences of assault and rioting which are specified in the section. It is not necessary that the lower Court should record a finding that a breach of the peace was involved in order to invest itself with power to make an order under S. 206 (1). Where the Judge has recorded his opinion that it is necessary in a case to require the convicted persons to execute a bond for keeping the peace that is all that the section in terms demands. 72 Ind. Cas. 615=24 Cr. L.J. 455=17 M.L.W. 499=1923 M.W.N. 314=32 M.L.T. 297=A.I.R. 1923 Mad. 618=44 M.L.J. 485.

——**S. 106—'Breach of peace'—Scope of.**

The expression "breach of the peace" implies some offence against the public (8 O.L.J. 318, Foll.). Where in the case of an offence under S. 325, I.P.C., the circumstances did not show that there was any likelihood of a breach of the peace in the sense of its being an offence against the public, *held* S. 106 could not be applied. 72 Ind. Cas. 955=24 Cr. L.J. 491=A.I.R. 1923 Oudh 37.

——**S. 106—'Assault'—Scope of.**

An offence under S.325 involves the use of criminal force and is in that sense an assault but the word "assault" as used in S. 106 refers to the offence of assault as defined in S.351, Penal Code. 71 Ind. Cas. 691=8 O.L.J. 318=24 Cr. L.J. 227=A.I.R. 1921 Oudh 140.

——**S.106—Breach of peace.**

The expression "breach of the peace" implies some offence against the public. 71 Ind. Cas. 691=24 Cr. L.J. 227=8 O.L.J. 318=A.I.R. 1921 Oudh 140.

——**S.106—Offence involving breach of peace—Robbery—Hurt.**

An order unser S. 106 is not illegal even though there was technically no breach of the public peace by the accused. A person who enters another's house and cuts off his ear with the ear-ring and deprives him of his property, commits a breach of the peace in the wider sense of the expression. 19 Cr. L.J. 929=47 Ind. Cas. 445.

——**S. 106—'Offence involving a breach of the peace'—Meaning and scope of.**

The words "offence involving a breach of the peace" in S. 106, Cr. P.C., should be construed liberally and as

referring not only to a necessary breach of the peace but also to a probable breach. 33 All. 771=8 A.L.J. 925=12 Cr. L.J. 405=11 Ind. Cas. 589.

——S.106—An offence involving breach of the peace.

"An offence involving a breach of the peace" in S. 106, Cr. P.C. means an offence into which breach of the peace necessarily enters as a constituting element and does not include an offence of which breach of the peace is not necessary ingredient but the facts found show that in committing it, the accused did an act involving a breach of the peace. An offence under S.448 of the I.P.C. is not such an offence. 19 M.L.J. 66=4 M.L.T. 468=9 Cr. L.J. 88=4 Ind. Cas. 616.

——S. 106—'Offence involving a breach of the peace'—Meaning of—House trespass—Penal Code, S. 448.

"An offence involving a breach of the peace," in S.106, Cr. P.C. means an offence into which breach of the peace necessarily enters as a constituting element and not merely an offence committed under circumstances showing that the accused did acts involving a breach of the peace. 29 M. 190, Foll. 7 C.W.N. 25, Not foll. An offence of house trespass is not an offence "involving a breach of the peace" within the meaning of S. 106, C.P.C. (1908) 19 M.L.J. 66=4 M.L.T. 468=4 Ind. Cas. 616=9 Cr L.J. 88.

8. Notice to Accused.

——S. 106—Order under—Notice to accused, if essential.

Section 106, Cr. P.C., permits of the passing of an order under that section at the time of passing sentences. It is not, therefore, necessary that either the trial Court or the Appellate Court should call upon the accused to show cause why he should not be bound over. A.I.R. 1943 Mad. 406=(1943) 1 M.L.J. 264=1943 M.W.N. 179=44 Cr. L.J. 639=207 Ind. Cas. 195.

——S. 106—Notice.

To adopt proceedings under S. 106 without notice to parties is an incorrect procedure on general principles of justice. 97 Ind. Cas. 424=27 Cr. L.J. 1112=7 A.I. Cr. R.136=A.I.R. 1927 Pat. 37.

——S. 106—Appellate Court passing order without special notice to parties.

It is not an incorrect procedure contrary to general principles of justice for the Appellate Court to pass an order under S. 106, Cr. P.C., without special notice to the parties. A.I.R. 1936 Pat. 36=16 P.L.T. 793=2 B.R. 66=37 Cr. L.J. 63=159 Ind. Cas. 246.

——Ss. 106 to 126—Procedure—Accused person—Right of being defended by pleader.

Persons against whom proceedings are taken under Ch. VIII are "accused persons" within the meaning of the Code of Criminal Procedure and have a right to be defended by a pleader and notice of the date of hearing should be given them. 23 C. 493, Foll. 1903 A.W.N. 79=25 A. 375.

9. Order under—Specific Cases.

——S. 106—Order—Conviction for offence.

When a person is convicted of an offence like criminal trespass, a necessary ingredient of which is a breach of the peace, an order under S. 106, Cr. P. Code may lawfully be passed by the Magistrate. 42 All. 345=2 U.P.L.R. (All.) 64=18 A.L.J. 300=21 Cr. L.J. 288=55 Ind. Cas. 304.

——S. 106—Offence under Ss. 426 and 547 of the Penal Code—How far section applicable.

Offences under S.426 or 547 of the Indian Penal Code do not come within the purview of the Criminal Procedure Code. (1902) 6 C.W.N. 471=30 Cal. 93.

——S. 106—Order on Conviction under S. 134, I.P.C.

An order under S. 106 on a conviction merely under S.143, I.P.C., is bad. (1908) 35 C. 315=12 C.W.N. 605.

——S.106—Order for security to keep the peace on conviction under Ss. 143, 379, I.P.C.—Finding but not conviction of criminal intimidation—Legality of order.

A conviction under S.143 or 376, I.P.C., is not of itself sufficient to sustain an order under S.106. Cr. P.C. although such conviction coupled with findings bringing the case within the scope of S.106 may sustain an order thereunder. But in such a case, these findings must be clear and explicit and moreover, if the finding be that the accused was guilty of criminal intimidation, the section expressly requires that the conviction must also be for that offence in order to sustain an order under the section. (1903) 8 C.W.N. 517.

——S.106—Conviction under S.75, Madras City Police Act (3 of 1888)—Order under S.106.

Where the conviction is under S.75, Madras City Police Act, the order under S. 106, Cr. P.C. is not called for. A.I.R. 1941 Mad. 488=1941 M.W.N. 221 (2)=43 Cr. L.J. 40=196 Ind. Cas. 575.

——S. 106—Conviction under S. 510, Penal Code—Security under S.106.

Offence under S.510 of the I.P.C. is not an offence involving a breach of the peace. The order for security under S. 106, Cr. P.C. in such a case is, therefore, unsustainable. A.I.R. 1940 Mad. 755=(1940) M.W.N. 531 (1) =52 M.L.W. 66 (2)=42 Cr. L.J. 16=191 Ind. Cas. 240.

——S. 106—Order under, in respect of offence under S. 426, Penal Code—Legality.

Offence under S. 426, I.P.C. does not involve a breach of the peace and the order under S.106, Cr. P.C. cannot be sustained. A.I.R. 1940 Mad. 55=50 M.L.W. 511 (1) =1939 M.W.N. 1012=(1939) 2 M.L.J. 750=41 Cr. L.J. 235=185 Ind. Cas. 753.

——S. 106—Conviction under S. 452, Penal Code—Order under S.106, if should follow.

An order under S.106, Cr. P.C., does not follow a conviction under S.452, I.P.C., unless the facts of a particular case justify such order. A.I.R. 1939 Cal. 320=40 Cr. L.J. 721=182 Ind. Cas. 850.

——S. 106.

An order to furnish security under S. 106 should not be passed with non-appealable sentence. A.I.R. 1935 Rang. 363=36 Cr. L.J. 1510=13 Rang. 287=158 Ind. Cas. 1115.

——S. 106—Penal Code (Act 45 of 1860), S. 323—Accused convicted of causing hurt.

An accused convicted of causing hurt under S. 323, I.P.C., can be ordered to find security under S. 106, Cr. P.C. The words "assault or other offences involving a breach of the peace" clearly include the offence of causing hurt under S.323, I.P.C., and so an accused convicted under that section can be ordered to find security to keep the peace under S.106, Cr. P.C. A.I.R. 1934 Oudh 425=9 Luck. 272=35 Cr. L.J. 284 (1)=10 O.W.N. 1228=146 Ind. Cas. 918 (1).

——S. 106—Penal Code (Act 45 of 1860), Ss. 325, 147, 149—Accused made constructively liable by calling in the aid of S. 149.

Where a person is made constructively liable for an offence by calling in the aid of the provisions of S. 149, I.P.C., it is not proper to take action against him under S.106, Cr. P.C. Where the Sessions Judge has altered the conviction of the accused to one under S.325 read with S.149, I.P.C., an order under S. 106, Cr. P.C., should not be passed. A.I.R. 1934 Oudh 279=35 Cr. L.J. 1159=11 O.W.N. 992=10 Luck. 100=150 Ind. Cas. 945.

——S. 106—Penal Code, Ss. 326, 149—Charge under —No conviction under S. 147.

Where the accused were found guilty of rioting and of offences punishable under S.326 read with S. 149, I.P.C. but were only convicted of the latter offence and not also under S. 147 :

Held, that technically, an order passed against them under S.106, Cr. P.C., would be illegal and should be set aside. A.I.R. 1932 Lah. 489=33 Cr. L.J. 576 (1)=138 Ind. Cas. 289 (2).

——S. 106—Order for security for keeping the peace—Penal Code, S.324—Formal finding that conviction involved breach of peace.

Where the accused were convicted under S. 324, I.P.C., and fined and were ordered to furnish security bonds under S.106, Cr. P.C., and it was contended in revision that the absence of an inquiry and a judicial finding that the offence involved a breach of the peace, vitiated the order :

Held, that inasmuch as the accused committed an offence under S. 324 which involved a breach of the peace, it was immaterial whether the Magistrate gave a formal finding to this effect or not. A.I.R. 1932 Lah. 435=13 L. 336=33 P.L.R. 588=33 Cr.L.J. 746 (1)=139 Ind.Cas. 127 (1).

——S. 106—Order under.

Order under S.106, Cr. P.C., does not lie where accused is convicted under any section of I.P.C. read with S.149. 85 Ind. Cas. 42=6 P.L.T. 330=3 Pat. 870=26 Cr. L.J. 426=A.I.R. 1925 Pat. 117.

——S. 106.

An order under S. 106 must be passed at the same time when there is a conviction and passing of sentence and not at a subsequent stage. 81 Ind. Cas. 613=21 A.L.J.839=4 L.R.A. Cr. 240=25 Cr. L.J. 965=A.I.R. 1924 All.230.

——S. 106.

Order under this section should be passed by the same Magistrate who tried the accused for the principal offence and not by another Magistrate. 74 Ind. Cas. 448=24 Cr. L.J. 784=A.I.R. 1924 All. 141.

——S. 106—Order under—Offences proved not those contemplated by the section—Duty of Magistrate to record other incidents giving him jurisdiction to pass order under S. 106.

Where the offences of which the accused are convicted are not such as are contemplated by S.106, the Magistrate passing an order under that section must record the other incidents which induce him to pass such an order. Otherwise, his order must be set aside. 26 C. 576, Foll. (1902) 6 C.W.N. 471.

——S. 106—Penal Code, Ss. 143, 379—Conviction under—Recognisance to keep peace where justifiable.

A conviction under S.143 or order under S.379, I.P.C., is not of itself sufficient to sustain an order under S. 106, Cr. P.C., unless it is clearly found that there was force employed or that there were armed men present. 8 C.W.N. 517 ; 27 C. 983 ; 33 C. 39. (1907) 7 C.L.J. 173.

——S. 106—I.P.C., Ss. 441 and 442—Criminal trespass on penatchut is house-trespass involving breach of peace.

Criminal trespass on a *penatchut* (outer verandah of a Burmese house where shoes are taken off) under the circumstances mentioned in S.441, I.P.C., with the object of causing hurt to a person in the house, is house-trespass involving breach of the peace under S.106, Cr. P.C. 9 Bur. L.T. 204=8 L.B.R. 463=18 Cr. L.J. 81=37 Ind. Cas 145.

10. Powers and duty of Court.

——S. 106—Power and duty of Court—Order under—Reasons for.

The trial Magistrate need not give reasons for his opinion while passing an order under S.106, Cr. P.C. A.I.R. 1942 Mad. 501 (1) =1942 M.W.N. 304=55 L.W. 231 (2) =(1942) 1 M.L.J. 490=43 Cr. L.J. 674 (1)=200 Ind. Cas. 352.

——S. 106—Procedure—Offence not coming under S. 106—Duty of Magistrate to record finding on facts making the section applicable.

When a person is convicted of offences which do not in themselves, and apart from any other incidents, come within the terms of S.106, Cr.P.C., it is incumbent upon a Magistrate to record a clear finding with respect to the facts which, in his opinion, make the section applicable to the case. A.I.R. 1932 Sind 87=26 Sind L.R. 18 =33 Cr. L.J. 713=139 Ind. Cas. 130.

——S. 106—Proof of previous conviction.

Whenever it is required to prove a previous conviction against a man in proceedings under Chap. VIII, Cr. P. Code, such previous convictions must be proved strictly and in accordance with law. 43 Cal. 1128=20 C.W.N. 725=17 Cr. L.J. 185=33 Ind. Cas. 825.

——S. 106—Reasons for refusing surety.

On a refusal by a Magistrate to accept sureties for good behaviour as the surety lived 10 miles from the accused, the Court held the order to be improper. No obstacles should be thrown in the way of people giving security. 7 A.L.J. 993=11 Cr.L.J. 536=7 Ind. Cas. 910.

——S. 106(3)—Altering Conviction—Security order.

A First Class Magistrate can on appeal order the appellant to execute a bond for good behaviour on altering the conviction of persons under Ss. 147 and 325 of the I.P.C. into one under S. 323, I.P.C., and such an order may be made by the Court specified in S. 106 (3) as well as by Original Courts. 33 Bom. 33=10 Bom. L.R. 759=1 Ind. Cas. 454.

11. Revision—Interference in.

——S. 106, Chap. VIII—Proceedings under Chap. VIII—Interference, when proper—Revision—High Court, when will interfere.

Proceedings under Chap. VIII, Cr. P.C., should be taken with care and caution only when the public interest compels. Where there is no reason to suppose that the Subordinate Magistrate is not a careful and responsible Magistrate and where he has seen the witnesses and has heard what they have to say, and he has come to the conclusion that the case against the suspected persons is unworthy of credit, and that the evidence should not be believed, the High Court will not interfere. A.I.R. 1936 Sind 243=38 Cr. L.J. 117=30 Sind L.R. 368=165 Ind. Cas. 950.

——S. 106—Revision.

Where the Magistrate has exercised his discretion in the matter and passed an order under S.106, the High Court will not interfere in revision. A.I.R. 1921 Pat.472.

——S. 106—Security order.

No order under S.106 can be passed upon conviction of an offence under S. 143 or S. 427, I.P.C. 99 Ind. Cas. 348=8 L.R.A. Cr. 11=28 Cr. L.J. 140=7 A.I. Cr. R. 130=A.I.R. 1927 All. 136.

——S. 106—Security for good behaviour—General report—Hearsay evidence—High Court interfering with discretion of Magistrate.

Hearsay evidence amounting to evidence of general repute is admissible for the purposes of proceedings under Chapter VIII of the Criminal Procedure Code. The object of Ch. VIII is the prevention, and not the punishment, of offences. The chapter gives a certain amount of discretion to Magistrates, and the High Court must be always slow to interfere with that discretion unless there is an error of law. (1903) 6 Bom. L.R. 34.

——Ss. 106, 110, Cl. (e)—Security for good behaviour—Are immoral and indecent acts offences involving a breach of the peace ?

'Offences involving a breach of the peace' in S. 110, Cl. (*e*), mean those in which a breach of the peace is an ingredient, and not those provoking or likely to lead to a breach of the peace. Immoral and indecent acts are not such offences. (1902) 30 C. 366.

——**S. 106—Security for keeping the peace—Possession—Compromise of dispute as to possession—Cancellation of order.**

Security to keep the peace taken from one of the parties should be cancelled when under a compromise between the parties, one of them is allowed to be in peaceable possession. 16 Cr. L.J. 700=30 Ind. Cas. 748.

——**S. 106—Security to keep the peace—Principle on which a person may be bound over.**

Before a person is bound over to keep the peace it must be shown that he is himself likely to commit a breach of the peace or do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. He cannot be bound down merely because he is a wealthy or influential member of a party. (1910) 7 A.L.J. 1161=8 Ind. Cas. 818=11 Cr. L.J. 719.

——**S. 106 (1)—Conviction under S. 392, I.P.C.—Order to give security to keep peace—Legality.**

An offence under Ss. 392 and 75, I.P.C., does not involve a breach of the peace. An order passed under S. 106, Cr. P.Code, directing certain accused who were convicted of an offence under that section to give security for keeping the peace is illegal. 18 M.L.T. 121=2 L.W. 631=16 Cr. L.J. 611=30 Ind. Cas. 435.

——**S. 106 (1)—Offence involving breach of peace—Penal Code, S.143—Conviction under—Security to keep peace.**

S. 106 does not apply to a person not convicted of any of the offences specified therein. Though intimidation is one of the elements of unlawful assembly, the criminal intimidation specified in S.106 is the one defined by S.503. Sentence provided by S.506 being more severe than that provided by Ss. 143 and 106 cannot be inflicted on a person convicted under S.143 merely because intimidation by show of criminal force is in the fourth and fifth parts of the definition in S.141 an element of the offence punishable under S. 143. 126 P.L.R. 1910=11 Cr. L.J. 680=8 Ind. Cas 551.

——**S. 106 (1)—Sub-divisional Magistrate—Binding over for more than 6 months.**

A Second Class Magistrate who is also a Sub-Divisional Magistrate can pass an order under S.106 of the Cr. P. Code binding over a person to keep the peace for a period exceeding 6 months. 37 All. 230=13 A.L.J. 268=16 Cr. L.J. 350=28 Ind. Cas. 734.

12. Surety's liability.

——**Ss. 106 to 110 and 514—Liability of surety for person ordered to keep peace or to be of good behaviour is independent liability.**

The liability of a surety under the security sections in Chap. 8 of the Code is not co-extensive with that of the person bound over but is a separate and independent liability to pay the amount agreed in the event of the person bound over committing a breach of peace or being guilty of misbehaviour.

The provisions relating to contracts of guarantee and surety's liability in Ch. 8, Contract Act, are wholly inapplicable to such a bond by the surety. A.I.R. (1946) All. 333=I.L.R. (1946) All. 801=225 Ind. Cas. 609=47 Cr. L.J. 757.

——**Ss. 106, 118—Surety's liability under Criminal P.C., if different from that of surety under Civil P.C.—S. 118 is restrictive of S.106—Liability of surety and principal is joint and several.**

Where a person is ordered to execute a bond with sureties for keeping peace, the fact that the real object of the Crown is to have the peace kept and not to obtain money, does not necessarily lead to the conclusion that the liabilities of the sureties under the Cr. P.C., are different from those of sureties under the civil law.

Section 118, Cr. P.C., is, as regards these provisions, really restrictive of S.106. In other words, although the maximum is fixed by S.106, the circumstances of the case may be such as to make it unnecessary to take as great a bond as would be permissible under S.106. Taking it for granted that the object of taking sureties is not to recover the amount of the principal bond but rather to ensure, as far as possible, that the peace shall be kept, this result can be obtained even if one holds that nothing further ean be taken from the sureties than the amount of the principal's bond.

To hold the view that the principal is liable to pay the amount of the bond and that each surety is in addition to that liable to pay the amount which he agreed to pay as surety, would amount to this, that the principal and each surety executed an independent bond and there is no joint liability. In Form No. XI of Sch. V, Cr. P.C., however, there is one bond by the principal followed after his signature by the undertaking of the sureties binding themselves jointly and severally. If, therefore, the sureties bind themselves jointly and severally it cannot be held that each of them can be called upon to pay the whole amount of the bond. In the Code, the expression always is "a bond with sureties", and therefore, the liability of a surety under the Cr. P.C., cannot be differentiated from that of a surety under the civil law. A.I.R. 1938 Oudh 195=1938 O.W.N.676=39 Cr. L.J. 831=176 Ind. Cas. 948.

——**S. 106—Surety bond—Principal committing breach of peace—Surety, if liable to pay even if payment is made by principal.**

Where a surety bond is executed in accordance with the provisions of S.106, Cr. P.C., the surety is liable to pay the amount specified in the bond on breach of peace by the principal even if payment has been made by the principal of the amount due on his own bond. An order requiring the surety to pay the amount in addition to any amount which might be recovered from the principal is in accordance with law. The power to require sureties has been given with some object other than that of insuring the recovery of the amount of the bond ; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit is demandable. A.I.R. 1937 Lah. 133=17 Lah. 523=38 P.L.R. 951=38 Cr. L.J. 420=167 Ind. Cas. 746.

[**Overrule** (1) 26 P. R. 1894 (Cr.)
(2) 30 P. R. 1890 (Cr.)
(3) A.I.R 1925 Lah. 228=26 Cr. L.J. 322=84 Ind. Cas. 546.
(4) A.I.R. 1924 Lah. 262=25 Cr.L.J.1131=81 Ind. Cas. 955.
(5) 12 Cr. L J 404=11 Ind. Cas. 588.]

——**Ss. 106, 107 and 118—Surety's liability.**

When a person is surety for another bound down to keep peace, both persons are liable, if the bond is broken, for, this is not a case of ordinary suretyship for the payment of money where the surety is liable only if the debtor fails and only one of the two is liable at a time. 36 Cal. 562=9 C.L.J. 296=13 C.W.N. 555=10 Cr. L.J. 89=2 Ind. Cas. 592.

——**S. 106—Surety—Liability of.**

A surety under S.106 of the Cr. P. Code cannot be made liable for an amount larger than the one for which the principal has executed bond. 5 Bur. L.T. 101=13 Cr. L.J. 482=15 Ind. Cas. 482.

13. Time—Computation of.

——**Ss. 106, 118—Order to execute bond to keep peace for one year—Appeal from and stay of, during its pendency.**

Where an accused is ordered to execute a bond with sureties for keeping peace for one year and an appeal is

lodged from such order together with an application for stay of the order and the Appellate Court suspends the order until the decision of the appeal, the time from which the period of one year begins to run is the date of the order of the Appellate Court possibly after deduction of the time between the original order of the Magistrate and the order of the Appellate Court staying such order. A.I.R. 1938 Oudh 195=1938 O.W.N. 676=39 Cr. L.J. 831=176 Ind. Cas. 948.

——S. 106—Judge directing security to be furnished in appeal—Persons ordered to give security, out on bail.

In certain cases, a Judge has in appeal power to extend the period during which security is required to be furnished and thereby extend the period of imprisonment to be suffered in default, but this power should be exercised only in exceptional circumstances. Ordinarily the period for which persons are ordered to give security, when they are out on bail, should be excluded from the period for which they are finally ordered to give security in appeal. A.I.R. 1936 Sind 125=29 S.L.R. 353=37 Cr.L.J.1003=164 Ind. Cas. 576.

——S.1 06—Security cannot be ordered to be effective from the date of judgment. 1934 M.W.N. 483 (1).

14. Quantum of punishment.

——S. 106—Order under—Accused found drunk and disorderly—Bond for keeping peace for two years.

Where an accused is found drunk and disorderly, an order under S.106, requiring him to furnish a bond for keeping the peace for a period of two years is out of all proportion to the gravity of the offence committed. A.I.R. 1943 Mad. 169=(1942) 2 M.L.J. 613=55 M.L.W. 746=1942 M.W.N. 760 (2)=44 Cr. L.J. 321=205 Ind. Cas. 56.

——S.106 Order under—When undesirable—Duty of Magistrate—Solitary instance of disorderliness.

It is generally undesirable, where a person is charged with some petty offence, to tack on to some small sentence of fine an order under S.106, which, in most cases, in view of the poverty of the accused persons, would necessitate their remaining in jail for a long period which would very much exceed the punishment legally permissible for the offence of which the accused are charged. An order under S. 106 is, of course, legally permissible, but should be used very sparingly in such cases.

Before passing an order under S.106, the Magistrate should be satisfied that if he does not call upon the accused to furnish a bond for keeping the peace, there is a likelihood that there will be breaches of the peace in future. When there is only a solitary instance of the accused being drunk and disorderly and there is no evidence to show that the accused is likely to do something similar in the future, an order under S.106 is not justified. A.I.R. 1943 Mad. 169=55 M.L.W. 746=(1942) 2 M.L.J. 613=44 Cr.L.J. 321=1942 M.W.N. 760 (2)=205 Ind. Cas. 56.

——S. 106—Where the accused is found guilty of disorderly and riotous behaviour, the order should be ' in default the accused should undergo simple imprisonment for one year or until such date within that year as the required security be furnished.' 1933 M.W.N. 548.

——S. 106—Security not desirable.

Order to give security is uncalled for when a sentence of imprisonment or transportation for so long a term as seven years is passed for the offence committed. 5 L.B.R. 34=10 Cr. L.J. 69=2 Ind. Cas. 531.

—S. 107.

Synopsis.

1. Applicability.
2. Appeal.
3. Bail.
4. Both parties dangerous.
5. Consent of accused—Effect.
6. Essentials for action under.
7. Evidence required.
8. Forfeiture of security.
9. Fresh proceedings.
10. Grounds for action under.
11. Jurisdiction under.
12. Lawful acts.
13. Limitation on powers under.
14. Joint trial.
15. Nature of proceedings under.
16. Powers and duty of court.
17. Procedure.
18. Reference and Revision.
19. Security under.
20. Wrongful acts.
21. Object and scope.
22. Miscellaneous.

1. Applicability.

——S. 107—Applicability —Dispute as to possession of immovable property—Bona fide claim under settlement from landlord—Proceedings under S. 107—Legality.

S. 107, Cr. P. Code, should not ordinarily be applied to cases of disputes in regard to immovable property, much less where the dispute is a *bona fide* dispute as to possession where the persons concerned claim under a settlement from the landlord. Proceedings under S. 107 are not intended for the purpose of binding over persons who do certain acts in the exercise of their right to property. Action under the section is in the main intended for persons who are desperate characters and habitually disturb the public peace or who, in spite of orders of Civil or Criminal Courts finding possession against them, persist in their unlawful conduct of disturbing the possession of others and take the law into their own hands. 56 Cal. 290; 2 Pat. 94; A.I.R. 1942 Pat. 331. A.I.R. 1950 Pat. 502=4 A.I.Cr. D. 639.

——S. 107—Applicability—Dispute between two villages regarding common boundary—People of one village forcibly keeping out graziers from another village.

Where there has been a dispute between two villages regarding their common boundary and the people of one village forcibly keep out the people of another village from grazing their cattle claiming that they have encroached upon their land, it cannot be said that they are not within their rights in doing so, and the proceedings against them under S.107, Cr.P. Code, are therefore misconceived. 51 Cr. L. J. 384=A.I.R. 1950 Kut. 7.

——Ss. 107 and 145—Applicability—Dispute as to land—Procedure—Proceedings started under S. 145—Conversion into one under S. 107—Legality and propreity of.

When there is a dispute concerning land, which is likely to lead to a breach of the peace or cause an apprehension of a breach of the peace, the proper procedure is to apply S. 145, Cr. P. Code, and decide the question of possession once for all. It is improper to start proceedings under S. 107 against one of the parties when a proceeding under S. 145 is pending against both the parties. It is still more improper and illegal to convert a proceeding under S. 145 into one under S. 107. To convert a proceeding under S. 145 into one under S. 107 is a process unknown to law and improper in the extreme. 3 A.I.Cr. D. 520=A.I.R. 1949 Pat. 482=51 Cr. L.J. 92.

——Ss. 107 and 145—Applicability—Dispute relating to possession of land likely to lead to breach of the peace—Procedure—Proceeding under S. 107—Propriety.

If a dispute relating to the possession of immovable property is, in the opinion of the sub-divisional Magistrate, likely to occasion a breach of the peace, the proper course is to adopt the procedure described in S. 145, Cr. P. Code, and not to start a proceeding under S. 107, Cr. P. Code. 27 P.L.T. 231=13 B.R. 550=231 Ind. Cas. 110=A.I.R. 1947 Pat. 235=48 Cr. L.J. 703.

——S. 107—Applicability—Proceeding under—Condition precedent to—Duty of Magistrate—Magistrate directing subordinate officer to inquire and report as to whether action was necessary—Propriety of.

The *sine qua non* for the institution of a proceeding under S. 107, Cr. P. Code, is that the Magistrate shall be of opinion that there is sufficient ground for proceeding. The exercise of the power conferred by S. 107 has been carefully restricted to certain specified Magistrates and it is only when such a Magistrate is of opinion that there is sufficient ground for proceeding that action can be taken under the section. It is wrong for a Magistrate to direct another subordinate officer to hold an inquiry and to report as to whether action under S. 107 was necessary, and then proceed under S. 107 on the report submitted by the subordinate officer. 27 P.L.T. 231=13 B.R. 550=231 Ind. Cas. 110=A.I.R. 1947 Pat. 235=48 Cr. L.J. 703.

——S. 107—Applicability and scope.

Section 107, Cr. P. C., does not contemplate the actual commission of an offence but merely the likelihood of breach of the peace. A.I.R. 1943 Nag. 88=1942 N.L.J. 529=44 Cr. L.J. 82=I.L.R. (1943) Nag. 609=203 Ind. Cas. 493.

——S. 107—Applicability and scope.

Magistrates have power to proceed under S. 107, Cr. P.C., in preference to S. 145, Cr. P.C. if they think it desirable. 1941 M.W.N. 960.

——S. 107—Intention of.

The intention of S. 107, Cr. P.C., in demanding security in case of apprehended violence by accused is preventive and not penal. A.I.R. 1940 Pat. 252=21 P.L.T. 652=6 B.R. 837=41 Cr. L.J. 746=189 Ind. Cas. 457.

——S. 107—Applicability of.

The section applies to a person who asserts a claim by keeping himself in the background and preparing to enforce the claim through a servant who is continuously armed. 1 P.L.J. 361=2 P.L.W. 386=18 Cr. L.J. 374=38 Ind. Cas. 758.

——S. 107—Right to manpan or respect—Nature of—Exclusive right to.

Right to *manpan* (right to respect) is not the kind of right which the law recognizes as being capable of possession by any individual. No individual can claim the right to its exclusive possession or use. Every person has a right to celebrate festivals and to obtain any respect which others voluntarily choose to give him. If the act complained of is not wrongful in itself it cannot become wrongful because somebody else's susceptibilities are likely to be hurt. If any person threatens to interfere by force or by resort to such means as the law considers illegal, then it is he who is in the wrong and it is he who should be bound over and not the person who is entitled to perform the act to which every one is entitled. A.I.R. 1942 Nag. 45 =1942 N.L.J. 15=43 Cr. L.J. 357=I.L.R. (1942) Nag. 620=198 Ind. Cas. 409.

——S. 107.

Starting of rival business in close proximity to previously established one—The best course is to prohibit the doing of the wrongful acts, or if necessary, to bind down the wrong-doer under S. 107, Cr.P.C. A.I.R. 1940 Pat. 185=6 B.R. 480=41 Cr. L.J. 463=5 Cut. L.T. 54=187 Ind. Cas. 511.

——Ss. 107 and 144—Scope and effect of.

It is not open to a Magistrate by passing repeated orders under S. 144, Cr. P.C., to avoid the decision of a dispute which may appropriately be dealt with under S. 145 or S. 107, Cr.P.C. A.I.R. 1939 Pat. 512=20 P.L.T. 374=40 Cr. L.J. 895=6 B.R. 30=184 Ind. Cas. 240.

——Ss. 107 and 144—If mutually exclusive.

Section 144, Cr. P.C., is not substitued for S. 107 or S. 145. But where S. 107 or S. 145 will meet the requirements of the case, S. 144 is not an appropriate remedy. 159 Ind. Cas. 455=2 B.R. 83=37 Cr. L.J. 95.

——Ss. 107 and 144—Relative scope.

Where the difficulty is to say which of the parties to the dispute is the party who is creating a disturbance, the proper procedure is under S. 107 and not under S.144. A.I.R. 1935 Pat. 461=1 B.R. 812=16 P.L.T. 624=36 Cr. L.J. 1268=157 Ind. Cas. 760.

——Ss. 107, 145—Delivery of possession by Civil Court—Magistrate, when should proceed under either section.

A Magistrate, in spite of delivery of possession by the Civil Court, has jurisdiction to start a case under S. 145, Cr. P.C. No hard and fast rule, however, can be laid down. Magistrate has discretion when there is an apprehension of a breach of the peace to choose either S. 145 or S. 107. It must be left to his discretion which particular section he chooses. Generally speaking, if the dispute arises immediately after the delivery of possession by the Civil Court and is between the parties to that delivery of possession, the more appropriate step will be to bind down under S. 107, Cr. P. C., the party who has been dispossessed by the Court. But if the delivery of possession is an old one or the dispute is between a man who has been given possession and a man who was not dispossessed by the Court, a proceeding under S. 145, Cr. P.C., will be more suitable . A.I.R. 1939 Pat. 151=19 P.L.T. 632=5 B.R. 385=40 Cr. L. J. 339=20 P.L.T. 333=4 Cut. L. T. 69=180 Ind. Cas. 322.

——Ss. 107, 145.

In the proceedings under S. 145, Cr. P. C., where one party alleges to be in joint possession with the opposite party, proceedings under S. 107 may be taken. 1937 O.W.N. 214.

——S. 107—Magistrate whether can take action under S. 107 to prevent lawful acts resulting in breach of peace owing to wrongful acts of others.

The word " wrongful " in S. 107, Cr. P. C., must mean something more than wrongful in the opinion of the Magistrate, and " wrongful act " must mean some act wrongful according to some law. Section 107, Criminal P. C., cannot be intended to authorize a Magistrate to take action to prevent lawful acts which may result in a breach of the peace because of the wrongful or unlawful acts of others. Section 107 is intended to be applied against the wrong-doers and not also against the wronged. It was never the intention of the section that the wrong-doers and the wronged should be classed together as wrong-doers and made the subjects of a common complaint and common action. The collection or the acquiescing of collection of women for the purpose of religious instruction, discourse or songs, the meeting together of men and women for a joint *satsang* or meeting is no offence under the law nor is the education of children, and the Magistrate, therefore, cannot take action to prevent such lawful act even if it would result in a breach of peace owing to the wrongful acts of others. A.I.R. 1939 Sind 167=40 Cr. L. J. 703=I.L.R. (1939) Kar. 662=182 Ind. Cas. 698.

——Ss. 107 and 112—Effect of.

It is doubtful how far an order under S. 112, Cr. P. C., can properly exceed the information given under S. 107. A.I.R. 1939 Sind 167=40 Cr. L. J. 703=I.L.R. (1939) Kar. 662=182 Ind. Cas. 698.

——**S. 107—Object of, is prevention and not punishment of offences.**

The object of the provisions contained in S. 107, is prevention and not punishment of offences; it is intended not to punish persons for anything that they have done in the past, but to prevent them from doing in future something that might occasion a breach of the peace. A.I.R. 1938 Cal. 583=66 C.L.J. 564=39 Cr. L. J. 992=178 Ind. Cas. 52.

——**S. 107—Object of—Information that person was committing acts involving breach of peace in the past.**

The object of S. 107, Cr. P. C., is to guard against apprehended breaches of the peace or wrongful acts which might probably lead to breach of the peace. Where information laid against a person is to the effect that he was committing various acts involving breach of peace in the past, an order directing him to furnish security for keeping the peace is not justified. A.I.R. 1937 Mad. 356=1937 M.W.N. 48=45 L.W. 308=38 Cr. L. J. 699 =169 Ind. Cas. 97.

——**S. 107—Duty of Magistrate under—Nature and extent of proceedings.**

In proceedings under S. 107, all that the Magistrate has to determine is whether there is a likelihood of a breach of the peace and it is enough for his purposes to find that both parties claim a right to possession and are ready to fight about it. An elaborate enquiry about ownership and title is entirely out of place. 167 Ind. Cas. 848=19 N.L.J. 264=38 Cr. L. J. 467.

——**S. 107 and 250—Effect.**

As an institution of proceedings under S. 107 Cr. P. C., is not an accusation of offence, S. 250 does not apply if the accusations prove to be false. A.I.R. 1935 Lah. 29. *See* also 25 Bom. 48.

——**S. 107—Application under, against several persons—Magistrate not taking action against some—Power of his successor to revive proceedings against them.**

Where on an application against several persons under S. 107, Cr. P. Code, the Magistrate was of opinion that no action was required against some of them, his successor exercising concurrent jurisdiction with him cannot set aside his order and revive the proceedings against them, unless there is a really fresh material before him. A.I.R. 1949 All. 350=50 Cr. L. J. 566.

——**Ss. 107, 110—Apprehension of using violence.**

Where it appears from the evidence that there is an apprehension of anyone using violence towards a particular person or particular persons, he ought to be bound over to keep the peace as provided by S.107, and not be proceeded against under S. 110. Cr. P. C., 27 A. 92. =1904 A.W.N. 195. =1 A.L.J. 495.

——**S. 107—Application under—Whether amounts to complaint.**

An application under S. 107 is not a complaint within the meaning of S. 4 (*h*). =1931 Cr. C. 125=53 A. 148 =32 Cr. L. J. 570=130 Ind. Cas. 630=A.I.R. 1931 A. 53=1930 A. L. J. 1475.

——**S. 107—Arrest prior to initiation of proceedings under S. 107—Regularity of procedure.**

A Magistrate has no power to order arrest with a view to his taking action under S. 107, Cr. P. Code, unless the case falls under S. 107 (3). Where an arrest is ordered first and then proceedings under S. 107, Cr. P. Code, are started, the proceedings are irregular. 1948 A.W.R. (H.C.) 214=A.I.R. 1949 All. 21=5 Cr. L. J. 78=1948 A. L. J. 484.

——**S. 107—Breach "is" likely not "was" likely—Security for good behaviour.**

S. 107 of the Criminal Procedure Code presupposes that the person sought to be put upon a rule of bail is likely (not *was* likely) to commit a breach of the peace; and that it cannot be presumed from the fact that if the person has done a wrongful act in the past that he is likely to do the same again. (1904) 6 Bom. L. R. 663.

——**Ss. 107, 145, 170—Disputes concerning Jalkar—Procedure.**

Where a dispute likely to cause a breach of the peace is a *bona fide* one relating to a fishery right, proceedings under S. 145 and not under S. 107 of the Cr. P. C., should be instituted. The words in S. 145 are mandatory while those in S. 107 are discretionary. 25 C. 559 foll. (1907) 6 C. L. J. 697=35 C. 117=12 C. W. N. 487.

——**Ss. 107, 144, 145—Dispute relating to possession of land—Jurisdiction of Magistrate to proceed under S. 107.**

The mere fact that the dispute that is likely to cause a breach of the peace is about the possession of land does not oust the jurisdiction of a Magistrate from acting under S. 107, Cr. P. C. 7 C.W.N. 142 not foll.; 7 C.W.N. 746, 26 M. 471 foll. (1905) 32 C. 966. =10 C.W.N. 288.

——**Ss. 107, 144,145—Finding that one of the rival parties is in possession—Order to give security.**

Where one of the rival parties is found to be in actual possession of the lands in dispute, a Magistrate can proceed either under S. 107 or Ss. 144, 145, Cr. P. C. (1902) 26 M. 471.

——**Ss. 107 and 145—Profits of market—Dues—Dispute—Applicability.**

A dispute relating to *chaudhrana* dues which is a purely voluntary payment to the *chaudhry* (or agent) by market dealers for regulating market business is not a dispute relating to the profits of a market within S. 145 and S. 107 and not S. 145 applies to the case. 36 All. 143=12 A.L.J. 162=15 Cr. L. J. 27=22 Ind. Cas. 171.

2. Appeal.

——**Ss. 107, 423, (1) (c), (d)—Appeal against order to give security—*De novo* trial, if can be ordered by Appellate Court—Powers of Appellate Court.**

When an appeal is preferred from an order other than an order of acquittal or conviction, the Appellate Court has no jurisdiction to order a *de novo* trial. It can only alter or reverse the order under S. 423 (1) (*c*) and under S. 423 (1) (*d*), Cr. P. C., any consequential order that might be just and proper may be passed. A.I.R. 1934 Mad. 202=1933 M.W.N. 241=34 Cr. L. J. 947=145 Ind. Cas. 306.

——**Ss. 107, 423 (1) (d), 426 (1)—Power of Appellate Court to suspend execution of order regarding security—'Convicted person', meaning of.**

Where certain persons were bound over under S. 107, Cr. P. C., to keep the peace and were ordered to find security, and they appealed to the Sessions Court which set aside the order :

Held, (*i*) that the words 'convicted person' in S. 426 (1) would apply to a person against whom an order under S. 107 has been made and that consequently the Court had power to suspend the order relating to the furnishing of security ;

(*ii*) that even supposing S.426 (1) did not apply, S.423 (1) (*d*) would cover the order originally made suspending the execution of the order relating to security. A.I.R. 1932 All. 680=1932 A. L. J. 624=33 Cr. L. J. 731 (2) =54 A. 861=139 Ind. Cas. 141.

——**S. 107—Appeal—Retrial.**

In the case of an appeal under S. 406 from the order under S. 107 the appeal is not one from conviction and therefore apart from the provisions of S. 423 appellate court can order re-trial. 48 All. 501=24 A. L. J.566 = 7 L.R.A. Cr. 121=27 Cr. L. J. 945=96 Ind. Cas. 497= A.I.R. 1926 All. 403.

——**Ss. 107 and 118—Security for keeping peace—If appealable.**

Order under S. 107 directing security for good behaviour to be given can be appealed from under S. 406. But no appeal will lie in proceedings instituted under S. 107 read with S. 118 for keeping the peace. 75 Ind. Cas. 979=19 N.L.R. 160=25 Cr. L. J. 67=A.I.R. 1924 Nag. 60. *See* also 27 All. 623=1905 A.W.N. 135.

——S. 107—Appeal—Order for security to keep peace not appealable.

An order for security to keep the peace is not appealable, but under S.406, Cr. P. C., an order for security for good behaviour is appealable. 11 Bom. L.R. 740=10 Cr. L. J. 375=3 Ind. Cas. 774.

3. Bail.

——S. 107—Bail—Can be refused only in certain cases under Cls. 3 and 4.

Where the proceedings have been instituted against a person under S. 107 it is only in the special circumstances referred to in Sub-Ss. (3) and (4) of that section that the law empowers a Magistrate to detain a person in custody until the completion of the enquiry. The sub-section can only be put into operation when a Magistrate, who has no powers to proceed under Sub-S. (1) of S. 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance and cannot, by any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and send him then to another Magistrate who has got adequate powers for dealing with the case. 74 Ind. Cas. 857=2 Pat. L.R. Cr. 77=5 P.L.T. 109=24 Cr. L. J. 825=A.I.R. 1923 Pat. 527.

——Ss. 107, 496—Security proceedings—Accused's right to bail.

In the case of proceedings under S. 107, Cr. P. C., the accused is entitled as of right to bail. If the District Magistrate considers that immediate measures are necessary for the prevention of a breach of the peace during the pendency of the enquiry, he can direct the applicant to execute a bond with or without sureties, for keeping the peace until the completion of the inquiry. If the applicant refuses to execute a bond or fails to furnish security as directed, then he could be kept in custody until the completion of the inquiry. A.I.R 1933 Rang. 165=34 Cr. L. J. 1195=146 Ind. Cas. 23.

——S. 107—Bail—Warrant of arrest issued under S. 114—Bail—Right of accused.

A Magistrate cannot refuse bail to a person arrested under S. 114, against whom proceedings are taken under S. 107 of the same Code. 31 Mad. 315 Foll. 9 S.L.R. 158=17 Cr. L. J. 77=32 Ind. Cas. 669.

——Ss. 107 (4) and 496—Bail—Right to be released on.

S. 107, Cl. (4) allowing a Magistrate to detain, in his discretion any person brought before him in custody until the completion of inquiry, is not subject to or controlled by S. 496. The latter section does not give an absolute right to bail to any person who is not charged with a non-bailable offence and should be read along with other provisions of the Code giving a special right of detention to a Court. 36 Mad. 474=22 M. L. J. 357=(1912) M. W. N. 169=11 M.L.T. 253=13 Cr. L. J. 447=15 Ind. Cas. 79.

——S. 107—Security for keeping the peace in other cases—Proceeding—Bail.

No bail should be called for from a person against whom proceedings under S. 107, Cr. P. C., are contemplated but not actually initiated. The most that can be required of him is to furnish recognizance, and that, only when there is any likelihood of his absenting himself from court. (1906) 11 C. W. N. 415.

4. Both parties dangerous.

——S. 107—Dispute over civil rights—Village feeling running high.

Where village feeling is running high over a disputed question of civil right, both the parties in the village should be bound down if they are prepared to assert that they have right on their side, until the disputed question of right has been finally settled one way or the other. A.I.R. 1943 Lah. 99=45 P.L.R. 64=44 Cr. L. J. 506=206 Ind. Cas. 355.

——S. 107—Both parties dangerous—Provocation by unlawful acts of one party.

When all the previous judicial proceedings show that all the lawful acts of one party, who was merely advising his own men not to pay rent to the other party and not to allow him to trespass and remove paddy from the lands, have been provoked by the unlawful acts of the other party, there is no justification for taking proceedings against both the parties under S. 107. 118 Ind. Cas. 504=30 Cr. L. J. 931=2 M. Cr. C. 287=1929 Cr. C. 610=A.I.R. 1929 Mad. 842.

——Ss. 107, 145—Bona fide dispute as to the right of possession—Binding down one party under S. 107—Proceeding under S. 145—Proper procedure.

When there is a *bona fide* dispute as to the right to the possession of land between two rival parties, giving rise to a likelihood of a breach of the peace, it is unfair to bind down only the party who happens to be in possession under S. 107, Cr. P.C., to keep the peace. The proper order in such a case would be to bind down both the parties under S. 107, Cr. P.C., or to institute a proceeding under S. 145, Cr. P. C. (1908) 12 C.W.N. 606.

——S. 107—Both parties putting forward a right.

Where there is a right put forward by both the parties, and where the right is in dispute, it is not fair to bind down only one of the parties. If the Magistrate thinks that in the interests of the public peace, he should resort to the provisions of S. 107 the proceedings should be drawn up against both parties so as not to give unfair advantage to one as against the others. 102 Ind. Cas. 781=8 P.L.T. 645=8 A.I. Cr. R. 248=28 Cr. L. J. 605=A.I.R. 1927 Pat. 314.

——S. 107—Both parties claiming—Procedure.

Two opposing parties in a dispute cannot be proceeded against under S. 107 in one proceeding. 88 Ind. Cas. 864=6 P.L.T. 768=26 Cr. L. J. 1248=A.I.R. 1926 Pat. 32.

——S. 107.

Where a dispute between two parties may end in a riot and both parties are dangerous, both the parties must be bound over and if they are landed proprietors, their personal security is sufficient. 63 Ind. Cas. 829=22 Cr. L. J. 701=3 U.P. L.R. (A) 185.

5. Consent of accused—Effect.

——S. 107—Accuseed consenting to give security—No evidence recorded—Effect.

Where an accused called upon to give security for keeping the peace says in terms that no prosecution evidence may be recorded and is willing to give security, it is sufficient proof that it is necessary for keeping the peace that he should execute the bond. A.I.R. 1937 Oudh 289=1937 O.W.N. 133=38 Cr. L. J. 302=166 Ind. Cas. 850.

——S. 107—Consent of accused—If amounts to plea of guilty.

It depends upon the facts and circumstances of each case as to whether a consent to give security amounts to a plea of guilty. A.I.R. 1937 Oudh 289=1937 O.W.N. 133=38 Cr. L. J. 302=166 Ind. Cas. 850.

——S. 107.

Certain persons were called upon to furnish security

They appeared and expressed their willingness to be bound over. The trial Court therefore took no evidence and passed an order against them.

Held, that the consent of accused amounted to a plea of guilty and the order was right. 81 Ind. Cas. 238=46 All. 109=21 A.L.J. 881=5 L.R.A. Cr. 21=25 Cr. L. J. 750=A.I.R. 1924 All. 269.

——S. 107—Consent of accused—Recording evidence before orders is necessary if there is no unqualified plea of guilt.

Recording of evidence is necessary in proceedings under S. 107 before an order is passed, if there is no unqualified plea of guilt. A statement of a person that he is not a quarrelsome person but is willing to give security would not justify an order requiring him to furnish security. 21 Cr. L. J. 656=57 Ind. Cas. 672 (N).

——S. 107—Consent of accused—Security to keep peace—Evidence.

There must be evidence on the record that the person from whom security is demanded is likely to commit a breach of the peace. The mere consent of the person to be bound down is not sufficient ; the fact of a likelihood of a breach of the peace must be established by the independent testimony on oath. 2 U.P.L.R. (H.C.) 38=54 Ind. Cas. 784.

——S. 107—Consent of accused—No inquiry—Order for security.

It is illegal to order a person to furnish security to keep the peace without any inquiy as to whether he was likely to commit a breach of the peace or was otherwise a proper subject for proceedings under S. 107, Cr. P. Code. The fact that a person expresses his willingness to obey an order for security is no bar to his moving theHigh Court in revision. 21 Cr. L.J. 59=54 Ind. Cas. 411.

——S. 107—Consent of accused—Effect.

Under S. 107, a Court is entitled to act upon a solemn and free consent amounting to a plea of guilty given before it by the person summoned. In such cases the person summoned might waive the formal production of evidence. A.I.R. 1924 All. 269, Appr. 112 Ind. Cas. 774=50 All. 599=30 Cr. L. J. 6=9 L.R.A. Cr. 39=9 A.I. Cr. R. 291=26 A.L.J. 312=A.I.R. 1928 All. 270.

——S. 107—Consent of accused—Sufficiency for action under.

When an accused, called upon to give security for keeping the peace, says in terms that no prosecution evidence may be recorded and he is willing to give security, it is sufficient proof that it is necessary for keeping the peace that he should execute a bond. No further enquiry need be made by the Magistrate. A.I.R. 1924 All. 269, Foll.; 21 Cr. L.J. 59, Diss.; 35 Cal. 674 and 27 P.R. Cr. 1917. Diss. from. 102 Ind. Cas. 897=8 A.I. Cr. R. 18=8 L.R.A. Cr. 94=28 Cr. L. J. 609=25 A.L.J. 819 =A.I.R. 1927 All. 579.

— —S. 107—Insufficient.

Consent to furnish security is no ground to order security. In the absence of evidence indicating apprehension of breach of the peace or of some act likely to cause breach of the peace on the part of the person concerned order passed is illegal. 81 Ind. Cas. 198=25 Cr. L. J. 710= A.I.R. 1925 Lah. 135.

——S. 107—Insufficient.

The mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace. 24 P.R. 1915; 27 P.R. 1917 (Cr.), Foll. 65 Ind. Cas. 639=23 Cr. L.J. 175 (Lah.).

——S. 107—Consent of accused—Accused's willingness not a sufficient ground for an order under.

The accused's own statement before Magistrate of his willingness to furnish security does not justify an order against him under S. 107. 24 P.R. Cr. 1915=44 P.W.R. Cr. 1915=16 Cr. L. J. 784=31 Ind. Cas. 384.

——S. 107—Consent of accused—Breach of the peace—Security—Order by consent.

The accused were called upon under S. 112 of the Cr. P. Code, to show cause why they should not furnish security to keep the peace under S. 107 of the Cr. P. Code for having formed an unlawful assembly which passed a mosque with loud music and which tended to cause breach of the peace by repeating this procedure. The accused denied these allegations but expressed their willingness to execute bonds to keep the peace. *Held*, that an order directing them to give security was illegal inasmuch as the accused denied every allegation on the basis of which they were considered liable to furnish security and no evidence was taken to prove these allegations. 35 C. 674; 30 M. 330 ; 37 A.C. 30, foll. 20 Cr. L.J. 105= 48 Ind. Cas. 985.

——S. 107—Consent of accused—Security to keep peace—Proof.

The mere fact that an accused person is willing to give security to keep the peace is not the kind of proof required by S. 118 Cr. P.C., as a condition precedent to the taking of the security. 27 P.R. Cr. 1917=18 Cr. L. J. 847= 36 P.W.R. Cr. 1917=41 Ind. Cas, 671.

——S. 107—No evidence—party agreeing to be bound down—Order without jurisdiction.

No person can be bound down under S. 107 without any evidence being recorded that he is about to commit a breach of the peace, even though he may agree to be bound down. (1908) 8 C.L.J. 68=35 C. 674.

6. Essentials for action under.

——S. 107—Operation of S. 107 usually restricted to persons not in possession.

The fact that a dispute likely to cause a breach of the peace concerns land does not by itself deprive a Magistrate of jurisdiction under S. 107. Such disputes can be dealt with under this section on information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. It is, however, essential, for the section to apply, that the acts committed or likely to be committed should be wrongful. Acts committed in the lawful exercise of the right of private defence cannot support proceedings under this section, and it is, therefore, to the party who is not in possession of the disputed property that the operation of this section is usually restricted. A.I.R. 1942 Pat. 331=23 P.L.T. 243=8 B.R. 670=43 Cr. L.J. 637=200 Ind. Cas. 316.

——Ss. 107, 144, 145.

Ordinarily, unless the facts are on the face of them quite clear, a proceeding should be drawn up under S. 145 for the purpose of investigating the question of actual possession of land. Before proceedings under S. 107 could be properly instituted against one party, it is necessary to ascertain which of the parties to the dispute was in possession of the land, which can more conveniently be done by proceedings under S. 145. Having regard to the peculiar jurisdiction conferred by S. 144, no inference of possession can be drawn from an order passed under it. It is a summary order and is in the nature of a temporary injunction intended for emergencies and should not be utilized in subequent proceedings as substantive evidence of possession of a successful party. Even a definite order under S. 144 must be ignored when evidence regarding possession is being considered. It is not under S. 144 but under S. 145 that the question of disputed possession is decided once for all so far as the Magistrate is concerned.

Hence, an order under S. 144 regarding possession shouldnot be made the basis of proceedings under S. 107. If after an order under S. 144, action under S. 107 is deemed necessary, the proper procedure is to decide the question of possession by proceeding under S. 145 and

then to take action under S. 107 accordingly. A.I.R. 1942 Pat. 331=23 P.L.T. 243=8 B.R. 670=43 Cr. L.J. 637=200 Ind. Cas. 316.

——S. 107—Principle that Crown must show likelihood of danger to peace.

The principle that to support an order for security, it is incumbent on the Crown to show not only that there was a likelihood of a breach of the peace at some past time, but that this likelihood continued to the present date, has no application to cases where claims are to immovable property and there is no indication that the party of the accused are likely to abandon their claims or to give up the intention of using violence in support of them. A.I.R. 1940 Pat. 252=21 P.L.T. 652=6 B.R. 837=41 Cr. L. J. 746=189 Ind. Cas. 457.

——Ss. 107 and 145—Dispute regarding the right of entry in Church—Order under S. 107 to keep the peace and hand over the keys to the Court till the decision of the question.

There was a dispute regarding the rignt of entry in a Church between the priest-in-charge of the Church and certain members of the congregation. The latter had been called on to show cause why they should not be bound over under S. 107, Cr. P.C., to keep the peace. The keys of the Church were in possession of the members of the congregation who had been called on to show cause. The Magistrate passed an order to the effect that the parties would prepare a list of the movables in the chapel and hand over the keys :

Held, that the Court might take possession of the property in dispute under S. 145, Cr. P. C., but it was not entitled to do so under S. 107 of the Code. The production of the keys before the Court would in no way enable it to come to a competent decision whether the members of the congregation were to be bound over to keep the peace or not. If it was found that they were to be bound over, the Church authorities were then entitled to proceed to break open the lock of the door which had been shut against them without any hindrance from the opposite party. A.I.R. 1934 Nag. 142=35 Cr. L.J. 991=30 Nag. L.R. 298=149 Ind. Cas. 429.

——Ss. 107, 145—Proceedings against one party alone—Proceeding under S. 107—Contents.

Where there is a dispute relating to possession of immovable property, the normal procedure is to institute proceedings under S. 145 and to decide the dispute as to possession once for all so far as the Criminal Court is concerned. But it is also optional to a Magistrate in special cases to proceed under S. 107 against both parties and to bind down the party who is proved not to be in possession. It is not proper to proceed against one of the parties alone under S. 107 and bind him over without determining the question of possession.

A proceeding under S. 107 should contain definite particulars and not mere vague recitals borrowed from the words of the section. A.I.R. 1931 Pat. 347=12 P.L. T. 535=32 Cr. L. J. 1014=133 Ind. Cas. 161.

——S. 107—Dispute about land.

Where there is a dispute regarding possession of immovable property and there is imminent danger of breach of peace before a Magistrate proceeds against a party under S. 107, it is advisable in order to ascertain the fact of possession that the proceedings under S. 149 may conveniently be taken. 1930 Cr. C. 1100=A.I.R. 1930 Pat. 556.

——S. 107 and S. 145, Cr. P. Code—Option of Magistrate.

If the Magistrate is satisfied at any time that there is an apprehension of a breach of the peace arising out of a dispute with regard to certain land, the proper course for him would be to institute a proceeding under S. 145, or to proceed against both the parties under S. 107. 115 Ind. Cas. 545=30 Cr. L. J. 492=10 P.L.T. 639=12 A.I. Cr. R. 451=A.I.R. 1929 Pat. 67.

——S. 107—Breach of peace.

The Magistrate under S. 145 is to decide the question of possession and not that of title which is to be decided by a Civil Court, and if it is probable that the parties to a land dispute will break the King's peace before the decision of the Civil Court can be given, that danger can be guarded against by an order under S. 107 in an appropriate case. 95 Ind. Cas. 62=28 Bom. L.R. 488=27 Cr. L. J. 734=A.I.R. 1926 Bom. 313.

——S. 107 and S. 145, Cr. P. Code—Effect.

A dispute about land which would justify proceedings under S. 145 does not bar proceedings under S. 107, but if the complainant is out of possession of the land in dispute and there is no danger of a breach of the peace, unless he attempts to resume possession, he should be referred to his remedies under S. 145 or in the Civil Courts and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was *prima facie* illegal are not sufficient grounds for binding over the opposite party to keep the peace. 68 Ind. Cas. 407=23 Cr. L. J. 567=A.I.R. 1923 Nag. 54.

——S. 107—Danger to breach of peace—Averting of —Ss. 107, 144 and 145, Cr. P. Code.

If the property is found to be in joint possession of both the parties, then no order under S. 145 can be passed and the danger to a breach of the peace by the contending parties with a view to exclude the other from the possession of the property in dispute can only be averted or avoided by binding both the parties or by binding both of them under S. 107, for none of them has a right to exclude the other from joint possession. If, on the other hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the exclusive possession of the other party, and if possible by binding him down. It is only when after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint, an order under S. 144 or 107 against one of the parties will not be justifiable. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 by attaching the property in dispute pending the enquiry. A.I.R. 1922 Pat. 228.

——S. 107—Essentials—Dispute as to Civil rights—Propriety of binding down one party only.

Where there was absolutely no evidence as to imminence of a breach of the peace, the only disputes between two parties were as to their civil rights in respect of the management and control of a temple, it is undesirable that one party should be bound down so as to give an advantage to the other side. To support a proceeding under S. 107, it must be shown that there were definite facts from which an interference could be warranted that the persons charged would disturb the public tranquillity unless preventive measures under S. 107 were adopted. Further, the evidence must show that the persons sought to be bound, were individually and not merely collectively connected with these facts. 8 C.W.N. 180; 9 All. 452 and 9 Ind. Cas. 1026, foll. (1919) P.H.C.C. 98=20 Cr. L. J. 194=49 Ind. Cas. 642.

——Ss. 107 and 112—Essentials—Information received by Magistrate—Sufficiency of notice.

A Magistrate of the first class upon mere information to the effect that a person is likely to distub the public tranquillity without any information being given of that person's intent to do any wroungful act, may issue a notice in writing to such person giving the substance of the

All. 801=1946 A.W.R. (H.C.) 141=225 Ind. Cas. 609=47 Cr. L. J. 757=1946 A.L.W. 407=A.I.R. 1946 All. 333 (F.B.).

——Ss. 107, 118, 514—Surety for another person to keep the peace—Forfeiture of bond—Liability of surety.

When a person has executed a bond to keep the peace and another person executed a bond as his surety for so doing, if the condition is broken, both are liable to pay. The object of these provisions of the code is to prevent crime and not to obtain money for the Crown. It is not the case of an ordinary suretyship, where the surety is discharged as soon as the principal debtor pays the money due to him. Here the surety is an additional safeguard against the breach of peace. 20 A. 206 relied upon ; 20 B. 31 ; 2 Cr. L. J. 463 dissented from. (1909) 13 C.W.N. 555=9 C.L.J. 296=2 Ind. Cas. 592=10 Cr. L.J. 89=36 C. 562.

——Ss. 107, 514—Security to keep the peace—Forfeiture of recognizance.

Held, that the mere fact that no immediate action under S. 514 of the code is taken against a person under recognizance to keep the peace or against his surety on the conviction of the former for an offence involving a breach of the peace is no bar to the taking of such proceedings at a subsequent time, as for example, after the time for appealing has expired or after the appeal by the principal has been dismissed. (1903) A.W.N. 237=26 A. 202.

9. Fresh proceedings on same facts.

——S. 107—No proceedings against a person can be instituted upon facts, which formed subject of enquiry in previous proceedings brought against him and in which he had already been discharged. 1933 M.W.N. 915.

——S. 107—Fresh proceedings.

To make the events that have been the subject of judicial pronouncement the ground of fresh proceedings under S. 107 is opposed to the settled principles of law. 41 Mad. 246 ; Foll. ; 17 C.W.N. 238, Rel. on. 118 Ind. Cas. 504=30 Cr. L.J. 931=2 M. Cr.C. 287=1929 Cr. C. 610=A.I.R. 1929 Mad. 842.

——S. 107—Fresh proceedings—When not barred.

After the notices were cancelled and the accused were discharged, the complainant filed a fresh complaint upon which the Deputy Magistrate recorded the statement of the complainant and then passed orders for process to issue to the accused.

Held, a Court which has passed an order of discharge cannot re-open the same case but there is no bar to a second case being instituted. The order of discharge does not stand in the way of such proceedings being taken. There is no acquittal but merely a discharge in such a case which does not prevent another case being instituted. 71 Ind. Cas. 696=21 A.L.J. 215=24 Cr. L. J. 232=4 L.R.A.Cr. 67=A.I.R. 1923 All. 332.

——S. 107—Fresh proceedings—Proceedings under—Facts forming subject of previous enquiry resulting in discharge not a ground for fresh enquiry.

The same facts which led to previous proceedings cannot form the subject of repeated proceedings either under the Penal Code or under the Cr. P. C. 41 Mad. 246=18 Cr. L. J. 878=41 Ind. Cas. 990.

——S. 107—Fresh proceedings—Original order instituting proceedings sufficiently specifying the information on which Magistrate acted—Fresh notice giving full information—How far a fresh proceeding.

Where the original order instituting proceedings under S. 107 of the Criminal Procedure Code did not contain sufficient particulars of the information on which the Magistrate acted and when objection was taken the Magistrate out of consideration to the parties amended the proceedings by giving full particulars, but still relying on the same information, it is doubtful whether such amendment can be considered a fresh proceeding. (1902) 6 C.W.N. 552=29 Cal. 389.

10. Grounds for action under.

——S. 107—Past breaches of peace—If a ground for action under.

Breaches of the peace in the past do not justify an order under S. 107. Although S. 107 gives authority to a Court to call upon person to furnish security only if it is likely that a breach of the peace will occur in the future, yet the Magistrate can pass an order under S. 107, if he is satisfied that breaches of the peace will occur in the future as they have occurred in the past. A.I.R. 1943 Mad. 394=(1943) 1 M.L.J. 246=1943 M.W.N. 149=56 L.W. 217=44 Cr. L. J. 756=208 Ind. Cas. 227.

——S. 107—Proceedings under S. 107—Effect of enmity between parties.

If a party goes to Court and says that owing to the existence of enmity, he apprehends danger from his adversary, and on that ground, he asks the Court to take proceedings under S. 107, Cr. P. C., and the Court decides the matter against him, then it will be very difficult to hold that it was a case which was without any reasonable and probable cause. The man may have believed that the opposite party was his enemy and he was, therefore, apprehending danger, but an enemy has no right to concoct a case against his adversary in order to put him to trouble, and if in a case it is found that with a view to support an imaginary story against an enemy one party fabricates evidence to bolster up his case against the other, then the prosecutor cannot say that his case against the other comes within "probable and reasonable cause". A.I.R. 1936 All. 537=1936 A.L.J. 594=1936 A.W.R. 231=163 Ind. Cas. 984 (2).

——S. 107—Order under S. 107, when proper.

For S. 107, Cr. P. C., to apply, it must be proved that a person is likely himself to commit a breach of the peace, or that a person is likely to do a wrongful act that may probably occasion breach of the peace. The mere fact that certain *sahukars* were threatening to get the *zamindars* imprisoned as they would not pay their debts is not sufficient for an order under S. 107.

[The High Court condemned the order of reference of the Sessions Judge which was for the most part irrelevant and in several portions uncalled for, objectionable and without jurisdiction, and ordered the irrelevant portions to be expunged.] A.I.R. 1933 Lah. 36=33 Cr. L.J. 915=33 P.L.R. 935=140 Ind. Cas. 91.

——S. 107—Grounds—Overt act—Necessity of.

Section 107 is one appearing in a chapter devoted in the Criminal Procedure Code to the object of preventing a breach of the peace, and to prove the existence of circumstances which may lead a reasonable man to apprehend a breach of the peace. It need not always be necessary to prove also an over act towards a breach of the peace on behalf of any of the accused. 124 Ind. Cas. 706=1930 A.L.J. 866=A.I.R. 1930 All. 408.

——S. 107—Threatening to beat a person saying why he served a particular person and asking another to give up serving a particular person on pain of being involved in litigation are not threats of violence of such a nature as would in law justify the passing of an order under S. 107. 120 Ind. Cas. 215=1929 Cr.C. 532=31 Cr. L.J. 20=A.I.R. 1929 Nag. 328.

——S. 107—Effect of the act of the accused.

If a person himself is likely to commit a breach of the peace he may be dealt with under S. 107. He would equally become amenable to the provisions of the section if, for any wrongful act on his part, other persons may do things which would probably occasion a breach of the peace or disturb the public tranquillity. 111 Ind. Cas. 396=47 C.L.J. 444=32 C.W.N. 477=29 Cr. L. J. 844=11 A.I. Cr. R. 100=A.I.R. 1928 Cal. 438.

——S. 107—Danger to public peace.

The mere fact that two parties had taken different sides in Municipal politics is not sufficient for an order being passed on the members of those parties under S. 107 without stating the risk or reasons which exist for thinking that there was a danger of the breach of the peace between the two parties. 110 Ind. Cas. 458=10 A.I. Cr. R. 434=29 Cr. L.J. 714=A.I.R. 1928 Lah. 863.

——S. 107—Breach of peace.

Mere existence of enmity between the persons of factions is no ground for instituting proceedings under S. 107 against one or both the parties. In order to bring a case within that section it must be established that a breach of the peace is imminent. 108 Ind. Cas. 517=10 L.L.J. 72=29 Cr. L. J. 417=29 P.L.R. 434=10 A.I. Cr. R. 141=A.I.R. 1928 Lah. 243.

——S. 107—Allegation not happening.

Where the persons, against whom proceedings under S. 107 are started, were likely to commit a breach of the peace on a particular occasion and that occasion passed off without any disturbance it cannot be inferred affecting the person against whom process is issued, and from their intention in the past that they are likely to do the same thing in future. Binding over such persons becomes in such a case unnecessary. 26 All. 190 ; 6 Bom. L. R. 662, Foll. ; 103 Ind. Cas. 607=8 P.L.T. 370=28 Cr. L.J. 719=8 A.I. Cr. R. 376=A.I.R. 1927 Pat. 231.

——S. 107—Overt act—Need for.

Where the accused is not shown to have committed any overt act, the mere expression of opinion by some witnesses that there is an apprehension of a breach of the peace and that the parties should be bound down is certainly insufficient to prove that there is really any danger of breach of the peace being committed by the accused. 1 P.L.T. 681 and 32 All. 571, Foll. 96 Ind. Cas. 858=27 Cr. L. J. 1002=A.I.R. 1926 Lah. 689.

——**S. 107**—Where the anticipated breach is to be committed by the other side, the only point to be seen is whether the act which brings about that breach is wrongful in itself. 32 All. 571 Foll. 97 Ind. Cas. 39=7 Lah. 482=27 Cr. L.J. 1063=27 P.L.R. 810=7 A.I. Cr. R. 92=A.I.R. 1926 Lah. 683.

——**S. 107**—Action may be taken against the disputants under S. 107 where there is a dispute about certain claim to weigh grain in a market-place likely to cause a breach of the peace. 68 Ind. Cas. 836=20 A.L.J. 694=23 Cr. L. J. 612=A.I.R. 1922 All. 430.

——S. 107—Vague allegations.

Where the allegations against the petitioners are too vague and do not give the necessary details which are required to inform the petitioners of the accusation that they have to meet, the Magistrate should not call upon the petitioners to show cause why they should not be bound down to keep peace. 77 Ind. Cas. 417=5 P.L.T. 353=2 Pat. L.R. Cr. 159=25 Cr. L. J. 369=A.I.R. 1922 Pat. 209.

——**S. 107**—Proceedings under, can be drawn up only when direct accusations are made against the persons. Proceedings under S. 107 should not be kept pending on the ground that the pendency of such proceedings tends to preserve the peace. 64 Ind. Cas. 137=2 P.L.T. 669=22 Cr. L.J. 745=A.I.R. 1921 Pat. 440.

——S. 107—Apprehension of breach of peace.

An order binding over a person for good behaviour under S. 107 is not legal unless there is an apprehension of actual breach of peace on the part of the person bound over. 62 Ind. Cas. 830=8 O.L.J. 282=22 Cr. L. J. 590.

——S. 107—"Is likely"—Essentials—Security for good behaviour.

To bring a case within S. 107, Cr. P. C., it is not enough to show that there is a great probability of a breach of the peace ensuing ; it must further be shown that the party is likely to do illegal acts of violence. (1904) 6 Bom. L. R. 862.

11. Jurisdiction under.

——S. 107—Foundation of jurisdiction—Essential conditions.

To have jurisdiction under S. 107, the Magistrate must have some tangible evidence that a wrongful act is contemplated which, if committed, is likely to cause breach of peace. 21 Cr. L. J. 453=56 Ind. Cas. 437 (Pat.).

——S. 107—Addition of parties—Jurisdiction.

When a proceeding under S. 107, Cr. P. C., pending before a Sub-Divisional Magistrate is transferred to the First Class Magistrate, it is open to him to include in the proceeding, names of persons who were not included by the Magistrate who had initiated the proceeding. A.I.R. 1932 Cal. 864=36 C.W.N. 796=33 Cr. L. J. 858=59 C. 1484=139 Ind. Cas. 850.

——S. 107—Altering Order—Order to furnish security in a particular sum—Subsequent order to furnish larger security—*Ultra vires*.

A Magistrate passed an order directing security for keeping the peace in certain amounts. A month later, he directed one of the accused to furnish security in a much bigger sum stating that he had overlooked that the accused was called upon in the initial stage to furnish a large security. *Held*, that the second order was *ultra vires*. The Magistrate had finished with the case and it was beyond his powers to alter the order. 17 A.L.J. 335=20 Cr. L. J. 486=51 Ind. Cas. 470.

——S. 107—Forum—Jurisdiction.

A Magistrate can deal with persons of general bad reputation and who are within his jurisdiction even though they might not be residents in his jurisdiction. 39 All. 139=14 A.L.J. 1074=17 Cr. L. J. 390=35 Ind. Cas. 822.

——S. 107—Jurisdiction—Solitary case of beating or assault at one place by persons belonging to another place—Institution of proceedings at former place—Legality.

One solitary incident of beating and assault of the complainant in a place by persons who all belong to and permanently reside in another place cannot justify the institution of proceedings under S. 107, Cr. P. Code, against those persons in the former place, where the assault is alleged to have taken place, when there is no chance of those persons visiting the former place in the ordinary course. 49 Cr. L. J. 14=A.I.R. 1948 Lah. 62.

——S. 107—Proceedings before Magistrate other than District Magistrate—At least temporary residence of person proceeded against within limits of Magistrate's jurisdiction must be established.

Under S. 107, when proceedings are sought to be started before a Magistrate other than a District Magistrate, the residence of the persons informed against

must be within the local limits of the Magistrate. When this is not proved, then at least a temporary presence at the critical time must be established. In the absence of these, no order under S. 107 can be passed by the Magistrate. A.I.R. 1943 Nag. 88=1942 N.L.J. 529=44 Cr. L.J. 82=I.L.R. (1943) Nag. 609=203 Ind. Cas. 493.

——**S. 107**—Where a person is bound down under S. 107, the proceedings under S. 514 can be taken only by the Magistrate binding down the accused. A.I.R. 1943 Pesh. 41=44 Cr. L. J. 478=206 Ind. Cas. 330.

——**S. 107**—There is no bar of jurisdiction in the way of the High Court to transfer a case under S. 107 from one District to another. A.I.R. 1942 Oudh 186=1941 O.W.N. 1351=43 Cr. L. J. 365=198 Ind. Cas. 433.

——**Ss. 107, 118—Notice under S. 107 giving out the fact of preliminary inquiry following previous petition against accused—No specific wrongful act given—Accused aware of what it was for, that they were proceeded against.**

Where the notice under S. 107, Cr. P. C., does not specify any particular wrongful act that the Magistrate was satisfied was likely to be committed by the accused, the proceedings are liable to be quashed on such a ground, but not after the whole matter has been enquired into, unless there is a reasonable suggestion of possible prejudice, or unless the defect goes to the jurisdiction. It cannot be contended with any show of reason that the accused were prejudiced in any way by an omission to set forth the substance of the information in the initial proceeding when they were fully aware of what it was for which in the beginning they were going to be proceeded against, and for which they were afterwards actually proceeded against, specially when the notice referred to the preliminary hearing that had followed the previous petition by the opposite party reasonably apprehending that his life and properties were in danger and the accused were holding out threats and spreading false rumours against them in the localities.

Consequently, the proceedings taken by the Magistrate in the notice cannot affect his jurisdiction in the matter so as to make the proceedings void. A.I.R. 1941 Pat. 241=7 B.R. 430=42 Cr. L.J. 296 (2)=22 P.L.T. 967=192 Ind. Cas. 463.

——**S. 107**—The Public Prosecutor has no authority to apply for the withdrawal of proceedings taken under S. 107. However the jurisdiction of the Magistrate under this section is a discretionary jurisdiction. A.I.R. 1940 Rang. 189=1940 Rang. L. R. 226=41 Cr. L. J. 853=190 Ind. Cas. 196.

——**S. 107**—Sub-Divisional Magistrate cannot take proceedings under S. 107 against person residing outside his Sub-Division. A.I.R. 1938 Nag. 448=39 Cr. L. J. 810=I.L.R. (1939) Nag. 158=176 Ind. Cas. 784.

——**S. 107 (2)—Temporary presence within jurisdiction when proceedings taken—Accused alleged to have come temporarily within jurisdiction only to commit offence—District Magistrate and not Sub-Divisional Magistrate has jurisdiction.**

Under S. 107 (2), Cr. P. C., it would be quite sufficient if the accused were temporarily present within the jurisdiction at the time the proceedings were taken. But sub-s. (2) of S. 107 is obviously intended to provide for cases where the accused although living outside the jurisdiction is alleged to have come temporarily within the jurisdiction in order to commit offences. In such cases, it is the District Magistrate alone who has jurisdiction and not the Sub-Divisional Magistrate. A.I.R. 1937 Cal. 520=41 C.W.N. 1091=38 Cr. L. J. 1078=66 C.L.J. 177=171 Ind. Cas. 335.

——**S. 107—Proceedings under—Accused belonging to a different District—Trial by District Magistrate.**

When the accused belong to a different district, the case should be tried by the District Magistrate. 153 Ind. Cas. 27=35 P.L.R. 341.

——**S. 107 (2)—Proceedings under—Whether can be taken against person outside jurisdiction of Sub-Divisional Magistrate.**

Sub-Divisional Officer has no jurisdiction to initiate proceedings under S. 107 against a person residing outside his jurisdiction. A.I.R. 1935 Pat. 131=I B.R. 356=36 Cr. L. J. 580=16 P.L.T. 347=154 Ind. Cas. 873.

——**S. 107—Mere presence within limits of local jurisdiction.**

A Magistrate can initiate proceedings against a person under S. 107, Criminal P. C., if he is within the local limits of the Magistrate's jurisdiction at the time when action is taken. The section does not make any reference to the residence of the person proceeded against. A.I.R. 1934 Mad. 255=39 L.W. 215=35 Cr. L. J. 626=66 M.L.J. 420=1934 M.W.N. 404=148 Ind. Cas. 226.

——**S. 107**—In a case where the same complainant files a complaint under S. 107 and a separate complaint against the same persons under S. 323, Penal Code, the former alone should not be transferred to the Court of the Bench Magistrates. A.I.R. 1934 Oudh 85=35 Cr. L. J. 417 (2)=11 O.W.N. 75=147 Ind. Cas. 516.

——**S. 107—'Person within jurisdiction' meaning of.**

For initiating proceedings against a person under S. 107, Criminal P. C., it is not necessary that that person should reside within the jurisdiction of the Magistrate; it is enough if he is within the local limits of the Magistrate's jurisdiction. But a person who resides outside the jurisdiction cannot be held to be a person within the jurisdiction merely because he is present in Court in obedience to a summons issued by the Magistrate under S. 112. A.I.R. 1932 All. 162=54 All. 341=33 Cr. L. J. 230=1932 A.L.J. 211=136 Ind. Cas. 72.

——**S. 107—Jurisdiction—Objection as to.**

Where the place where the breach of the peace was apprehended was within the Magistrate's jurisdiction, but the accused resided outside it, and no question of jurisdiction was raised in the trial Court and the Magistrate passed order under S. 107, and no prejudice is caused to the accused:

Held, that the irregularity, if there was one, is cured by S. 531. 49 All. 228=25 A.L.J. 44=27 Cr. L. J. 1132=7 L.R.A.Cr. 174=97 Ind. Cas. 652=A.I.R. 1926 All. 767.

——**S. 107**—It is only a Chief Presidency or a District Magistrate who can take these proceedings when either the person informed against (he having left the place) or the place where a breach of the peace or disturbance is apprehended is not within the local limits of the Magistrate's jurisdiction. 5 N.L.R. 94, Foll. 68 Ind. Cas. 407=23 Cr. L. J. 567=A.I.R. 1923 Nag. 54.

——**S. 107—Breach of peace within limits.**

When proceedings are taken under S. 107 before the District Magistrate within whose jurisdiction the place where the breach of peace is apprehended is situate, it is immaterial whether the person informed against was or was not within the District at the time the notice was issued and there is no error or irregularity in procedure. 67 Ind. Cas. 348=20 A.L.J. 523=23 Cr. L. J. 396=A.I.R. 1922 All. 337.

——**S. 107—Ferry—Dispute about possession—Jurisdiction.**

Magistrate having no jurisdiction over place of ferry cannot pass an order in respect thereof. A.I.R. 1922 Pat. 219.

——**S. 107.** Temporary residence is sufficient to give a Magistrate jurisdiction to act under this section. 22 Cr. L. J. 109=59 Ind. Cas. 413=L.R. 1 A. (Cr.) 168.

——**Ss. 107, 145—Jurisdiction.**

The making of a formal order under Sub-s. (1) of S. 145, Cr. P. C., is absolutely necessary to institute proceedings under that section. Where a notice was issued under S. 107, Cr. P. C., calling upon the parties to show cause why they should not execute a bond to keep the peace, and the Magistrate, when he tried the case, recorded an order to the effect that the case was one for the application of S. 145, Cr. P. C., and passed an order in the following words :—" In the absence of direct proof that the first party has been unlawfully evicted from possession during the two preceding months, I feel bound to bind down the 1st party under Cl. (6), S. 145, Cr. P. C."—*Held* that the order was bad and that the expression " bind down " was not correct. (1902) 7 C.W.N. 174=30 Cal. 443.

——**S. 107 (2)—Transfer—Of proceedings.**

Proceedings initiated by the District Magistrate under S. 107 can be transferred by him to some other subordinate and competent Magistrate. 31 C. 150, foll. ; 13 C.W.N. 580, not foll. 27 C.L.J. 314=19 Cr. L. J. 496=45 Ind. Cas. 160.

——**S. 107—Transfer of case under S. 107 by District Magistrate—Order invalid.**

The provisions of S. 107, Cr. P. Code, do not fall within the scope of S. 528. S. 177 does not apply to such cases and the use of the word " ordinarily " in that section excludes trial of cases under S. 107, Cr. P. Code. 13 C.W.N. 80 foll. 41 Mad. 246=18 Cr. L. J. 878=41 Ind. Cas. 990.

——**Ss. 107 and 526—Transfer.**

A Dt. Magistrate is not competent to transfer a case under S. 107 to a Magistrate of the 2nd class who is incompetent to conduct and conclude the proceedings. 37 All. 20=12 A.L.J. 1136=16 Cr. L. J. 55=26 Ind. Cas. 647.

——**S. 107—Transfer—Proceedings under, if a criminal case and if can be transferred by High Court under S. 526, cl. (8).**

A proceeding under S. 107 is a criminal case and therefore S. 526, cl. 8 of the code applies to it. 41 Cal. 719 =15 Cr. L. J. 171=18 C.W.N. 274=22 Ind Cas. 747.

——**S. 107—Transfer—Object of—Power of District Magistrate to transfer case.**

The object of S. 107 is merely to restrict the *initiation* of proceedings against the persons residing out of the jurisdiction of the District Magistrate and not to restrict his power to transfer such proceedings to a Subordinate Magistrate after initiation. 24 A. 151 foll. The proceedings under the section are intended to be precautionary and not punitive ; and therefore security should not be required to a very large amount. (1904) 31 C. 350.

——**Ss. 107 and 125—Transfer of proceedings—Jurisdiction.**

On the transfer of a proceeding under S. 107 from one district to another, it is the Dt. Magistrate of the latter district that can make an order of cancellation under S. 125. 23 C.W.N. 958=20 Cr. L. J. 337=50 Ind. Cas. 817.

——**S. 107—Subordinate Magistrate, if may take a proceeding at the direction of the District Magistrate when the person informed against does not reside within the local limits of the jurisdiction.**

Even on the direction of the District Magistrate a Subordinate Magistrate has no jurisdiction to draw up a proceeding under S. 107, Cr. P. C., against a person residing in another jurisdiction. In such a case the proceeding must take place and be brought to a conclusion before the District Magistrate himself. (1909) 13 C.W.N. 580=1 Ind. Cas. 78=9 Cr. L. J. 148.

——**Ss. 107 and 145—Breach of peace—Immovable property.**

The power of a Magistrate to take action under S. 107 is not ousted by the mere fact that the dispute out of which a breach of the peace is likely to arise relates to immovable property. 16 Cr. L. J. 211=27 Ind. Cas. 835.

——**Ss. 107, Cl. (2), 122—Accused not in district—Institution of proceedings by District Magistrate—Transfer to Subordinate Magistrate of first class.**

Though it is only the District Magistrate that can *institute* proceedings under S. 107, Cl. (2), Cr. P. C. against a person not resident in the district, yet it is open to the District Magistrate subsequently to transfer the case to a competent subordinate magistrate for disposal. (1901) 24 A. 151=1901 A.W.N. 203.

12. Lawful Acts.

——**S. 107—Person performing lawful act—Others preventing him from doing it on ground that they are exclusively entitled to perform it—Person attempting to perform it.**

If a person intends to do a lawful act, the mere fact that somebody else threatens to prevent the performance of that act and thus threatens to create a breach of the peace is no ground for binding over under S. 107 the person wishing to perform the act. A.I.R. 1942 Nag. 45=1942 N.L.J. 15=43 Cr. L. J. 357=I.L.R. (1942) Nag. 620=198 Ind. Cas. 409.

——**S. 107—Acts amounting to an exercise of lawful rights—Whether to be treated as wrongful acts.**

Where acts which amount to an exercise of lawful rights are done, they are not to be treated as wrongful acts necessitating proceedings under S. 107, Criminal P. C. A.I.R. 1934 Oudh 179=35 Cr. L. J. 809=11 O.W.N. 501=9 Luck. 651=148 Ind. Cas. 899.

——**S. 107—Person believing to be entitled to get possession of immovable property—Attempt to take peaceful possession—Collections from tenants without creating disturbance.**

If a person believing to be entitled to get possession over immovable property attempts to take peaceful possession over it, and makes collections from tenants without creating any disturbance, then no action should be taken against him under S. 107, Criminal P. C., but if, in his endeavour to obtain possession, he makes a show of armed forces and threatens to force tenants to pay rent to him, then he is doing a thing which is not lawful and the Magistrate is fully competent to take action against him under S. 107, Criminal P. C.

The question as to whether or not preventive action is to be taken under S. 107 is to be decided on the facts of each case. A.I.R. 1934 Oudh 179=35 Cr. L. J 809=11 O.W.N. 501=9 Luck. 651=148 Ind. Cas. 899.

——**S. 107—Doing lawful act—Exercising lawful right—Power of Magistrate—Whether and when can be bound down.**

S. 107, Cr. P. Code does not authorise an action against a person who is expected to do an act which may cause a breach of the peace or disturb public tranquillity unless that act is wrongful and the mere fact that the doing of lawful act may lead to a breach of the peace, while it may authorise the Magistrate to take action against the persons expected to commit the breach, does not authorise the action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or disturb the public tranquillity. 12 C.W.N. 703 ; 32 A. 571 ; 6 M. 203, Rel. on. (1916) 2 U.B.R. 157=11 Bur. L.T. 59=18 Cr. L. J. 512=39 Ind. Cas. 480.

——S. 107—Doing lawful act—Security to keep peace—Breach apprehended by opposite party if one party exercises his right—If ground for demanding security.

The fact that the opposite party would commit breach of the peace, if one party exercises his right is not a ground for demanding security to keep peace from the latter. 12 C.W.N. 703, foll. 15 Cr. L. J. 661=25 Ind. Cas. 989.

——S. 107—Holding of hat on one's own land—Another previously established hat in close proximity held on same day.

A person will be acting within his rights in holding a *hat* on his own land even on the day on which the rival *hat*, in close proximity to it and previously established, is being held as long as he does not resort to any wrongful act leading to a breach of the peace. If the owner of one or both are committing wrongful acts, the best course is to bind down the wrong doer under S. 107, Criminal P. C. A.I.R. 1934 Pat. 104=14 P.L.T. 740=35 Cr. L. J. 1057=150 Ind. Cas. 118.

——S. 107—Person doing lawful act in lawful manner—Injury to susceptibilities of person of different faith.

Where a breach of peace is anticipated between two parties and one of them complains and the breach is anticipated to be committed by the other side, the only point to be seen is whether the act which brings about that breach of peace is wrongful in itself. The fact that a person does a lawful act in a lawful manner and by so doing he has injured the susceptibilities of a person of a different faith would not in itself be sufficient to warrant proceedings against him under S. 107, Criminal P. C. Proceedings under S. 107, Criminal P. C., are intended to be preventive and not punitive, the object being to prevent persons from doing something likely to occasion a breach of the peace or disturbance of public tranquillity in the immediate or near future. A.I.R. 1932 Lah. 101=33 P.L.R. 370=34 Cr. L. J. 478=142 Ind. Cas. 796.

——S. 107—Lawful acts—Religious susceptibilities.

The doing of a lawful act in a lawful manner, even if that injures the susceptibilities of persons of a different faith would not in itself be sufficient to warrant proceedings under S. 107. Certain Hindus participated in a Hindu funeral procession proceeding with music before a mosque in pursuance of an old custom. They also on another occasion were reciting Grantasaheb in their private houses quite adjoining a mosque. Proceedings were taken against them under S. 107 as it was likely to hurt the feelings of the Mahomedan community and would result in a breach of the peace.

Held, that the persons were within their rights in doing what they did and could not be proceeded against. 120 Ind. Cas. 427=31 Cr. L. J. 75=A.I.R. 1929 Lah. 138.

——S. 107—Order to prevent a party from taking a procession along a road—Procession, right to take.

A party insisting upon their right to take a procession along a certain road to which another party objected cannot be bound down under S. 107, Cr. P. C., to keep the peace unless there is a finding that the taking of the procession along the particular path is a wrongful act or that the processionists are themselves likely to commit a breach of the peace or disturb the public tranquillity. When a party have the right to take a procession along a particular road they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party. (1908) 12 C.W.N. 703.

——S. 107—Order for security to keep the peace—Mokhasadar's protest—Zemindar's interference with Mokhasadar's possession.

A Zemindar acts illegally in sending people to a Mokhasa village to oust the Mokhasadar from possession and to induce the tenants to break their engagements with the Mokhasadar and the Mokhasadar is entitled to object to this trespass and to protest against such improper proceedings. Such protest on the part of the Mokhasadar or his agent will not justify a Magistrate in binding him to keep the peace. (1904) 14 M.L.J. 491.

——S. 107—Order set aside as improper.

There being dispute between the Zemindars on the one hand and the tenants on the other with regard to the possession of certain land the Deputy Magistrate instituted proceedings under S. 145, Cr. P. C., between the parties and attached the land and made a temporary settlement thereof with a third party. One of the parties to the proceedings having moved the High Court, the proceeding where held to be defective and the Deputy Magistrate allowed them to be dropped holding that there was no further apprehension of a breach of the peace. The third party, however, remained in possession of the land, and there being in the meantime a survey and settlement of right in the village, the Settlement Officer recorded them as being persons in possession and the Zemindars apparently acquiesced in the arrangement. The tenants, however, attempted to interfere and were eventually bound down under S. 107, Cr. P. C. *Held*, that proceedings under S. 107, Cr. P.C., taken under such circumstances were based on a misunderstanding of the real position of the parties and, therefore, could be maintained. (1906) 5 C.L.J. 447.

——S. 107—Co-sharer—Lawful acts of.

When a co-sharer exercises his lawful rights in improving the joint property in spite of the objection of his co-sharers, he cannot be bound over under S. 107 on the ground that his action is likely to cause a breach of the peace. 19 Cal. 253 (P.C.). Rel. on. 97 Ind. Cas. 358=8 Lah. 98=27 P.L.R. 599=27 Cr. L. J. 1094=7 A.I.Cr. R. 129=A.I.R. 1926 Lah. 695.

——S. 107—Security to keep the peace—Measurement of land by co-sharer landlord—Legality—Bengal Tenancy Act, Ss. 90, 188.

When one of several co-sharer landlords sought to take a measurement of lands contrary to the provisions of Ss. 90 and 188 of the Bengal Tenancy Act, the other co-sharer landlords were justified in objecting, and when no force had been used by them, they ought not to have been bound over to keep the peace under S. 107, Cr. P. C., inasmuch as any likelihood of a breach of the peace was due to the action of their co-sharer. (1905) 9 C.W.N. 618.

13. Limitation on Powers under.

——S. 107 and Penal Code, S. 147—Delivery of possession by Civil Court.

The Criminal Court is bound to maintain the auction-purchaser in possession of the property purchased by him after the passing of a decree by a Civil Court and the service of the writ of the delivery of possession. The Criminal Court cannot re-open the question of possession and investigate it under Ss. 107, 144 and 145 of the Cr. P. Code or in an enquiry of an offence under the Penal Code. The Magistrate has power under S. 145, Cr. P. C., to investigate into the actual service of the writ of delivery of possession. But as soon as it is proved that the *dakhaldahani* has been effected, it is his duty to maintain the possession of the auction-purchaser. 66 Ind. Cas. 817=3 Pat. L. T. 335=23 Cr. L. J. 321=A.I.R. 1922 Pat. 197.

——S. 107—Bona fide claim—S. 145, Cr. P. Code.

When a magistrate has reason to think that an individual is likely to commit a breach of the peace, he has jurisdiction, even though the case for the apprehended breach of the peace may relate to a dispute about land to put into operation S. 107, Cr. P. Code. Where there is a dispute about land and where there is some *bona fide* claim on the part of both the parties, the appropriate and proper section is S. 145, Cr. P. Code. 65 Ind. Cas. 555=23 Cr. L. J. 123 (Pat.).

——S. 107—Disputed possession—S. 145.

S. 107 applies to a case of undisputed possession ; where the possession is in dispute, proceedings under S. 145 should be instituted. 62 Ind. Cas. 590=22 Cr. L. J. 574 (Pat.).

——S. 107—Civil proceedings pending.

Where a civil suit is pending for the determination of the rights of the parties in certain property it is not proper to start proceedings under S. 145 of the Code. Proceedings under S. 107 are more appropriate. 59 Ind. Cas. 643=24 C.W.N. 1039=22 Cr. L. J. 131= 32 C.L.J. 255.

——S. 107—Exclusive possession—Essentials of order under.

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates under the Bengal Land Registration Act and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of the survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, wrongful acts are committed or threatened to be committed jointly by number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. 59 Ind. Cas. 374= 1 Pat. L. T. 681=22 Cr. L. J. 86.

——S. 107—Dispute regarding property—Bona fide dispute—Order requiring security from one party if proper—Prejudice to proceedings in another court—Initiation of proceedings under S. 107, ground for.

Where two parties had both applied to the Land Registration Court for registration of their names as proprietors of an estate and pending these proceedings, a Magistrate instituted proceedings, under S. 107, Cr. P. C., against one of the disputing parties and it was contended on their behalf that there being a *bona fide* dispute between the parties as to title and possession of the proceeding under S. 107, Cr. P. C., taken against one party alone to the exclusion of the other would prejudice the former in the land registration proceedings : —*Held* that such a consideration was foreign to the matter under enquiry in the proceeding under S. 107, Cr. P. C. *Held*, further, that the question whether the one party or the other were in peaceful possession (*see* S. 526) would have to be decided in the proceeding but no objection could on that account be taken to the initiation of proceedings under S. 107, Cr. P. C., against one or the other party, if on the facts presented before the Magistrate at the time of its initiation it appeared that such party were out of possession and were seeking to obtain possession by unlawful means which were likely to cause a breach of the peace. (1906) 11 C.W.N. 121. *See* also 12 C.W.N. 606.

——S. 107—Doing lawful act—Defence of property with help of police—Likelihood of breach of the peace.

A person is justified in posting men for the defence of his property in the presence of the police-guard, and he having done so in self-defence, it could not be said that there was any likelihood of the breach of the peace from his side. The order demanding security from him was set aside. 18 A.L.J. 157=21 Cr. L. J. 337=55 Ind. Cas. 673.

——S. 107—Dropping of proceedings—Principles governing.

Where the danger of breach of peace exists only because of the happening of a certain event or function, social or religious, and when that event has happened and the danger no longer exists then certainly proceedings under S. 107 should be dropped. But where although the occasion which gave rise to the apprehension of a breach of the peace has passed peacefully because of police protection but the danger still lurks because of the strained relations between the parties, the fact that the event has passed off, will not be a sufficient justification for the dropping of the proceedings. 1948 A.W.R. (H.C.) 214. A.I.R 1949 All. 21=50 Cr. L. J. 78=1948 A.L.J. 484.

——S. 107—Essentials—Security if can be taken from a person inducing others to commit breach of peace.

Security for keeping the peace cannot be taken from a person who is not likely to commit breach thereof himself but is likely to induce others to commit breach of the peace. 11 P.W.R. 1912 Cr.=4 P.R. 1912 Cr.=125 P.L.R. 1912=13 Cr. L. J. 126=13 Ind. Cas. 782.

——S. 107—Essentials—Likelihood of breach of the peace, security when to be taken.

Security for keeping the peace should be taken where probabilities exist of breaches of the peace taking place in the near future, although the occasion on which ill-feeling between the parties first arose has passed away. 8 A.L.J. 1080=12 Cr. L. J. 493=12 Ind. Cas. 213.

——S. 107—Essentials—Bad feeling.

The condition precedent to taking security under S. 107, is that the Magistrate should be informed that some person is likely to commit breach of the peace or disturb the public tranquillity or do some wrongful act that may probably occasion breach of the peace or disturb the public tranquillity. Mere bad feeling between two sections of a population is not enough. 126 P.L.R. 1911=43 P.W.R. 1911 Cr.=12 Cr. L. J. 186=9 Ind. Cas. 1026.

——S. 107—Essentials—Likelihood of breach of peace.

To justify an order under S. 107 the Magistrate must believe that the person to be bound is about to commit breach of peace or to do some wrongful act likely to occasion breach of peace. A Magistrate is not right in binding certain Muhammadans who quietly and secretly killed cows in a mosque and in a private house. 32 All. 571=7 A. L. J. 649=11 Cr. L. J. 355=6 Ind. Cas. 454.

——S. 107—Essentials—S. 109, Clauses (a) and (b) —Game with rings.

Order of Magistrate, demanding security for good behaviour from persons, carrying on a game with rings at a *mela*, is bad under Cl. (*a*), S. 107 but good under Cl. (*b*), S. 109. 6 A. L. J. 253=9 Cr. L.J. 527=2 Ind. Cas. 219.

——S. 107—Essentials—Security to keep the peace —Evidence as to probability of breach of the peace.

Held, that facts which might be taken to establish the probability of certain persons disturbing the public tranquillity at a particular annually recurring festival, would afford no ground, after such festival had passed without the public tranquillity having been disturbed, for binding over such persons to keep the peace with a view to the possibility of their creating a disturbance at the next recurrence of the festival. 1903 A.W.N. 229=26 A. 190.

——Ss. 107 and 144—Possession of auction purchaser.

Criminal Courts can proceed under Ss. 107 and 144 to retain the possession of the auction purchaser of a holding in execution of a decree. The aggrieved party can sue for possession in Civil Court. 1 Pat. L.T. 81=2 U.P. L.R. (Pat). 35=(1920) P.H.C.C. 124=57 Ind. Cas. 95.

——Ss. 107, 144 and 145—Simulatneous proceedings—Propriety of—Dispute as to possession—Proceedings under S. 107 and also under S. 144 or S. 145 should not be going on at the same time.

Where on the application of petitioners for assistance of the Magistrate in the matter of possession of land, an injunction was issued under S. 144 of the Cr. P. Code and proceedings were taken against the petitioners under S. 107. *Held*, that the procedure was bad, as in effect it debarred the petitioners from giving evidnce of possession. If on the expiry of the injunction under S. 144 there was any apprehension of a breach of the peace, the more appropriate procedure would be to take proceedings under S. 145 of the Cr. P. Code rather than under S. 107. 19 Cr. L. J. 367=44 Ind. Cas. 591.

——Ss. 107 and 145—Propriety of order under S. 107.

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates under the Bengal Land Registration Act and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, wrongful acts are committed or threatened to be committed jointly by number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. 22 Cr. L.J. 86=1 Pat. L.T. 681=59 Ind. Cas. 374.

14. Joint Trial.

——S. 107—Joint trial.

Court should not treat the case of all the opposite parties in a lump but should find out the persons who could definitely be said to have contemplated a breach of the peace. 124 Ind. Cas. 706=1930 A.L.J. 866=1930 Cr. C. 565=31 Cr. L.J. 710=A.I.R. 1930 All. 408.

——S. 107—Individual finding.

Where in a case under S. 107 several persons are bound over to keep the peace there must be individual finding showing how each person against whom order is made deserves to be so treated. The mere fact that the persons were followers of one party or other will not justify making an order in lump against the whole body of men. 125 Ind. Cas. 855=1930 Cr. C. 382=31 Cr. L.J. 944=34 C.W.N. 144=A.I.R. 1930 Cal. 294.

——S. 107—Common object.

Accused formed one gang with one purpose, namely, that of harassing P.W. 1, and the act of each accused was directed towards this common end.

Held, that joint trial of all accused is not illegal. 106 Ind. Cas. 589=1927 M.W.N. 185=29 Cr. L.J. 77=A.I.R. 1927 Mad. 542.

——S. 107—Members of a gang—Otherwise individual finding.

There is no direct prohibition against trying a number of persons under S. 107 jointly. But unless it is apparent that the various persons against whom proceedings are taken from a gang, it is highly unfair and unjust that they should be proceeded against jointly. The effect of such a proceeding is that it is unnecessarily protracted and the parties thereby prejudiced. Furthermore if by any chance such a proceeding is conducted jointly, it is essential that the case of each accused should be considered separately and individually. (20 A. 881, Foll.) When an objection as to the impropriety of the joint proceeding was taken in the first Court and when the evidence has not been taken separately against each accused but has been lumped together and when it is impossible to discover from the judgments of the trial and appellate Courts how much of the evidence was believed and how much rejected,

Held, that the accused has been gravely prejudiced by the proceeding taken against him in conjunction with other accused persons. 81 Ind. Cas. 600=21 A.L.J. 841=4 L.R.A. Cr. 241=25 Cr. L.J. 952=A.I.R. 1924 All. 195.

——S. 107—A joint trial of two persons, not being contending parties, is legal. S. 117 (4) and not S. 235, Cr. P. Code, applies to the case. 76 Ind. Cas. 568=25 Cr. L.J. 200=A.I.R. 1923 All. 476.

——S. 107—Dispute between Zemindars.

The mere fact, that dispute exists between two rival *Zemindars*, would not justify proceedings being taken against all their officers and servants unless there are materials to show that they are likely to commit any breach of the peace. Information of the kind mentioned in S. 107 must be of a clear and definite kind directly it should disclose tangible facts and details; so that it may afford notice to such person, of what he is to come prepared to meet. It may be that some of the persons mentioned in the Police report are likely to commit a breach of the peace, while others are not likely to do so, but all of them must not be lumped up together because they are all interested in the dispute. In one sense all the members of a *Zemandar's* family are interested in a dispute relating to a property comprised in the *Zemindari* but that, by itself, would be no ground for taking proceedings against them all. 6. All. 26 Foll. 71 Ind. Cas. 694=24 Cr. L. J. 239=A.I.R. 1922 Cal. 97.

——S. 107—Joint trial—Charge against body of persons.

There must be definite evidence in case of each and every man charged under S. 107 that there is a danger of breach of peace by him. 38 All. 468=14 A.L.J. 656=17 Cr. L. J. 400=35 Ind. Cas. 832.

——Ss. 107 and 117—Joint trial.

A joint trial of two hostile factions under S. 107 is bad according to S. 117 (4) of the Code. 14 A.L.J. 268=17 Cr. L.J. 165=33 Ind. Cas. 645.

——S. 107 (1)—Joint trial—Opposing factions—Security—Practice.

The common and proper practice is to take security from the leaders of opposing factions that are likely to commit breach of the peace as it is often impossible to bind over all the members of two or more parties. But before a person is bound over to keep the peace he must be shown to be himself likely co commit a breach of the peace or do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and should not be bound down merely because he is a wealthy or influential member of his party. 7 A.L.J. 1161=11 Cr. L.J. 719=8 Ind. Cas. 818.

——S. 107—Joint trial of opposing factions.

If cases of two opposing factions have been tried jointly, the trial is not illegal. 11 Bom. L.R. 740=10 Cr. L.J. 375=3 Ind. Cas. 774.

——S. 107—Joint finding without a separate finding of guilt on the part of each, bad.

In order to bind down any person under S. 107, Cr. P.C., it is essential that the Magistrate should come to definite findings that the persons bound down are themselves separately guilty of a conduct making them liable to be

so bound down. To group all as one party and to bind them without a distinct finding with regard to each is illegal. (1908) 12 C.W.N. 992=35 C. 929.

——Ss. 107, 117 (4)—Joint inquiry—Associations—Persons acting as servants should be bound down—Prejudice.

Where all the acts alleged against certain persons against whom a joint inquiry under S. 107, Cr. P. C., was instituted were found to have been done by them for the benefit of their common matter, viz., with a view to extort kabuliyats at enhanced rates from his tenants : *Held*, (HENDERSON, J. *dissentiente*) :—That although each of the acts alleged was not done by all of them together yet they were associated together within the meaning of S. 117, Sub-s. (4) so as to justify a joint inquiry : *Held further*, that they could be proceeded against under S. 107, Cr. P. C., notwithstanding that the acts imputed to them were committed by them not as individual members of society, but as servants of another person. (1905) 9 C.W.N. 898 =1 C.L.J. 616.

——Ss. 107, 537—Security to keep the peace, order for—Persons likely to commit breach of the peace—Facts justifying order—Misjoinder, if vitiates proceedings—Illegality—Cure.

The facts from which, for the purposes of S. 107, Cr. P. C., it may be reasonably inferred that the persons sought to be bound down are likely to disturb the public peace, must be facts of a definite nature and must show that such persons are individually and not collectively connected with them. No hard and fast rule can be laid down applicable to all causes, and each case must be determined upon its own circumstances. The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons should be applied to enquiries under S. 107, Cr. P. C. Where both the parties to a proceeding under S. 107, Cr.P.C., were tried together (some amongst them having also been examined as witnesses in the case) and were bound down in the result of that trial :—*Held* that there was misjoinder. (1903) 8 C.W.N. 180.

——S. 107—Two opposing parties proceeded against in one proceeding—Misjoinder.

The two opposing parties in a dispute cannot be proceeded against under S. 107, Cr. P. C., and bound over to keep the peace in one proceeding. 8 C.W.N. 180 ref. to and considered. (1906) 5 C. L. J. 231=11 C. W. N. 472.

15. Nature of proceedings under.

——Quaere :

Where an order is passed under S. 107 against the applicant, it is doubtful whether it can be said that for the purposes of S. 423 (1) (*b*) the applicant had been convicted and was appealing from his conviction. A.I.R. 1942 Oudh 416=1942 O.W.N. 387=43 Cr. L.J. 729 =1942 A.W.R. (C.C.) 251=201 Ind. Cas. 60.

——S. 107—Administrative rather than judicial.

S. 107 is not intended to give any redress to the applicant because without injury there can be no redress while the section contemplates possible injury, therefore the order of a Magistrate refusing to take action cannot be interfered with, by a superior court, as the power is administrative rather than judicial. The person complained against is not an accused person. 81 Ind. Cas. 973=11 O.L. J. 732=25 Cr. L. J. 1149=28 O. C. 44 = A.I.R. 1925 Oudh 138.

——S. 107.—Section 403 which embodies the principle of *autrefois acquit*, would not apply to proceedings for taking security either under S. 107 or S. 110, as there is no conviction of any offence. A.I.R. 1942 Lah. 84=44 P.L.R. 71=43 Cr. L. J. 564=I.L.R. (1943) Lah. 365= 199 Ind. Cas. 532.

[Overrules A.I.R. 1929 Lah. 28=30 P.L.R. 416=115 Ind. Cas. 544.]

——S. 107—Persons that lie be bound over under—Leaders of factions.

Though ordinarily the person who can be bound over under S. 107, Cr. P. Code, is the individual from whom there is an actual apprehension of a breach of the peace, nonetheless other persons who are behind the actual breakers of peace as abetters or instigators, for example leaders or controllers of a faction are also persons in whose cases orders under S. 107 may properly be made in the view that they are persons who are likely to do a wrongful act that may probably occasion a breach of the peace. I.L.R. (1947) All. 476=1947 A.W.R. (H.C.) 98=1947 A.L.W. 134=1947 A.L.J. 74=A.I.R. 1947 All. 392.

——S. 107—Persons, if can be punished for wrongs done by others—Nature of acts in respect of which security is required—Persons holding responsible position in community and having influence over members, if sufficient to proceed against them, for acts done by members.

Before a person is called upon to show cause why he should not execute a bond, it must be established (*a*) that he is likely to commit a breach of the peace or disturb the public tranquillity or (*b*) to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. It is the individual who is contemplated in S. 107, Criminal P. C., and it is the individual act that must be brought home to him. The only case in which a person can be punished for the wrongs done by others is where he abets or instigates the offence. Failing that, no person in the world can be visited with any penalty for acts done by others on whom he has no control, and for whose conduct he cannot be held responsible. A person who is doing a lawful act cannot be called upon to execute a bond under S. 107, Criminal P.C., merely because some other person might commit the breach of the peace and offer violence to the law-abiding citizens. Acts in respect of which security is required must not be acts, the repetition of which may be merely apprehended from past commission of similar acts, but acts from which a reasonable inference can be drawn that the accused are likely (not were likely) to commit a breach of the peace. The fact that the persons hold a respectable position in the community to which they belong and wield an enormous influence with its members is not enough to institute proceedings under S. 109 against those persons, for acts done by the members unless it is shown that they themselves are likely to commit a breach of the peace or disturb the public tranquillity or do any wrongful act which may probably occasion the breach of the peace. A.I.R. 1939 Lah. 363 (364) =41 P.L.R. 318=40 Cr. L. J. 901=I.L.R. (1939) Lah. 554=184 Ind. Cas. 279.

——S. 107—The proceedings under S. 102, Criminal P.C., are proceedings for the preservation of the peace and not for the preservation of morals. A.I.R. 1939 Sind 238=40 Cr. L. J. 803=I.L.R. (1940) Kar. 113= 183 Ind. Cas. 460.

——S. 107—Object of S. 107 is not to punish for past offences but to prevent future breach of peace.

The object of S.107, Criminal P. C., is not to punish persons for anything they might have done in the past but is to prevent them from doing something which is likely to occasion a breach of the peace or disturbance of public tranquillity in the immediate or near future. These proceedings are meant to be preventive and not punitive and in such proceedings, it is incumbent on the prosecution to give clear proof of acts or specific conduct on the part of the person or persons proceeded against from which a reasonable immediate inference could be drawn that a breach of the peace or disturbance of public tranquillity is likely. A.I.R. 1931 Lah. 191

=32 P.L.R. 138=12 Lah. 457=32 Cr. L. J. 1207=134 Ind. Cas. 585.

——**S. 107—Nature of proceedings.**

Ss. 202 and 203, Cr. P. Code, are applicable only to complaints and a proceeding under S. 107 cannot be regarded a complaint within the meaning of cl. (*h*), sub-s. (1), S. 4 of the Code. 29 P.L.R. 666=11 A.I. Cr.R. 183=29 Cr. L. J. 866=111 Ind. Cas. 450= A.I.R. 1928 Lah. 694.

——**S. 107**—S. 250 does not apply to proceedings under S. 107. A.I.R. 1923 All. 332, Foll. The fact that the complaint is treated as one under S. 506 of the Penal Code does not make any difference. Further, where the opposite party agrees to give security, the complaint cannot be called false and frivolous. A.I.R. 1924 All. 269, Rel. on. 102 Ind. Cas. 780=25 A.L.J. 493=7 A.I.Cr.R. 543= 8 L.R.A.Cr. 87=28 Cr. L. J. 604=49 All. 750=A.I.R. 1927 All. 531.

——**S. 107—Surveillance register.**

An order binding down a person in a proceeding under S. 107 is not an order convicting a person under any law, so the name of such a person must not be entered in the Surveillance Register. 59 Ind. Cas. 905=2 P.L.T. 176=1921 P.H.C.C. 40=A.I.R. 1921 Pat. 74.

——**Ss. 107 to 110—Person proceeded against under the preventive section—If an accused—Nature of proceedings.**

A person proceeded against under the preventive sections of the Cr. P. Code is not accused of an offence nor is he prosecuted. The proceedings against him do not therefore, end in his " acquittal " or " conviction". They are applied only to the result of a criminal trial and are quite out of place when the result of proceedings under the preventive sections has to be described. 1949 A.L.J. 413=A.I.R. 1950 A. 134=51 Cr. L. J. 436.

——**Ss. 107, 495—Power of Magistrate to order Police to enquire and report and to conduct prosecution.**

Though a proceeding under S. 107, Criminal P. C., is not a complaint and the Magistrate is not, therefore, competent to proceed under Ss. 202 and 203, Criminal P. C., yet when dealing with such a petition, he can, independently of those sections, refer the matter to the Police for enquiry and report and after he has issued notice under S. 112 he can direct the Police to adduce evidence on behalf of the prosecution. A.I.R. 1932 All. 670=1932 A.L.J. 880=54 All. 1036=34 Cr. L. J. 42=140 Ind. Cas. 536.

——**Ss. 107, 120 and 340—Right of counsel.**

Persons proceeded against under Chap. VIII (*b*) have a right to be defended by a pleader but not those proceeded against under Chap. VIII (*c*). 4 S.L.R. 47= 11 Cr. L. J. 501=7 Ind. Cas. 606.

——**Ss. 107 and 437—Accused person.**

A person from whom security has been demanded under S. 107 is not an " accused person " and neither the D.M. nor the S.J. can order inquiry under S. 437, should that person be released or discharged under S. 119 of the Cr. P. Code. 149 P.L.R. 1915, overruled. 6 P.R. 1911 Cr.=30 P.W.R. 1911 Cr.=12 Cr. L. J. 232 =153 P.L.R. 1911=10 Ind. Cas. 178.

16. Power and Duty of Court.

——**S. 107—Power and duty of Court under.**

Though a Magistrate's powers under S. 144, Criminal P.C., are very wide, the Court must depricate the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145 of the Code. A.I.R. 1940 Pat. 382=7 B.R. 54 =41 Cr. L. J. 907=190 Ind. Cas. 425.

——**S. 107**—Habitual and unjustifiable use of S. 144, Criminal P. C., as a substitute for Ss. 107 and 145 of the Code is deprecated. A.I.R. 1940 Sind 158=41 Cr. L. J. 952=I.L.R. (1940) Kar. 508=190 Ind. Cas. 618.

——**S. 107—Information lodged for taking proceedings under S. 107, against certain person—Magistrate, if can refer matter to Police for preliminary enquiry and report.**

There is nothing in the Criminal P. C., which forbids a Magistrate before whom information has been lodged for taking proceedings under S. 107, Criminal P. C., to refer the matter to the Police for preliminary enquiry and report. Therefore, if the Magistrate, before issuing a notice under S. 112, thinks fit to consult the Police in order to form an opinion as to whether, or not the matter is one in which such a notice should be issued, there is nothing illegal in his action. A.I.R. 1938 Lah. 861 =40 P.L.R. 579=40 Cr. L. J. 193=I.L.R. (1938) Lah. 640=179 Ind. Cas. 353.

[Overrules A.I.R. 1928 Lah. 694=111 Ind. Cas. 450= 29 Cr. L. J. 866=29 P.L.R. 666.]

——**S. 107—Stolen property—Charge not established against the person in possession—Question to be considered by Criminal Courts in such cases.**

Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the Police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of the property. 167 Ind. Cas. 848=19 N.L.J. 264=38 Cr. L. J. 467.

——**S. 107**—It is the duty of a Magistrate to enquire if information which prompted him to issue notice is correct. And if the accused states that the information is correct, it would be tantamount to a plea of guilty and the Magistrate can proceed to make the rule absolute on the basis of it. A.I.R. 1935 Pesh. 116=36 Cr. L. J. 1212=157 Ind. Cas. 755.

——**S. 107—Only one party bound down.**

Where the dispute between the parties has been going on for some time and there is no probability or even a likelihood of anything happening in the nature of a breach of the peace, security proceedings are not called for. Though it is not illegal, it is inadvisable that in such a dispute, only one side should be bound down, as it gives an unfair advantage to the other side. A.I.R. 1934 Pesh. 21=35 Cr. L. J. 963=148 Ind. Cas. 1078.

——**Ss. 107, 344—Order awarding costs against complainant for failure to accompany process-server.**

In a proceeding under S. 107 Criminal P. C., the complainant should not be directed to accompany the process-server. Such an order is not contemplated by S. 344 and cannot be passed under any other section. Consequently, an order awarding costs should not be passed against the complainant for failure to accompany the process-server. A.I.R. 1933 Lah. 720=35 Cr. L. J. 457=35 P.L.R. 183=147 Ind. Cas. 675.

——**S. 107—Duty of Magistrate to issue process to defence witnesses.**

In a case under S. 107, Criminal P. C., the Magistrate must issue summonses for the attendance of the witnesses for the defence, unless he takes the responsibility of recording his ground for refusing the application for any of the reasons specified in S. 257, Criminal P. C. A.I.R. 1931 Lah. 56=31 P.L.R. 949=32 Cr. L. J. 620 =130 Ind. Cas. 816.

——**S. 107—Reference of question of possession, legality of.**

An agreement to refer the matter of possession of a

property to arbitration is not bad for indefiniteness or vagueness.

A Magistrate cannot delegate his power to make an order under S. 107, Criminal P. C., to arbitration ; but there is nothing illegal in referring to arbitration the question as regards possession, though a decision of that question may render the proceedings under S. 107 infructuous. A.I.R. 1931 Pat. 92=13 P.L.T. 101=130 Ind. Cas. 810.

——Ss. 107 and 151—Proceedings under—Duty of Police—Dispute between two parties relating to exhibition of film—Proceedings against both—Propriety.

Where one of the parties is likely to cause a breach of the peace because the other party wants to exhibit a certain film, the duty of the police is to take proceedings under Ss. 107 and 151, Cr. P. Code, against the former alone in order to guard the latter in the enjoyment of his civil right. Pak. L.R. (1950) Lah. 172=51 Cr. L. J. 1142=A.I.R. 1950 Lah. 132.

——S. 107—Propriety of binding down one party only where both parties should be bound down—Duty of the Magistrate to ascertain rights and obligations of parties—Preventive jurisdiction of Magistrate, how to be exercised.

The preventive jurisdiction of a Magistrate under S. 107, Cr. P. C., must be exercised with caution. Where its exercise may lead to the infringement of an undoubted civil right, where an obligation which the law of the country imposes becomes incapable of being enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation of the other party, the Magistrate should not bind down the party who has the legal right, in him. In a proceeding under S. 107, Cr. P. C., if there are doubts as to the existence of the respective rights and obligations of the parties, the Magistrate should bind down both parties so that his order may not be detrimental to either. Where, however, no doubt exists, the party in the wrong should be bound down. An attempt to ascertain the legal rights of the parties should always be made by the Magistrate before he binds down one or the other party under S. 107, Cr. P. C. (1907) 11 C.W.N. 1002=34 C. 935. *See* also 11 C.W.N. 1128.

——S. 107—Leaders discharged—Party feuds.

Where there were old-standing feuds between two parties which in the course of events developed into a very serious and heavy litigation and the Magistrate finding no evidence against the masters discharged them but assuming a possibility of breach of peace ordered their servants to provide heavy securities,

Held, that the Magistrate's order was not justified. 87 Ind. Cas. 517=23 A.L.J. 300=26 Cr. L. J. 981 =A.I.R. 1925 All. 443.

——S. 107, 143—Unlawful assembly—Force not actually used—Party entitled to possession taking possession with armed men.

Order under S. 106 should be against both parties. *See* 11 C.W.N. 176.

17. Procedure.

——Ss. 107-117—Order under Ss. 107-117, Cr. P. Code, without complying with the formalities required by law—Legality—If can be justified on the ground of expediency.

To call upon a person to furnish security immediately without complying with the formalities required by law and without giving to that person an opportunity to defend himself, not because there was an apprehension of a breach of the peace by him but that somebody else might get excited and commit a breach of the peace, is wholly unwarranted and cannot be justified on the ground of expediency. 1948 O.W.N. 86=A.I.R. 1949 Oudh 83=1948 A.W.R. (C.C.) 57=51 Cr. L. J. 89.

——Ss. 107 and 110—Proceeding under S. 110—Order cancelling bail and demanding bond for keeping peace pending enquiry, passed on hearsay—Propriety.

A magistrate cannot cancel the bail of an accused person prosecuted under S. 110, Cr. P. Code, and direct him to execute a bond for keeping the peace until the conclusion of the enquiry merely on hearsay and on the suggestion of the Police. Before an order of this sort is made, there should be some material before the Magistrate which would amount to proof. 51 Cr. L. J. 606= A.I.R. 1950 Cal. 200.

——Ss. 107, 145—Dispute relating to immovable property likely to cause breach of peace—Proper procedure.

If the Sub-divisional Magistrate comes to the conclusion that the dispute in respect of the possession of immovable property between two parties is likely to cause breach of peace in the future the proper procedure to be adopted is that described in S. 145, Criminal P. C. 27 Pat. L.T. 231=48 Cr. L. J. 703=231 Ind. Cas. 110. A.I.R. 1947 Pat. 235.

——S. 107—Action under—Proper procedure.

Section 107 is one of the sections of Criminal P. C. designed to enable public Officers to take action to prevent the commission of offences. They confer wide and unusual powers on the Officers concerned. As the exercise of these powers necessarily results in interference with the liberty of the subject, the powers must be exercised strictly in accordance with law. The *sine qua non* for the institution of a proceeding under this section is that the Magistrate shall be of opinion that there is sufficient ground for proceeding. The Legislature has been careful to restrict the exercise of the power conferred by S. 107 to certain Magistrates specified in the section. It is only when such Magistrate is of opinion that there is sufficient ground for proceeding that action can be taken. It might not be improper for a Sub-divisional Magistrate to direct another Magistrate to make an enquiry with regard to facts, but directing that Magistrate to report whether action under S. 107 is necessary, is entirely a wrong procedure. 27 Pat. L.T. 231=48 Cr. L. J. 703=231 Ind. Cas. 110=A.I.R. 1947 Pat. 235.

——S. 107—Joint proceeding under S. 107 against opposing parties to dispute.

The two opposing parties in a dispute cannot be proceeded against under S. 107, Criminal P. C., and bound over to keep the peace, in one proceeding. Such a procedure must, almost inevitably result in prejudice, since the persons proceeded against and, as it were, in the position of accused persons, are put into the witness-box and cross-examined. It is an elementary principle that in criminal cases, the accused person shall not be cross-examined. A.I.R. 1943 Pat. 417=10 B.R. 391= 45 Cr. L. J. 406=9 Cut. L. T. 16=211 Ind. Cas. 536.

——S. 107—Cases of individual persons not separately considered.

In a proceeding under S. 107, Cr. P. C., where the cases of individual persons have not been separately considered and the evidence against each person has not been summarised, the order under S. 107 cannot be sustained and must be set aside. A.I.R. 1943 Pat. 417=10 B.R. 391=45 Cr. L. J. 406=9 Cut. L. T. 16=211 Ind. Cas. 536.

——**S. 107—Possession of land claimed by rival parties—Parties must be tried separately.**

Ordinarily, a man is entitled to be tried separately, and it is only when he and other persons have combined to commit an offence or to produce a situation for which they may be held liable at law that he and the other persons so concerned can be tried together. Where either the petitioner or their rivals are in possession of the land, what the Court has to determine under S. 107 is which of them is the aggressor and may, therefore, reasonably be called on to furnish security to keep the peace. The petitioners must be tried separately and not along with those persons who dispute their right to the land. A.I.R. 1943 Pat. 376=9 Cut. L. T. 15=10 B.R. 336=45 Cr. L. J. 308=211 Ind. Cas. 103.

——**Ss. 107, 112—Notice under S. 107, if must relate to breach of peace or wrongful act in contemplation at time when information is given to Magistrate.**

Action taken under S. 112, Cr. P. C., constitutes a judicial act and, therefore, the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case.

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of S. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under S. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. A.I.R. 1940 Mad. 23=50 M.L.W. 802=1939 M.W.N. 1209=41 Cr. L. J. 238=(1940) 1 M.L.J. 11=I.L.R. (1940) Mad. 335=185 Ind. Cas. 824 (F.B.).

——**Ss. 107 to 110**—The temporary order under S. 117 must be capable of direct relation to the application under Ss. 107 to 110 on which the proceedings are based. A. I. R. 1940 Sind 175=41 Cr. L. J. 937= I.L.R. (1940) Kar. 494=190 Ind. Cas. 532.

——**Ss. 107, 145—Complaint under Ss. 107/145—Court's omission to draw up original order under S. 145 (1) and affix its copy under S. 145 (3), if vitiates all proceedings.**

In a case under Ss. 107/145, Cr. P. C., the Magistrate's omission to draw up the necessary original order under S. 145 (1), Cr. P. C, and affix its copy at the spot under S. 145 (3), vitiates all the proceedings and the final order passed in such a case can be set aside. A.I.R. 1938 Lah. 345=40 P.L.R. 20=39 Cr. L. J. 702 =176 Ind. Cas. 124.

——**Ss. 107, 242—Mere willingness to execute security bond—Whether sufficient to act as plea of guilty under S. 242.**

A mere consent to execute a bond can amount to a plea of guilty only if the plea is explicit, detailed and capable of no other interpretation. The attention of the accused should be directed to each of the facts mentioned in the notice and he should confirm them separately. The mere fact that the accused shows his willingness or preparedness to execute a bond is not, therefore, enough to act as a plea of guilty under S. 242, Cr. P. C. A.I.R. 1935 Pesh. 116=36 Cr. L. J. 1212=157 Ind. Cas. 755.

——**S. 107—Procedure—Transfer.**

Where in certain proceedings under S. 107 the Subdivisional Magistrate passed a preliminary order under S. 112 and subsequently the District Magistrate transferred the case to the joint Magistrate who had no jurisdiction for disposal,

Held that the transfer was valid and that the joint Magistrate could continue the proceeding. (1930) M.W.N. 698=32 M.L.W. 320=127 Ind. Cas. 652= 1930 Cr.C. 1035=A.I.R. 1930 Mad. 859=59 M. L. J. 887.

——**S. 107—Warning notice.**

On the basis of a police report warning notices had been issued to the parties concerned on 8th September 1928. On 8th October he drew up proceeding against one of the party under S. 107, Cr. P. Code.

Held, that as the order of 8th September 1928 was not a final order disposing of the police report, the Magistrate did not become *functus officio* and was competent to take proceedings under S. 107, Cr. P. Code. 31 Cr. L. J. 58=120 Ind. Cas. 256=A.I.R. 1929 Cal. 506.

——**S. 107—Contents of order.**

A preliminary order under S. 112 on which proceedings under S. 107 were initiated must state the facts upon which the Magistrate charges the person proceeded with. (1930) M.W.N. 698=32 M.L.W. 320=1930 Cr.C. 1035=A.I.R. 1930 Mad. 859=127 Ind. Cas. 652=59 M.L.J. 887.

——**S. 107—Reasons for action under.**

If a proceeding under S. 107 has only reproduced the language of the section without specifying in what way and with reference to what matter a person was likely to commit a breach of the peace and in what way he was likely to do a wrongful act which might occasion a breach of the peace, it cannot be supported. 30 Cr. L. J. 492=115 Ind. Cas. 545=10 P.L.T. 639=12 A.I. Cr. R. 451=A.I.R. 1929 Pat. 67.

——**S. 107—Discharge.**

Where in proceedings under S. 107 the Magistrate proceeds to enquire into the truth of the information under S. 117 (1) but the complainant and prosecution witnesses are found absent, it is proper for the Magistrate to pass an order under S. 119 discharging the person proceeded against. 45 C.L.J. 211=31 C.W.N. 388=101 Ind. Cas. 607=28 Cr. L. J. 479=A.I.R. 1927 Cal. 343.

——**S. 107**—It will be well that the Code should be revised and that express provision should be made conferring power in terms upon Magistrates to refer petitions under S. 107 for investigation under S. 202. 49 Mad. 315 =23 M.L.W. 327=93 Ind. Cas. 8=A.I.R. 1926 Mad. 521=50 M.L.J. 460.

——**S. 107 and S. 202, Cr. P. Code—Investigation.**

It is perfectly open to a Magistrate who is asked to set in motion S. 107 to avail himself of the help which is available to him under S. 202, when complaint of an offence of which he is authorised to take cognisance is made to him. Apart from S. 202 it is competent to a Magistrate to refer the matter to the police, and the Police are entitled to hold the investigation, and it is the duty of the complainant to assist in the investigation, and so any statement made by the complainant during the investigation is absolutely privileged. 49 Mad. 315

=23 M.L.W. 327=93 Ind. Cas. 8=A.I.R. 1926 Mad. 521=50 M.L.J. 460.

——S. 107—Trial as warrant case.

Trying a case under S. 107 as a warrant case is an irregularity vitiating the proceedings, especially where the punishment in default of security was rigorous. 85 Ind. Cas. 46=5 L.R.A.Cr. 24=26 Cr. L. J. 430=A.I.R. 1924 All. 695.

——S. 107—Drawing up of proceeding.

If the District Magistrate thinks it necessary in order to prevent a breach of the peace to take proceedings under S. 107, Cr. P. Code, he should himself draw up such proceedings and he might then transfer the case to a Subordinate Magistrate for hearing. But he should not direct proceedings to be drawn up by a Subordinate Magistrate nor should the Subordinate Magistrate draw up proceedings merely because the District Magistrate has ordered him to do so. 72 Ind. Cas. 367=24 Cr. L. J. 367=A.I.R. 1924 Cal. 540.

——S. 107—Rejection of application.

If a Magistrate is satisfied after making an enquiry himself or through some other agency that the apprehension of a breach of the peace complained of does not exist he need not make an order under S. 112 of the Code and must refuse the application. 76 Ind. Cas. 25=25 Cr. L. J. 89=A.I.R. 1924 Lah. 630.

——S. 107—Omission to set forth information.

The omission to set forth in an order under S. 112, Cr. P. Code, the substance of the information received by the Magistrate, does not vitiate the proceedings if as a matter of fact the accused had clear notice of the case made against them and ample time and opportunity to let in evidence. 64 Ind. Cas. 666=23 Cr. L. J. 42 (Pat.).

——Ss. 107, 355 and 360—Procedure—Mode of recording evidence.

A case under S. 107 of the Cr. P. Code is triable as a summons case and the deposition to be received in a summons case is that provided by S. 355 of the Cr. P. Code. S. 360 of the Cr. P. Code lays down a certain procedure and that is the reading over of the deposition to the witnesses when the deposition is recorded under S. 355 of the Cr. P. Code. 4 Pat. L.W. 44=19 Cr. L. J. 169=(1918) P.H.C.C. 13=43 Ind. Cas. 585.

——S. 107—Procedure.

A Magistrate while ordering a person to furnish security to keep the peace should follow the directions in Chap. VIII of the Cr. P. Code and give the person bound over, an opportunity to show cause. 10 A.L.J. 353=13 C.R.L.J. 844=17 Ind. Cas. 716.

——Ss. 107 (3) and (4) and 349—Procedure—Second Class Magistrate referring for taking security—Magistrate acting under S. 107.

A Magistrate in a case under S. 107 (3) and (4) cannot pass the summary order under S. 349 (2) but must go through all the procedures prescribed in Ss. 112 and 116 of the Code and must hold the regular enquiry prescribed in S. 117. A second class Magistrate who is of opinion that security for keeping the peace should be taken from the accused, should not himself convict the accused but should forward the accused persons, with the file to the Dt. Magistrate, recording his opinion and with the recommendation that the accused should be convicted and sentenced and security taken under S. 106. 7 P.R. 1909 Cr.=21 P.W.R. 1909 Cr.=10 Cr. L. J. 309=3 Ind. Cas. 577.

——S. 107—Procedure—Defects in—Ss. 112 and 115 and Sch. 5, No. 12 and Chap. VIII.

Where in a proceeding under S. 107, the procedure prescribed in Chap. VIII is not complied with, inasmuch as the summonses were not in accordance with form No. 12 nor accompanied by a copy of the order under S. 112, the order requiring bonds to keep the peace must be set aside as illegal. 9 Cr. L. J. 179=1 Ind. Cas. 211.

——S. 107—Order of discharge—Power of Sessions Judge to interfere.

Where a Magistrate has discharged the accused under S. 107, Cr. P. Code, to set aside the order of discharge and to direct further inquiry. The only section under which he can take action is under S. 438 by making a report to the High Court. 1930 A.L.J. 1475=53 All. 148=32 Cr. L. J. 570=1931 Cr.C. 125=130 Ind. Cas. 630=A.I.R. 1931 A. 53.

——S. 107 (2)—Delegation of inquiry—Breach of the peace—Accused living in Sudder division—Procedure.

Breach of the peace being apprehended in a subdivision, the District Magistrate was moved for the commencement of proceedings, under S. 107, Cr. P. C., as the accused was living in the Sudder division. The Dt. Magistrate instead of drawing up the proceedings, merely said that he sanctioned the proceedings and sent the case to the Sub-Divisional Magistrate. *Held*, that though the District Magistrate did not express his intention strictly in accordance with law, the irregularity in expression did not deprive the trying Magistrate of jurisdiction in the case and could not affect the merits of the trial in any way. 19 Cr. L. J. 266=44 Ind. Cas. 122.

——S. 107—Security to keep the peace—Formalities to be observed before passing order.

In proceedings under S. 107, Cr. P. C., no final action should be taken and no final order calling upon a person to furnish security to keep the peace should be passed without formal evidence being recorded. (1907) 17 M.L.J. 407=30 M. 330=2 M.L.T. 329.

——S. 107, Cl. (2)—Delegation of inquiry.

It is not competent for a Dt. Magistrate to direct a proceeding to be drawn up by a Deputy Magistrate against a person residing in another jurisdiction; the proceeding must take place and be finished before the Dt. Magistrate himself and before no other. 13 C.W.N. 580=9 Cr. L. J. 148=1 Ind. Cas. 78.

——Ss. 107 and 145—Proceedings under—To recover immovable property—Procedure.

Proceedings under S. 107 of the Cr. P. Code are only intended for the security of the public peace, not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immovable property after having their adversaries' hands tied down by an order under that section. Where the dispute relates to the possession of immovable property, the proper course is to institute proceedings under S. 145 and not under S. 107, 3. C.W.N. 463 foll. 144 P.L.R. 1917=19 Cr. L. J. 446=44 Ind. Cas. 974.

——Ss. 107 and 145—Proceedings may be concurrent—Order under the former section does not take away jurisdiction under the latter.

There may be concurrent proceedings under both the above sections between the parties; and the passing of an order under S. 107 does not deprive the Magistrate of jurisdiction under S. 145. 21 C.W.N. 160=18 Cr. L. J. 129=37 Ind. Cas. 481.

——Ss. 107 and 145—Proceedings under S. 145—Order to furnish security—Legality.

There was a dispute about the possession of the house between two sets of persons and on proceedings instituted under S. 145 the Magistrate decided in favour of one set, but apprehending a disturbance on the part of the other, ordered them to furnish security. *Held*, that the order about security is illegal. The Magistrate cannot make

an order under one section in proceedings taken under another section. 14 A.L.J. 794=17 Cr. L. J. 527=36 Ind. Cas. 495.

——Ss. 107 and 145—Combination of Proceedings under Ss. 107 and 145—Notice under S. 107.

It is very undesirable to combine proceedings under S. 107 with those under S. 145 and to act against both opposing parties under S. 107. Before issuing process under S. 107, the Magistrate must have information of a clear and definite kind disclosing tangible facts and details so that it may afford notice, to the person, of what he is to come prepared to meet. 8 S.L.R. 207=46 Cr. L. J. 235=27 Ind. Cas. 907.

——Ss. 107 and 145—Security to keep peace—Order under S. 145—No bar.

The passing of an order under S. 145 does not debar the Magistrate from directing parties to give security under S. 107 on the same facts, the only difference being that it is at the option of the Magistrate to proceed under S. 107, while he is bound, if moved for the purpose, to take action under S. 145. 36 Mad. 315=14 Cr. L.J. 559=21 Ind. Cas. 159.

——Ss. 107 and 145—Dispute about land—Order under both sections.

There is nothing either in S. 107 or S. 145 of the Cr. P. Code to preclude a Magistrate from proceeding under the latter section though orders were passed under the former. 9 A.L.J. 693=13 Cr. L. J. 566=15 Ind. Cas. 982.

——Ss. 107 and 145—Discretion of Magistrate.

A Magistrate can exercise his discretion to proceed against the persons likely to cause a breach of peace for the possession of an immovable property either under S. 145 or S. 107. 34 All. 449=9 A.L.J. 582=13 Cr. L.J. 526=15 Ind. Cas. 798.

——Ss. 107 and 145—Concurrent proceedings.

The fact that a party has been bound down to keep the peace under S. 107 does not debar the Magistrate from acting under S. 145 when so required. 39 Cal. 469=16 C.W.N. 384=13 Cr. L. J. 142=13 Ind.Cas. 830.

——Ss. 107 and 145—The fact that there was a dispute as regards the land does not oust the Magistrate's Jurisdiction under S.107. After proceeding under S. 107 whether to act under S. 145 will depend upon the circumstances. The competence of Magistrates to act under S. 107 against persons out of possession must depend upon whether as against those persons the conditions specified in the section have been established. 39 Cal. 150=16 C.W.N. 83=14 C.L.J. 429=12 Cr. L. J. 569=12 Ind. Cas. 833 (F.B.).

——Ss. 107 and 145—Scope of—Dispute as to land—Complaint as to possession.

The fact that proceedings under S. 145 may be instituted owing to a dispute about possession of land is not a bar to proceedings under S. 107. A complainant cannot invoke S. 107 to bind over the opposite party where breach of the peace would be the result of his own attempt to get back possession though the original dispossession was itself illegal. 5 N.L.R. 94=10 Cr. L. J. 221=3 Ind. Cas. 64.

18. Reference and Revision.

——S. 107—Reference.

The Session Judge has jurisdiction to make reference in a proceeding under S. 107, even before the applicants have submitted the proceedings to the District Magistrate under S. 125 of the Code. (40 A. 140, Not foll. ; 39 A. 469 appr. and foll.) The jurisdiction of the District Magistrate under S. 125 of the Code is neither appellate nor revisional. The Code has allowed an appeal expressly against an order of a Sub-ordinate Magistrate directing a party to give security for good behaviour. As no such appeal is allowed in a case where security is ordered for keeping the peace, the District Magistrate's power is merely confined to examining the record to satisfy himself whether it was any longer necessary to keep the parties under the bond. The act is not a judicial act which the District Magistrate is called upon to exercise. 73 Ind. Cas. 504=24 Cr. L. J. 616=A.I.R. 1924=Oudh 241.

——S. 107—Revision.

Where the Magistrate has jurisdiction to proceed under S. 145, there can be no interference with his discretion even if the matter might have been more suitably dealt with under S. 107. A.I.R. 1934 Pat. 471=15 P.L.T. 453=1 B.R. 369=36 Cr. L. J. 624=155 Ind. Cas. 36.

——S. 107—Discretion of District Magistrate—Interference by High Court, when proper—Order not illegal nor definitely improper.

The High Court should be astute not to interfere with the exercise of his discretion by the District Magistrate as to which of the powers conferred on him by statute enabling him to ensure the peace of his District, he should exercise in a particular case. He is necessarily in a better position to say which of those powers is called for by the situation confronting him at the crucial moment. It is enough that the action which he is taking is not illegal or definitely improper. Where it can certainly not be predicated that action under S. 107 is not proper since it is clear that such action is legal, the Court ought not to quash the proceedings under S. 107 even if it should be possible to predicate later on (as opposed to the date of initiation months ago) that a proceeding under S. 145 might eventually give better results. Convenience is not necessarily a good criterion, still less, a general criterion. A.I.R. 1934 Pat. 463=36 Cr. L. J. 257=152 Ind. Cas. 1050.

——Ss. 107, 443—Order accepting claim—Appealability of—Revision.

Although no appeal lies from an order accepting a claim under S. 443, Cr. P. C., revision is competent. In the absence of an appeal, revision is always open unless there is something special barring revision. Even if there is any such barring of revision, the High Court can always hold whether an order had or had not been passed without jurisdiction, for, if an order is without jurisdiction it is a mere nullity and the High Court would not be revising an order but merely declaring that the order was a nullity. A.I.R. 1933 Lah. 1019=35 Cr. L. J. 505=35 P.L.R. 268=147 Ind. Cas. 997.

——Ss. 107, 436, 438—Order of discharge—Power of Sessions Judge to order further inquiry—S. 436, scope of—Procedure to be followed.

Where a Magistrate discharges a person against whom an application has been made under S. 107, Criminal P. C., the Sessions Judge has no jurisdiction to set aside the order of discharge and direct further enquiry under S. 436, Criminal P. C., inasmuch as S. 436 only contemplates further inquiry into any complaint which has been dismissed under S. 203 or sub-s. (3) of S. 204 or into the case of any person accused of an offence who has been discharged.

The only section under which the Sessions Judge might take action in such a case is under S. 438 by making a report to the High Court.

The question whether it is necessary in the interest of keeping the peace to take security from a person is essentially a question which primarily concerns the District Magistrate and the local Police. The Sessions Judge or the High Court should not ordinarily interfere in such cases. A.I.R. 1931 All. 53=53 All. 148=1931 A.L.J. 1475=32 Cr. L. J. 570=130 Ind. Cas. 630.

——S. 107—Revision—Should be within 30 days of the order.

Persons who come to High Court in revision against an order under S. 107 are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain. 49 All. 228=25 A.L.J. 44=27 Cr. L. J. 1132=7 L.R.A.Cr. 174=97 Ind. Cas. 652=A.I.R. 1926 All. 767.

——S. 107—Refusal to take action.

An order refusing to take action under Section 107 cannot be reversed by the Sessions Judge nor can he direct the Magistrate to draw up proceedings under the section. 81 Ind. Cas. 167=25 Cr. L. J. 679=A.I.R. 1925 Cal. 262.

——S. 107—Insufficient grounds.

The High Court seldom interferes in the preliminary stage with the discretion of the Magistrate taking action under the preventive sections of the Code of Criminal Procedure, but it would interfere when the materials on which the orders are based are clearly insufficient to support the orders passed therein. 76 Ind. Cas. 429=25 Cr. L. J. 189=38 C.L.J. 198=28 C.W.N. 23=A.I.R. 1924 Cal. 114.

——S. 107—Discretion.

Where a dispute likely to lead to a breach of the peace was over the possession of a fishery, and the Magistrate drew up a proceeding under S. 107 of the Cr. P. Code, *held*, the Magistrate had jurisdiction to proceed under S. 107 of the Cr. P. Code and he having exercised his discretion it was not open to the High Court to interfere in revision. 24 C.W.N. 1075=60 Ind. Cas. 336=22 Cr. L. J. 224 (Cal.).

——S. 107—Revision—Dismissal by Magistrate—If Dt. Magistrate can order re-enquiry as to provision under S. 145.

Where certain persons applied to a Magistrate to take action against the petitioners under S. 107 or 144 or 145, Cr. P. C. and their petition was dismissed as frivolous by the Magistrate but the Dt. Magistrate remanded the case in revision for a proper determination of the question of legal possession under S. 145, Cr. P. Code. *Held*, that the Dt. Magistrate had no authority to revise the order of the Magistrate in the matter and could not direct him to take action under S. 145, Cr. P. C. 1 Pat. L. W. 258=18 Cr. L. J. 488=39 Ind. Cas. 328.

——S. 107—Appeal.

A bond under S. 107 is not given to any particular person but to the Court and no private party is entitled to appeal against an order refusing to forfeit it though it is open to the Magistrate to take action in revision. 77 Ind. Cas. 733=25 Cr. L. J. 445=A.I.R. 1925 Oudh 51.

——Ss. 107, 125 and 439—High Court.

The High Court will revise an order of the Dt. Magistrate cancelling the order requiring security for good behaviour only in very exceptional cases as the last resort. 19 Cr. L. J. 900=47 Ind. Cas. 96.

——Ss. 107 and 145—Dispute as to possession of fishery—Proceeding under S. 107—Refusal to change into S. 145.

Where a dispute likely to lead to a breach of the peace was over the possession of a fishery, and the Magistrate drew up a proceeding under S. 107 of the Cr. P. Code, *held*, the Magistrate had jurisdiction to proceed under S. 107 of the Cr. P. Code and he having exercised his discretion it was not open to the High Court to interfere in revision. 24 C.W.N. 1075=22 Cr. L. J. 224=60 Ind. Cas. 336.

——Ss. 107 and 439—Order for security to keep the peace—Rival religious sects—Interference by High Court when proper.

Where one sect of persons tries to force their views on the other with the result that a disturbance of the public peace is probable, an order binding down the former under S. 107 to keep the peace will be maintained. Such an order should merely prevent them from creating a breach of the peace and continuing to annoy the others at their worship but should not prevent them from exercising their right of worship. 2 U.P.L.R. (Pat.) 64=21 Cr. L. J. 225=55 Ind. Cas. 97.

19. Security under.

——S. 107—Security—Surety considerations.

In proceedings under S. 107 the amount of the surety bonds was small and there was no question that the persons offered as sureties were financially sound for the amounts of the bonds and that they were of respectable station in life. *Held*, that the plainest considerations of justice and fairplay demanded that these sureties ought to have been accepted. 111 Ind. Cas. 394=48 C.L.J. 143=29 Cr. L. J. 842=11 A.I.Cr.R. 202.

——S. 107—Time for.

Persons against whom orders are passed under S. 107 must be given sufficient time to furnish security. 92 Ind. Cas. 702=27 Cr. L. J. 318=4 Bur. L. J. 172=A.I.R. 1925 Rang. 353.

——S. 107—Rejection of.

As long as the security is ample, the Court is bound to accept the same without enquiring into the politics of the person standing surety. 92 Ind. Cas. 702=27 Cr. L. J. 318=4 Bur. L. J. 172=A.I.R. 1925 Rang. 353.

——S. 107—Rejection of, time for fresh sureties.

The Magistrate if he is not satisfied with the sureties tendered should reject them within a reasonable time so as to give the accused an opportunity of offering fresh sureties. 92 Ind. Cas. 702=27 Cr. L. J. 318=4 Bur. L. J. 172=A.I.R. 1925 Rang. 353.

——S. 107—Breach of.

If proceedings under Section 514 for breach of the conditions of a bond to keep the peace under Section 107 of the Code are instituted within one year from date of the bond, the fact that they were not completed within that period will not affect the legality of the proceedings. 68 Ind. Cas. 847=44 All. 657=20 A.L.J. 693=23 Cr. L. J. 623=A.I.R. 1922 All. 503.

20. Wrongful Act.

——S. 107—Wrongful act—Meaning of.

The words "wrongful act" in S. 107 mean an act forbidden by the penal statutes of India or declared to be penal or wrongful by such statutes. 21 Cr. L. J. 453=56 Ind. Cas. 437 (Pat.).

——S. 107—Wrongful act—Putni sale—Regulation VIII of 1819—Durputnidar under the defaulting putnidar resisting the purchase.

After the sale of a putni under Reg. VIII of 1819, a durputnidar continued to be in possession and insisted upon collecting rents from the raiyats, even though the revenue authorities and the zemindars had done everything necessary for them to do to put the purchaser in possession.—*Held*, that the act of the durputnidar was wrongful, and that he was rightly bound down to keep the peace. The fact that he had brought a suit to set aside the sale can make no difference, the effect of the Putni Regulation being to render the act unlawful until such time as the sale shall have been set aside. (1905) 9 C.W.N. 792.

——S. 107—Wrongful act—Security.

Where there was already a cattle market and certain persons intended to open another cattle market and the Magistrate apprehending that there would be a breach

of the peace consequent thereupon, bound them over under S. 107, *held*, S. 107 Cr. P. C. which is confined to cases where the Magistrate was informed that a person was likely to commit a breach of the peace or to do any wrongful act which may occasion a breach of the peace, does not apply to cases where he was informed that the accused were intending to do something perfectly legal on their land. 16 A.L.J. 279=19 Cr. L. J. 437=44 Ind. Cas. 965.

——S. 107—Wrongful act—When object lawful, order improper.

Persons whose object was to do a particular act with the sanction and under the protection of the authorities and not in defiance of any prohibition that may be issued by them, cannot be bound over under S. 107 of the Code. 37 All. 33=12 A.L.J. 1246=16 Cr. L. J. 46=26 Ind. Cas. 638.

——S. 107—Wrongful act—Security to keep peace—Boycotting of servants of Zamindar.

Where the tenants were boycotting the Zamindar's servants but doing nothing likely to disturb the public tranquillity, they were not liable to be bound down under the section. 14 Cr. L. J. 238=19 Ind. Cas. 334.

——S. 107—Wrongful Act—Blowing conch to wound religious feelings.

The blowing of a conch for mere amusement or at a place fixed for religious ceremonies or worship is not a wrongful act, but doing it at a place not intended for religious worship with a view to wound the religious feelings of Mahomedans is an act likely to provoke a breach of peace and disturb the public tranquillity. 33 A. 775=13 Cr. L. J. 170=13 Ind. Cas. 922.

21. Object and scope of.

——S. 107—Scope and object—Jurisdiction of Magistrate to take action—Essential condition of.

The power conferred by S. 107, Cr. P. Code, must be exercised strictly in accordance with law, because the section is one of the sections designed to enable public officers to take action to prevent the commission of offences and confers unusual powers on the officers concerned, and the exercise of those powers necessarily results in interference with the liberty of the subject. The Magistrate taking action must be satisfied and must be of opinion that there is sufficient ground for proceeding. 27 P.L.T. 231=13 B. R. 550=231 Ind. Cas. 110=A.I.R. 1947 Pat. 235=48 Cr. L. J. 703.

——S. 107—Scope of enquiry—Dispute concerning land—Proceedings against both sides—If to be taken.

In a case where there is a dispute concerning land, it is proper to take action against both sides if S. 107, Cr. P. Code, is to be resorted to, because binding over one party puts the other at an advantage. But it cannot be said that the Court should not investigate the title and the facts of possession of the parties. Such an enquiry falls legitimately within the purview of criminal Court acting under S. 107 because the Court has to find out who is the aggressor and who has the right on his side. I.L.R. (1947) Nag. 706=A.I.R. 1948 Nag. 76=49 Cr. L. J. 61=1947 N.L.J. 360.

——S. 107—Scope.

Dispute about the cultivation of a bund and a proclamation forbidding people on payment of fine and shoebeating from picking fruit from a Ber tree do not come within the purview of S. 107. 120 Ind. Cas. 215=31 Cr. L. J. 20=1929 Cr. C. 532=A.I.R. 1929 Nag. 328.

——S. 107—Right to worship.

The right to perform the puja of an idol or to have a share of the offerings made to the idol cannot be said to be a right of user of any land as provided in S. 145. If there is such a dispute between the parties which the Magistrate considers may lead to any breach of the peace he may take such steps as he considers necessary under S. 107. 52 Cal. 959=42 C.L.J. 127=92 Ind. Cas. 223=27 Cr. L. J. 239=A.I.R. 1926 Cal. 437.

——S. 107—Costs.

S. 545 of the Cr. P. Code does not apply to a case under S. 107; consequently an order directing the accused to pay costs of the complainant is *ultra vires*. 77 Ind. Cas. 828=5 L.R.A. Cr. 12=25 Cr. L. J. 476=A.I.R. 1924 All. 694.

——S. 107—Attachment.

No order of attachment of property can be passed in a proceeding under S. 107. 25 Cr. L. J. 350=77 Ind. Cas. 238=A.I.R. 1924 Oudh 345.

——S. 107—Abettors Abetment—Instigating breach of peace.

Abetment by instigation or conspiracy of the offence of voluntarily causing hurt is a wrongful act and nothing more likely to occasion a breach of the peace can be imagined than instigating the infliction of a public thrashing. 67 Ind. Cas. 346=6 N.L.J. 274=23 Cr. L. J. 394=A.I.R. 1922 Nag. 180.

——S. 107—Unsuccessful charge of a distinct offence.

The apprehension as to the breach of peace arose out of facts which were undisputed. In connection with those facts a charge of murder was laid unsuccessfully against certain persons and proceeding under Section 107 was also started.

Held, one charge did not exclude the other and, though the charge of murder failed, the order demanding security to keep the peace was valid. 9 O.L.J. 285=A.I.R. 1922 Oudh 273.

——S. 107—It may sometimes be necessary to bind parties under S. 107 in order to prevent a breach of the peace even though proceedings under S. 145 have been taken. 61 Ind. Cas. 240=24 O.C. 21=22 Cr. L. J. 384=A.I.R. 1921 Oudh 119.

22. Miscellaneous.

——S. 107—Master's liability—Owner bound for acts of servants consented to.

The manager of a Zamindar resorted to acts of violence in realizing tolls from *hat* users; Zamindar was directed to execute a security bond of Rs. 200. It was held that the order was justified. S. 107 does not apply where the civil right is exercised in a lawful manner. 21 Cr. L. J. 651=57 Ind. Cas. 667 (Pat.).

——Ss. 107, 443—European British subject, right of, in regard to a proceeding under S. 107, Cr. P. C.—Transfer.

A person against whom proceedings under S. 107, Cr. P. C., are instituted is in the position of accused person. When a proceeding under S. 104, Cr. P. C., is instituted against a European British subject, his case falls within the purview of S. 443, Cr. P. C., and he is entitled to claim that he should be tried by a Justice of the Peace or a District Magistrate or Presidency Magistrate provided the Justice of the Peace is a Magistrate of the first class and a European British subject. Where a proceeding under S. 107, Cr. P. C., was instituted against a European British subject, by a Magistrate not competent to try a European British subject, on application to the High Court, the proceeding was directed to be transferred to the file of a Magistrate competent to try him under S. 443, Cr. P. C. (1908) 13 C.W.N. 151=8 C.L.J. 565=36 C. 163=9 Cr. L. J. 359=1 Ind. Cas. 737.

——S. 107, Cl. (4)—"Such person"—Jurisdiction of Magistrate to detain in custody when person was not sent by another Magistrate.

The words "such person" in Cl. (4) of S. 107 means person sent by another Magistrate under Cl. (3) of S. 107; and consequently a Magistrate has no jurisdiction to retain in custody a person not sent to him by another Magistrate under Cl. (3) but who is before the court. (1908) 31 M. 315=3 M.L.T. 311 (F.B.).

——S. 107, Cls. (3), (4), S. 496—Custody—Detention in, pending inquiry.

Only in the special circumstances referred to in Cls. (3) and (4) of S. 107 does the law empower a Magistrate to detain the person in custody until the completion of the inquiry. (1904) 8 C.W.N. 779=32 C. 80.

——S. 107—When security should be demanded—Disobeying illegal order.

To justify an order under S. 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some wrongful act that may occasion a breach of the peace. Where an order was passed prohibiting the applicants from killing cows and the Magistrate, believing that they would disobey the order, bound them down to keep the peace, held that the order being illegal, the applicants could not be bound down. (1910) 7 A.L.J. 649=32 A. 571=6 Ind. Cas. 454=11 Cr. L. J. 355.

——S. 108—Failure to give security under S. 108—Only simple imprisonment can be awarded, not rigorous.

The imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under S. 108, be simple, and under the provisions of S. 123 (6), Criminal P. C., the sentence of rigorous imprisonment for one year is illegal. A.I.R. 1941 Oudh 98=42 Cr. L. J. 35=1940 O.W.N. 1018=16 Luck. 260=1940 A.W.R. 441=190 Ind. Cas. 805.

——S. 108—Accused delivering one speech coming under S. 153-A, Penal Code (Act XLV of 1860)—Proceedings under S. 108 cannot be taken.

The commission of only one offence under S. 153-A, I.P.C., is not to be taken to justify the proceedings under S. 108 of the Criminal P. C. The element of intention on the part of the accused is not to be deduced from a solitary instance. He may be prosecuted for offence under S. 153-A. A.I.R. 1941 Oudh 98=1940 O.W.N. 1018=42 Cr. L. J. 35=1940 A.W.R. 441=16 Luck. 260=190 Ind. Cas. 805.

——S. 108—Proceedings under S. 108 for speeches offending against S. 153-A, Penal Code (Act XLV of 1860)—Previous speeches made by speaker, if admissible under S. 14, Evidence Act (1 of 1872).

Where proceedings are started against a person under S. 108, Criminal P. C., in respect of certain speeches made by him offending against S. 153-A, I. P. C., the previous speeches made by such person are admissible, in evidence under S. 14, Evidence Act, as his state of mind reflected in the previous speeches would be highly material in determining the speaker's intention in delivering the questioned speeches. A.I.R. 1940 Nag. 134 =1940 N. L. J. 31=41 Cr. L. J. 713=I.L.R. (1942) Nag. 62=189 Ind. Cas. 74.

——S. 108—Section 112, Criminal P. C., provides for a preliminary order to be passed in proceedings started under Ss. 107, 108, 109 and 110 and contemplates that the order should contain as much of the information as would be sufficient to enable the party to know under which of the several sections, or which part of any one of them, he is proceeded against. A.I.R. 1940 Nag.134 =1940 N. L. J. 31=41 Cr. L. J. 713=I.L.R. (1942) Nag. 62=189 Ind. Cas. 74.

——Ss. 108, 531—Magistrate acting on previous information having jurisdiction to do so—Discretion should not be interfered with—Even if he had no jurisdiction, S. 531 covers case when no prejudice is caused.

When S. 108, Criminal P. C., provides that a Magistrate may act on information which states that a person of the nature contemplated by that section is within the local limits of his jurisdiction, and it is clear from his order that he has believed this information and acted on it, it is in the last degree undesirable that the High Court should go behind the information, and substitute a conclusion reached after elaborate enquiry and arguments, for a discretion which the Magistrate was expected to exercise on the spot as soon as he conveniently could:

Held, that after transfer of the case, the Magistrate enquiring into the matter on the basis of previous information, had jurisdiction to proceed with the case and that even if he did not have it, S. 531, Criminal P. C., would cover the case, when no failure of justice is caused. A.I.R. 1937 Nag. 70=19 N. L. J. 183=I.L.R. (1936) Nag. 200=38 Cr. L. J. 447=167 Ind. Cas. 739.

——S. 108 (a)—Accused making isolated speech on special occasion at meeting for special purpose—Absence of evidence as to his having made objectionable speeches in the past or of intention to do so in future.

The provisions of S. 108 (*a*), Criminal P. C., cannot properly be applied in respect of an isolated speech made by the accused on a special occasion and at a meeting for a special purpose. Where there is no evidence of the accused having made any other objectionable speech in the past or of his having any intention to do so in the future, he should not be proceeded against under S. 108 (*a*). A.I.R. 1934 Oudh 70 (72)=11 O.W.N. 26=35 Cr. I. J. 562=9 Luck. 344=147 Ind. Cas. 1082.

——Ss. 108, 439—Dissemination or attempt to disseminate seditious matter—Proceeding under S. 108—Propriety of—Revision—Findings of fact, if can be interfered with.

Where the accused are alleged to have engaged in a continuous sedious propaganda in an organised manner, the mere fact that the forum of their activities is closed, owing to Police searches, will not necessarily show that the accused would not have, if left to themselves, resumed their activities. In such cases, it is proper to take proceedings under S. 108, Criminal P. C. The test is whether there is any evidence of dissemination or attempt to disseminate seditious matter by the accused, which could be reasonably accepted as sufficient to justify an order under S. 108, Criminal P. C. A.I.R. 1933 Lah. 236= 35 Cr. L. J. 408=35 P.L.R. 157=147 Ind. Cas. 266.

——S. 108—Security for keeping the peace—Fixing excessive amount, impropriety of.

Section 108, Criminal P. C., embodies a preventive and not a punitive provision of law and it is improper to demand an excessive amount as security which leaves the accused no option even if he wanted to furnish a security and practically amounts to sending him to jail without being tried and convicted for any offence. A.I.R. 1932 Lah. 559=33 Cr. L. J. 831=33 P.L.R. 911= 139 Ind. Cas. 696.

——S. 108—Security proceedings—Strict proof of habitual conduct, necessity of—Mere joining Congress processions and preaching boycott of British goods.

In order that a person may be bound over under S. 108, Criminal P. C., for sedition, it must be shown that the person concerned is in the habit of intentionally disseminating or intends to disseminate seditious matters, in other words, it must be shown that there is danger of his continuing his seditious activities unless he is prevent-

ed from doing so under this section. It may be fair to assume that a person who habitually does something is likely to continue to do so, but the habitual nature of his activities sought to be prevented must be clearly proved.

Where all that was proved against the accused was that he had joined the processions and meetings arranged by the Congress Committee and it was not shown that he had any hand in organising them, and out of the four speeches that he was alleged to have made there was none capable of being construed as seditious :

Held, that S. 108, Criminal P. C., had no application to the facts of this case. A.I.R. 1932 Lah. 7=32 Cr. L. J. 1172=134 Ind. Cas. 486.

——**S. 108—'Disseminates or attempts to disseminate'—Whether refers to one act or to probability of repetition of offence—Habit, if to be proved by prosecution.**

The words 'disseminates or attempts to disseminate' in S. 108, Criminal P. C., are used by the Legislature as not referring to the number of acts performed but rather having reference to whether the evidence showed that there was something to show that a repetition of the offence was probable.

In such a case, the prosecution has not to show that the act complained of is a habit on the part of the person who is bound over under S. 108, Cr. P. C. A.I.R. 1932 Pat. 213=13 P.L.T. 275=33 Cr. L.J. 711=139 Ind. Cas. 88.

——**S. 108—Condition.**

To take proceedings under S. 108, Cr. P. Code, there ought to be evidence that, if not prevented the person accused would continue to act in the way in which he had done. 50 All. 854=26 A. L. J. 813=30 Cr. L. J. 216=114 Ind. Cas. 48=A.I.R. 1928 All. 344.

——**S. 108—Grounds—Solitary Act.**

Where the accused has committed one single offence at one particular time under S. 153-A and there is no evidence whatsoever of his having done so before, or of his having an intention of doing so in the immediate future, the proceedings under S. 108, Cr. P. Code, are not legally justified. 50 All. 854=26 A. L. J. 813=30 Cr. L. J. 216=114 Ind. Cas. 48=A.I.R. 1928 All. 344.

——**S. 108—Proceedings under S. 153-A, I. P. Code.**

Merely disseminating matter is not sufficient. Intention to promote feeling of enmity is necessary. Court's opinion as to the effect of disseminated matter is not sufficient. Real intention of the accused must be looked at. 54 Cal. 59=44 C. L. J. 172=30 C.W.N. 953=27 Cr. L. J. 1154=97 Ind. Cas. 738=A.I.R. 1926 Cal. 1133.

——**S. 108**—Merely because a person does not plead guilty and insists upon putting his case before the Court and taking its decision, to infer that it is necessary after the dicision has been given to bind him over in order to prevent him from doing the same thing again is unwarranted. 54 Cal. 59=44 C. L. J. 172=30 C.W.N. 953=27 Cr. L. J. 1154=97 Ind. Cas. 738=A.I.R. 1926 Cal. 1133.

——**S. 108—Intention—Actual not necessary.**

Under S. 108 (*b*) it is not necessary to find out that there was actual intention to promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects but it will be sufficeint that there are words in the leaflet or matter complained of which were likely to promote such feelings. 43 Cal. 591=20 C.W.N. 199=23 C. L. J. 105=17 Cr. L. J. 254=34 Ind. Cas. 974.

——**S. 108—Procedure—Resorting to S. 108 to save trouble of prosecution under S. 153-A, I.P. Code.**

Where proceedings are taken under S. 108, Cr. P. Code, against an accused convicted under S. 153-A, Penal Code, to avoid the trouble and possible refusal of Government to prosecute under the provisions of S. 153-A, Penal Code, the procedure is not permissible because, when the law has provided certain sanctions, it cannot be permitted that the same action may be taken without sanction by adopting a different course. 50 All. 854=26 A. L. J. 813=30 Cr. L. J. 216=114 Ind. Cas. 48=A.I.R. 1928 All. 344.

——**S. 108**—The procedure applicable to proceedings under S. 108 is that prescribed for warrant cases except that a charge need not be framed. The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought, is entitled to keep quiet and expect prosecution to prove their case. 76 Ind. Cas. 294=25 Bom. L.R. 97=47 Bom. 438=25 Cr. L. J. 150=A.I.R. 1923 Bom. 255.

——**S. 108—Security for good behaviour from persons disseminating seditious matter—Test under S. 108—Accused offering undertaking to refrain from delivering political speeches—Whether Magistrate should accept such undertaking—Undertaking not one of penitence.**

The provisions are preventive in nature. The test under S. 108 is whether the accused has been disseminating seditious matter and whether repetition of offence is feared. Offer of an undertaking to refrain from repetition of offence must arise from penitence. Magistrate was right in not accepting the offer. 11 Bom. L. R. 743=10 Cr. L. J. 379=3 Ind. Cas. 776.

——**S. 108—Sedition—Dissemination.**

A speech advocating establishment of Home Rule in India and the attainment of it by constitutional means does not in itself amount to disseminating seditious matter. 19 Bom. L. R. 211=18 Cr. L. J. 567=39 Ind. Cas. 807.

——**Ss. 108 (6) and 451—Penal Code S. 153 (a).**

To sustain an order under S. 108 (6) of the Cr. P. C., it is not sufficient only to prove that the language used was highly offensive to a community but it must be shown that the applicant intended to provoke feelings of enmity or hatred between two communities. S. 451 of the Cr. P. Code applies only to trials and an inquiry under S. 108 (6) is not a trial and no jury can be claimed. 4 Bur. L.T. 84=12 Cr. L. J. 248=10 Ind. Cas. 789.

——**S. 108—Security for good behaviour.**

The provisions of Chapter VIII of the Criminal Procedure Code, 1898, are preventive in their scope and object and are aimed at persons who are a danger to the public by reason of the commission by them of certain offences. The test under S. 108 of the code is whether the person proceeded against has been disseminating seditious matter and whether there is a fear of a repetition of the offence. In each case that is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances. *Held*, also that in the particular case before them, where the last of the speeches was made on 5-9-1908 and the information was filed on 10-12-1908 the District Magistrate was right in making the order for security ; also that the Magistrate was right in not accepting the undertaking of the petitioner not to deliver speeches for a year if the case was dropped. The case being criminal, the Magistrate was right in conforming to the provisions of the law strictly before passing an order under the section. (1909) 11 Bom. L. R. 743. =3 Ind. Cas. 776=10 Cr. L. J. 379.

——**S. 109—Synopsis.**

1. **Applicability and scope.**
2. **Concealing oneself—What is.**
3. **Essentials to be proved.**
4. **Grounds for action under.**
5. **Jurisdiction under.**
6. **Power of High Court.**

7. Sentence
8. Sureties.
9. Terms explained.
10. Miscellaneous.

1. Applicability and Scope.

——Ss. 109, 112, 537—Proceedings under S. 109—Omission to read order under S. 112 at commencement of proceedings—Defect is curable under S. 537.

An omission to read the order under S. 112 to the person concerned who is present in Court at the commencement of the proceedings under S. 109 does not render them illegal and the defect is curable under S. 537. A.I.R. 1946 Oudh 230=21 Luck. 251=224 Ind. Cas. 551=47 Cr. L. J. 642.

——S. 109—Scope of—Residence of persons concerned—Relevancy.

S. 109 of the Cr. P. Code is not confined generally to persons coming from outside the Magistrate's jurisdiction and it applies as much to persons residing within it as to persons coming from outside. In fact the residence of the persons against whom information is received is an absolutely irrelevant consideration in determining the scope of S. 109. 1949 A. L. J. 413=A.I.R. 1950 A. 134 =51 Cr. L. J. 436.

——S. 109 (b)—Fact that accused can be tried of substantive offence, whether bar to his prosecution under S. 109.

The mere fact that the accused could be tried for a substantive offence of attempted theft is not a bar to his prosecution under S. 109, Cr. P. C., if the case can otherwise be established to fall under any of the clauses of that section.

Where the positive facts found against the accused were that he belonged to Delhi and not to Fyzabad, that he gave a false name and address when questioned by the Police constable, that he was seen mixing in the crowd of passengers at the Railway Station and was attempting to feel their waists and pockets, that he further admitted the fact that he was a pickpocket and had come to try his luck, and that he appeared originally at 9 a.m. and suddenly disappeared for two hours and reappeared at 11 a.m. :

Held, that the fact left no doubt that the accused was trying to conceal his presence with a view to commit the offence of theft, and brought him within the mischief of cl. (b) of S. 109, Cr. P. C., in other words, he was unable to give a satisfactory account of himself. A.I.R. 1942 Oudh 246=43 Cr. L. J. 342=1942 O.W.N. 3= 1942 A.W.R. 34=198 Ind. Cas. 276.

——S. 109 (a)—Applicability—Accused coming within local limits of jurisdiction of certain Magistrate and taking precaution to conceal himself—S. 109 (a) applies.

Section 109 (*a*) of Cr. P. C. is applicable to a preson who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate. If a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives information, such Magistrate has power to demand security, even though the residence of the person informed against within the jurisdiction is well known. A.I.R. 1941 Oudh 509=1941 O.W.N. 867= 42 Cr. L.J. 617=1941 A.W.R. 241=17 Luck. 105=194 Ind. Cas. 740.

——S. 109 (a) (b)—Clause (a) of S. 109, Cr. P. C., should be applied with proper discretion. It cannot be applied to a person who was merely found talking at night time with bad characters in a place open to the public or to one who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. There must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the person is present within the local limits of the Magistrate's jurisdiction:

Held, having regard to the entire circumstances, that it was a matter of common experience that a person in the position of the petitioner would ordinarily try to run away when challenged at night, from the Police or the *chaukidars* and that there was no sufficient evidence which would justify the inference that the petitioner had been found to be taking precautions to hide his presence, far less that he was taking such precautions in order to commit an offence. A.I.R. 1941 Pat. 478=7 B.R. 747=42 Cr. L. J. 554=22 P.L.T. 545=194 Ind. Cas. 295.

——S. 109—Accused walking at midnight on thoroughfare being questioned by dafadar telling that he was going to marriage party with other persons—Absence of proof that statement was untrue.

The accused who was walking at midnight on a *bandh* which was used as a thoroughfare, being questioned by the *dafadar* on patrol duty replied that he was going to a marriage party and he also stated that he had other companions with him. Later on, three other persons came out of a reservoir :

Held, that in absence of evidence to show that the statement made by accused was untrue, S. 109, Cr. P. C., had no application to the case. A.I.R. 1940 Pat. 410 =41 Cr. L. J. 777=21 P.L.T. 171=6 B.R. 842=189 Ind. Cas. 641.

——Ss. 109 (a), (b), 112—Magistrate by order under S. 112 taking security under S. 109 (b)—Sessions Judge on appeal considering that facts come under Cl. (a) and not Cl. (b) and so changing S. 109 (b) to S. 109 (a)—Action, if without jurisdiction—Accused unable to give account of his presence and when accosted, running away after throwing away bundle of house-breaking implements—Accused found to be residing in vicinity and carrying respectable profession in day time—Cl. (a) or cl. (b) applicable.

There is nothing in the provisions of S. 109 or of S. 112, Cr. P. C., which makes it imperative on the part of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate. Where Sessions Judge in appeal has considered that what is set out in the body of the order by the Magistrate under S.112 Cr. P. C. brings the matter within the terms of cl. (a) of S. 109 and not under Cl. (b), as the trying Magistrate did and he has in effect corrected what he considers either to be a misconception of the trying Magistrate or a clerical error and the substance of the accusation which the applicant had to meet has not been altered in any way ; the action of the Session Judge is not without jutisdiction.

Where the order under S. 112 clearly states that the accused did not give a satisfactory account of his presence in the manner and under the circumstances he was seen and there is nothing about his taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction, S. 109 (b) and not S. 109 (a) is applicable though it is known that the accused resides in the vicinity and has a regular means of livelihood.

When a man is called on to give a satisfactory account of himself, the implication necessarily follows that it is not a general account of himself but an account of himself in relation to the circumstances in which he is called on to

give such account. Under S. 55 of the Cr. P. C., an officer in charge of a Police Station is empowered to arrest or cause to be arrested *inter alia* anyone who cannot give a satisfactory account of himself,. A person cannot be considered to have given a satisfactory account of himself if, being found with unmistakable burgling instruments in his possession, in the middle of the night, he says that he is a respected house-holder, following an honourable profession in the day-time still less can he be said to have given a satisfactory account of himself when, on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and when forced to open his door to the Police, denies that he had left his house that night. A.I.R. 1938 Nag. 303=39 Cr. L. J. 747=I.L.R. (1938) Nag. 595=176 Ind. Cas. 465.

——Ss. 109 (b), 110—Prosecution under S. 109 (b)—Evidence showing accused to be thief by habit—Proper order.

A proceeding against a man because he has no ostensible means of subsistence is a totally different proceeding from one for being by habit a thief.

An order was framed against a person under S. 109 (b), Cr. P. C., as having no ostensible means of subsistence, but the evidence led was all about his being by habit a thief. The Magistrate still passed an order under S. 109 (*b*) to furnish security. No appeal was filed against the order.

Held, that the proper order to be passed in such a case was one under S. 110, Cr. P. C., but as no appeal was preferred from the order, it was not right to set it aside. A.I.R. 1937 Rang. 544=39 Cr. L. J. 285=173 Ind. Cas. 213.

——Ss. 109, 117, 517—'Enquiry' if includes proceedings under the security sections—Proceedings under S. 117, if an enquiry within S. 117—S. 517 is not limited to cases where it is found that some offence has been committed.

The definition of "enquiry" in the Cr. P. C., is wide enough to include proceedings under the security sections and there is nothing in S. 517, Cr. P.C. to limit the applicability of an order of confiscation to cases where it is found that some offence has been committed. A proceeding under S. 117 is an enquiry within S. 517. A.I.R. 1936 Nag. 143=I.L.R. (1936) Nag. 150=38 Cr. L. J. 175=166 Ind. Cas. 271.

——S. 109 (a)—A mere attempt to commit an offence does not obviously bring the person within the scope of S. 109 (*a*). 1935 M.W.N. 1348.

——S. 109—Security bond under S. 109, Cr. P. C., cannot be demanded from a person already undergoing imprisonment; it should take effect after the expiration of term of imprisonment. 1935 M.W.N. 11.

——S. 109 (a) (b)—Cl. (a), meaning and effect of.

Section 109, cl. (*a*), Cr. P. C., does not mean that the man is taking precautions to conceal the fact of his being present within the local limits of such Magistrate; but it means that he is taking precautions to conceal his presence and that the concealment is to be within the local limits of such Magistrate. A.I.R. 1935 Pat. 69=15 P.L.T. 836=1 B.R. 482=36 Cr. L. J. 846=155 Ind. Cas. 729.

——S. 109—Except under special circumstances, it is not a criminal offence to give a false name. A.I.R. 1935 Rang. 294=36 Cr. L.J. 1384 (2)=158 Ind. Cas. 500.

——S. 109—Abuse of power.

The fact that a man does not work or that he was convicted previously for bad livelihood does not justify a Magistrate, without being satisfied from the evidence that since his release he has no ostensible means of livelihood, to order him to furnish securities for good behaviour. 86 Ind. Cas. 666=41 C. L. J. 142=26 Cr. L. J. 842=A.I.R. 1925 Cal. 616.

——S. 109—Applicability.

Where a Magistrate ordered certain persons who belonged to a gang which frequented melas and carried on a game played with rings to furnish security to be of good behaviour under S. 109 of the Code of Criminal Procedure—*Held* (1) that the conviction under clause (*a*) of the section was illegal, game being legal or illegal according to the manner in which it was played; (2) that clause (6) was very wide and the Magistrate upon the evidence did not act illegally. (1909) 6 A. L. J. 253=2 Ind. Cas. 219 (2)=9 Cr. L. J. 527.

——S. 109—Person convicted under S. 411.

Where a petitioner has already been tried and convicted of an offence under S. 411, Penal Code, in respect of any particular incident, he cannot be proceeded against for the same incident also under S. 109, Cr. P. Code. The person having already been punished for his act and there being no other evidence against him, proceedings under S. 109, Cr. P. Code, are not justified. 29 Cr. L. J. 1043=112 Ind. Cas. 467=11 A. I. Cr. R. 397=A.I.R. 1928 Lah. 928.

——S. 109—A man who is deliberately preparing to commit a burglary, and when caught by the police admits his intention, cannot be dealt with under the provisions of S. 109. 49 All. 844=8 L.R.A. Cr. 106=102 Ind. Cas. 503=28 Cr. L.J. 567=25 A. L. J. 679=8 A. I. Cr. R. 102=A.I.R. 1927 All. 592.

——S. 109 (a)—Impersonation of another—Whether covered by the provisions of the section—Criterion to decide if action under the section can be taken.

In order to attract the provisions of cl. (*a*) to S. 109, Cr. P. C., it is necessary to show that the person concerned was concealing his own presence for the purpose of committing the offence—in other words, that the act which was to help him to commit the offence was the concealment of his own presence or identity and not the impersonation of another.

Where the accused represented to a Raja that he was the Maharaj Kumar of another place, a person of influence who would be able to help the Raja to make a rich marriage and to arrange for loans at low rates of interest.

Held, that the concealment of his identity was no part of his criminal objective and the criminality of assuming the identity of Maharaj Kumar was not a criminality contemplated by S. 109 (*a*), Cr. P. C., and that the provisions of S. 109 (*a*) did not cover the case. A.I.R. 1934 All. 45=35 Cr. L. J. 442=1933 A. L. J. 1601=56 A. 314=147 Ind. Cas. 368.

——S. 109 (a)—Applicability.

S. 109, Cr. P. Code, applies to persons who being or coming within the local limits of the Magistrate's jurisdiction take precautions to conceal their presence. 50 All. 909. foll. 1949 A. L.J. 413=A.I.R. 1950 A. 134=51 Cr. L. J. 436.

——S. 109 (a)—Applicability—Conditions—Proof of continuous act of concealment—Necessity.

It is not necessary for the application for S. 109 (*a*), Cr.P. Code, that the act of concealment on the part of the accused must be shown to be a continuous act and not merely an isolated act. No time limit can be put on the taking of precautions by the accused to conceal his presence. It is a question of fact in each case whether the circumstances justify the inference that he has been taking precautions to conceal his presence and there was an intention to commit an offence. 21 Luck. 251=224 Ind. Cas. 551=1946 Oudh (Rul.) 201=1946 O.A. (C.C.) 144=1946 A.W.R. (C.C.) 144=1946 O.W.N. 225=47 Cr. L. J. 642=A.I.R. 1946 Oudh 230.

——**S. 109 (a) and (b)—Giving false name and delivery of letters inciting crime—Security for good behaviour.**

A person giving a false name and delivering secretly letters containing an incitement to commit crime or demanding money for the means therefor falls within S. 109 (*a*) of the Code and should in the interests of public peace be called upon to give security for good behaviour. 15 Cr. L. J. 255=23 Ind. Cas. 207.

——**Ss. 109 (b) and 110 (c)—Person unable to give account of himself—Association with political conspirator.**

Where a person who cannot give a satisfactory account of himself is found in the house of another in another district who is suspected to be of a dangerous character and a political conspirator, a Magistrate is justified in passing an order under S. 109 (*b*) to give an account of himself. S. 109 is not restricted to vagrants but applies also to persons unable to give a satisfactory account of themselves. 13 Cr. L. J. 239=14 Ind. Cas. 431.

——**S. 109, cl. (b)—Object of.**

The object of the last part of S. 109 is to enable Magistrates to take action against suspicious stranger lurking within their jurisdiction ; so the section cannot be used against a son residing temporarily in his father's house and the father who is a man of substance cannot be said to be without means of subsistence. 39 Cal. 456=16 C.W.N. 499=15 C. L.J. 396=13 Cr. L. J. 161=13 Ind. Cas. 913.

——**S. 109 (b)—Vagrant—Security—Previous conviction—Means of subsistence—'Doing no work'.**

The fact that a man does no work, or that he has been once before convicted for bad livelihood, does not justify a Magistrate without being satisfied from evidence that since his release the accused has no ostensible means of livelihood, to order him to furnish security for good behaviour. (1900) 5 C.W.N. 28.

2. Concealing himself, what amounts to.

——**S. 109—Persons brought under arrest—'Concealment'—Meaning of.**

The application of clause (*a*) cannot be limited only to cases where a person has not been brought under arrest, nor is it necessary in all cases to prove that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. 22 C.W.N. 163 and 41 C. L. J. 142, Diss. from.

A person whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach cannot be said to come within the mischief aimed at in Cl. (*a*).

It is certainly undesirable to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various, but there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad characters in a place which is open to the public. 8 P.L.T. 95=1926 P.H.C.C. 290=27 Cr. L. J. 1128=97 Ind. Cas. 648=A.I.R. 1926 Pat. 569.

——**S. 109 (a)—Act of concealment need not be continuous—Whether person has been taking precautions to conceal his presence is question of fact.**

It is not necessary that before S. 109 (*a*) can apply it must be shown that the act of concealment is not an isolated act but a continuous one. No time limit can be put on the taking of precautions. In every case it would be a question of fact whether the circumstances justify the inference that a person has been taking precautions to conceal his presence and that there was an intention to commit an offence. A.I.R. 1946 Oudh 230 =21 Luck. 251=224 Ind. Cas. 551=47 Cr. L. J. 642.

——**S. 109 (a)—Continuous course of conduct in taking precautions to conceal his presence.**

It is not necessary, in order to bring a person within the operation of S. 109 Cl. (a), Cr. P. C., to show that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. Otherwise, it would be impossible to take action against any person, however bad his character or his intention to commit an offence may be, if his attempt at concealment were confined to a solitary instance. A.I.R. 1934 Oudh 367=11 O.W.N. 935=35 Cr. L. J. 1272=151 Ind. Cas. 286.

——**S. 109—Applicability—'Concealment.'**

It is an entire mistake to read Cl. (*a*) of S. 109 as applying to any person who takes a step to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his prescence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his neighbourhood. (A.I.R. 1927 All. 50, Foll.) 123 Ind. Cas. 747=31 Cr. L. J. 569= 57 Cal. 949=1929 Cr. C. 519=34 C.W.N. 194=A.I.R. 1929 Cal. 775.

——**S. 109 (a)—'Concealment'.**

Section 109 (a) refers to the case of a continuous act and not the case of an isolated effort of concealment. 50 C. L.J. 181=112 Ind. Cas. 295=31 Cr. L.J. 408=1929 Cr. C. 365=A.I.R. 1929 Cal. 729.

——**S. 109—Act of concealment—Point of time.**

While S. 109, Cr. P. Code, speaks of a continuing act it does not expressly specify the time with respect to which the continuity of the act of concealment is to be determined. The section does not require that the act of concealment should be continuous at the time when the Magistrate receives information. S. 109 (*a*) is not *referable* to continuous acts of concealment only. (Case-law reviewed.) 1949 A. L. J. 413=A.I.R. 1950 A. 134=51 Cr. L.J. 436.

——**S. 109 (a)—"Taking precautions to conceal", explained—Person about to commit offence, unexpectedly startled and concealing himself to prevent arrest comes under clause (a).**

A person cannot be bound down under cl. (*a*) of S. 109, Cr. P. C. merely because he is afraid of arrest or because he is making a nuisance of himself, *e.g.*, shouting or singing and conceals himself to avoid arrest. But, he can be bound down if the evidence shows that before running away and before being caught concealing himself, there is reason to believe that he was about to commit an offence. The words "taking precautions to conceal himself" are wide enough to include the case of anyone who is presumably about to commit an offence, who is unexpectedly startled and who then conceals himself to prevent arrest ; the whole object of this clause being to prevent the commission of particular offence. A.I.R. 1943 All. 369=1943 A L.J. 485 (1)= I.L.R. (1943) All. 822=1943 A W.R. 255 (1) =45 Cr. L. J. 280=220 Ind. Cas. 538.

——**S. 109 (a)—"Concealing presence" meaning explained.**

The words "concealing presence" are very wide. They are sufficient to cover the concealment of bodily presence in a house or grove or under a bridge, etc., but they also are sufficient to cover the case when a man conceals his appearance, *e.g.*, by wearing a mask or covering his face or disguising himself by a uniform or in some other

manner. A.I.R. 1943 All. 367=1943 A.W.R. 254=1943 A. L. J. 481=45 Cr. L. J. 219=I.L.R. 1943 All. 816=210 Ind. Cas. 83.

——**S. 109 (a)—Person residing within local limits—Whether there can be concealment.**

There may be concealment within the meaning of S. 109 (*a*), Cr. P. C., even if residence within the local limits is well known.

No definite rule whether the concealment should be continuous or not should be laid down and it is a question of fact in each case.

Section 109, Cr. P. C., is one restrictive of liberty and must be applied only when strictly applicable.

The section penalises the taking of precaution to conceal whether these precautions are successful or not. A.I.R. 1938 Nag. 465=39 Cr. L. J. 807=I.L.R. (1939) Nag. 405=176 Ind. Cas. 820.

——**S. 109—Accused standing in one position, thus hoping that he would be mistaken for inanimate object—Whether concealing himself.**

Where the accused does not give a satisfactory account of himself, the proper clause applicable is (*b*) and not (*a*) of S. 109. Where the accused was not actually hiding, but was walking along the road, and on observing the watchman on the alert, he stood still and waited until his attention should be diverted before proceeding on his way, standing there apparently in the hope that he might be mistaken for an inanimate object or part of a building if the watchman happened to turn his eyes on him, this cannot be considered as concealing his presence. A.I.R. 1938 Nag. 303=39 Cr. L. J. 747=I.L.R. (1938) Nag. 595=176 Ind. Cas. 465.

3. Essentials to be proved.

——**S. 109—Essentials—Mere concealment.**

Cl. (*a*) of S. 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. Passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover, such precautions for the purpose of concealment must be taken with a view to commit offence.

Accused was loitering on a certain road at 3 a.m. and caught by a constable as he attempted to conceal himself. Accused was an old offender.

Held, that a mere attempt at concealment on the approach of a constable was nothing and an old offender could not be expected to face a constable if found at that hour of the night. The attempt to conceal himself to avoid observation did not bring the accused within the mischief of the section (39 Cal. 456, Foll.) 86 Ind. Cas. 666=41 C. L. J. 142=26 Cr. L. J. 842=A.I.R. 1925 Cal. 616.

——**S. 109—Evidence—Sub-ss. (a) and (b) relate to different charges—Case under cl. (a)—Evidence of unsatisfactory way of life, if can be admitted.**

Sub-sections (*a*) and (*b*) of S. 109 correspond to different charges and it is impossible to switch from S. 109 (*a*) to S. 109 (*b*); if both charges are framed, the evidence must be examined separately. Evidence that the accused's general way of life is unsatisfactory cannot be admitted in a S. 109 (*a*) case. A.I.R. 1943 All. 367=1943 A.L.J. 481=45 Cr. L. J. 219=I.L.R. (1943) All. 816=210 Ind. Cas. 83.

——**S. 109—Evidence of previous convictions.**

The evidence of the previous convictions is relevant in proceedings under S. 109, Cr. P.C. A.I.R. 1942 Oudh 246=43 Cr. L.J. 342=1942 O.W.N. 3=1942 A.W.R. 34=198 Ind. Cas. 276.

——**Ss. 109, 110—Order under S. 110 during the continuance of an order under S. 109—Evidence.**

Ss. 109 and 110, Cr. P.C., have the same object, and an order under S. 110 is not valid during the continuance of an order under S. 109. For a conviction under S. 110, Cr. P. C., that person is by habit a thief, the evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the accused is an habitual thief. (1904) 8 C.W.N. 543.

4. Grounds for.

——**S. 109—Grounds for action under—Previous convictions.**

Previous convictions do not, by themselves, prove that the person is now leading a life of crime or is dependent on the proceeds of crimes committed by others. A.I.R. 1943 All. 368=1943 A.L.J. 483=45 Cr. L.J. 157=1943 A.W.R. 255=I.L.R. (1943) All. 818=209 Ind. Cas. 563.

——**S. 109 (b)—General conduct or livelihood is referred to—Suspicious conduct on particular occasion is not sufficient—It can be considered merely with evidence of general unsatisfactory conduct.**

The last words of S. 109 (*b*) refer to the general conduct or livelihood of a man. No action can be taken by the Police under the words of S. 109 (*b*) "or who cannot give a satisfactory account of himself" on the strength of suspicious conduct of a particular occasion. Either the man has committed a substantive offence or he has not. If he has not, no action can be taken against him. He can only be ordered to give security under these words of S. 109 (*b*), if he is unable to give a satisfactory account of himself which is entirely different from being unable to give satisfactory explanation of his conduct on a particular occasion. Such unsatisfactory conduct can only be taken into consideration along with evidence about general unsatisfactory conduct or livelihood. A.I.R. 1943 All. 368=45 Cr. L. J. 157=1943 A.L. J. 483=1943 A.W.R. 255=I.L.R. (1943) All. 818=209 Ind. Cas. 563.

——**S. 109 (a)—Accused trying to escape arrested at night with lathis and house-breaking implements.**

The accused were caught while attempting to escape from a Police raid in the middle of the night with *lathis* and house-breaking implements in a city :

Held, that they could be bound down to be of good behaviour. A.I.R. 1943 All. 367=1943 A.L.J. 481=1943 A.W.R. 254=45 Cr. L. J. 219=I.L.R. (1943) All. 816=210 Ind. Cas. 83.

——**S. 109 (a)—Persons wearing ordinary clothes and just leaving railway platform.**

Magistrate cannot take security from the accused under S. 109 (*a*), Cr. P. C., even if it was suspected with good reason that they had alighted at the platform in order to commit an offence as men who had just left the railway platform and who were wearing ordinary clothes cannot be held either to have concealed or disguised their presence. A.I.R. 1943 All. 368=1943 A.L.J. 483=1943 A.W.R. 255 (2)=I.L.R. (1943) All. 818=45 Cr. L. J. 157=209 Ind. Cas. 563.

——**S. 109—Man of position and substance foolishly choosing not to give his correct name and trying to run away from Police.**

In the case of a man of position and substance, the mere fact that he foolishly chose not to give his correct name and very foolishly tried to run away from the Police at the time he was arrested, and declined to explain how he happened to be there, are really no reasons for holding that he could not give a satisfactory explanation of himself or for saying that he is a man of no ostensible means

of subsistence. Such a person should not be dealt with under S. 109, Cr. P.C. A.I.R. 1936 Oudh 383=37 Cr. L. J. 888=1936 O.W.N. 752=164 Ind. Cas. 105.

——S. 109 (a) (b)—Person found with house-breaking implements near wealthy man's house—Admission of object of being there.

If a man be found by the Police with implements of house-breaking lurking near the house of a wealthy man thereby indicating that he is about to commit burglary there and when challenged by the Police, he admits the object of his being there, he can be dealt with under cls. (*a*) and (*b*). A.I.R. 1935 Pat. 69=15 P.L.T. 836=1 B.R. 482=36 Cr. L. J. 846=155 Ind. Cas. 729.

——S. 109, cl. (a)—Accused proved to be habitual offender—Precaution at concealment of his whereabouts.

Where it was in evidence that the accused was once bound down under S. 110, Cr. P. C., he was also convicted under S. 454, I.P.C., it was also proved that he had sold some ornaments to a person where he was arrested and that person doubted that the ornaments were stolen property :

Held, that the accused was arrested under very suspicious circumstances and an order passed against him under S. 109, cl. (*a*) Cr. P. C., was legal. A.I.R. 1934 Oudh 367=11 O.W.N. 935=35 Cr. L. J. 1272=151 Ind. Cas. 286.

——S. 109—Grounds.

Where the accused persons give correct names and addresses when questioned by the police, the mere fact that they did not give satisfactory account of what they were doing at the time of arrest cannot justify action under S. 109. 122 Ind. Cas. 295=31 Cr. L. J. 408=50 C. L. J. 181=1929 Cr. C. 365=A.I.R. 1929 Cal. 729.

——S. 109—The only evidence against the accused was that he was seen coming out of a sugar-cane field at 10 p.m. by two persons who challenged him. He tried to run away, but was caught by them. It was found that he was a resident of a village near the place where he was arrested.

Held, that on these facts he cannot be ordered to be bound over under S. 109. 111 Ind. Cas. 448=26 A. L. J. 896=10 A.I. Cr. R. 353=9 L.R.A. Cr. 128=29 Cr. L. J. 864=A.I.R. 1928 All. 476 (F.B.).

——S. 109—An attempt to avoid a police patrol does not bring a person, resident and shopkeeper in a town, within the ambit of S. 109. 94 Ind. Cas. 141=27 Cr. L. J. 573=A.I.R. 1926 Lah. 368.

——S. 109—Not engaged in any work at the time of arrest.

The fact, that about the time when the accused was arrested he could show no work in which he was engaged, does not necessarily mean that he had no ostensible means of subsistence. 86 Ind. Cas. 666=41 C. L. J. 142=26 Cr. L. J. 842=A.I.R. 1925 Cal. 616.

——S. 109—Neither refusal to give names, nor giving false name first and true name afterwards, nor a desire to conceal business amount to concealing presence. 81 Ind. Cas. 598=21 A. L. J. 847=4 L. R.A. Cr. 237=25 Cr. L. J. 950=A.I.R. 1924 All. 202.

——S. 109—Security for good behaviour—Mere suspicion—Legality.

S. 109, Cr. P. Code, would not apply to the case of three respectable residents of Delhi who came to Meerut by a night train and who were found on the road between the station and the city near to the place where a burglar's jemmy was found. Order under S.109 Cr. P. Code passed more on suspicion than on any good basis of fact must be set aside. 17 A. L. J. 432=20 Cr. L. J. 401=51 Ind. Cas. 161.

——S. 109 (a)—Ingredients necessary to justify an order under.

Taking precautions to conceal one's presence is a necessary ingredient to justify an order under S. 109 (*a*), Cr. P. Code. In the absence of such an ingredient, the mere fact that the persons concerned were armed with lathis and one of them had also a house-breaking implement would not establish that the intention of all of those persons together was to commit some offence. An order under S. 109 (*a*) in such a case is unjustified. 51 Cr. L. J. 609=A.I.R. 1950 A. 184=1949 A. L. J. 565.

5. Jurisdiction.

——S. 109—Jurisdiction.

Magistrate within whose jurisdiction concealment is to be effected has jurisdiction and not one within whose jurisdiction precautions are taken that has power to demand security. 113 Ind. Cas. 417=50 All. 909=26 A. L. J. 1257=9 L.R.A. Cr. 149=10 A.I. Cr. 531=30 Cr. L. J. 145=A.I.R. 1929 All. 33 (F. B.).

——S. 109—Concealment to be effected at a certain place.

If a person is concealing his presence in a part of the territorial limits of the jurisdiction he is necessarily concealing his presence within that jurisdiction also. Therefore if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives the information, such Magistrate has power to demand security even though the residence of the person informed against within the jurisdiction is well-known. 49 All. 240 ; A.I.R. 1927 All. 50 ; 97 I. C. 428 and 49 All. 844 ; A.I.R. 1927 All. 592 ; 102 I.C. 503, (Overruled). 113 Ind. Cas. 417=50 All. 909=26 A. L. J. 1257=9 L.R.A. Cr. 149=10 A.I. Cr. R. 531=30 Cr. L. J. 145=A.I.R. 1929 All. 33 (F.B.).

——Ss. 109 and 118—Security for good behaviour—Jurisdiction.

Where petitioner who was by profession a *kaviraj* was found at about midnight in a lane in a town with two others who had house-breaking implements in their possession and who on being discovered fled and when arrested remained silent and gave a false explanation of his presence on the spot, to the Magistrate: *held, per Teunon, J.* that the facts found did not bring the petitioner within either cl. (*a*) or (*b*) of S. 109 as the petitioner's presence within the Magistrate's jurisdiction was well known. *Per Huda, J.* Cl. (*a*) of S. 109 refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid arrest or detection. 27 C. L. J. 382=22 C.W.N. 163=18 Cr. L. J. 825=41 Ind. Cas. 649.

——S. 109 (a)—Satisfactory account of presence—Accused living within jurisdiction of.

Certain persons were arrested under suspicious circumstances of whom one was a resident within the jurisdiction of the Magistrate trying the case. He was called upon to furnish security as he could not give a satisfactory account of his presence at the spot. *Held*, that the order was not justified. 17 A. L. J. 891=20 Cr. L. J. 572=52 Ind. Cas. 60.

——S. 109 (b)—Jurisdiction of Magistrate—Cognizance of accused's case—Illegal arrest.

Magistrates are competent to put in force the provisions of S. 109, Cr. P. C., whenever they have credible information that the accused had no ostensible means of livelihood, or was unable to give a satisfactory account of himself ; and will be within the limits of their jurisdiction in trying the case irrespective of the manner in which it comes before them. 26 M. 124 app.—(1903) 31 C. 557=7 C.W.N. 661.

6. Power of High Court.

——**Ss. 109 to 112**—Where in a case under S. 110, Cr.P.C., evidence was produced before a Magistrate which he disbelieved and in a reference to High Court under S. 438, Cr. P. C., against his order cancelling under S. 119 notice to show cause made under Ss. 109 to 112, the District Magistrate stated some reasons why this evidence ought to be believed but these reasons could be explained away:

Held, that the case was not one in which the High Court should interfere and set aside the order of the Magistrate, cancelling under S. 119, Cr. P. C., the notice to show cause made under Ss. 109 to 112. 170 Ind. Cas. 482=1937 O.W.N. 816=38 Cr. L. J. 889.

——**Ss. 109 and 118**—High Courts are reluctant to place restrictions upon the discretion of a Magistrate in administering S. 109, but the statutory provisions of the section are so stringent that it may be made an engine of oppression unless care is taken by Magistrates to prevent its abuse. The object of the section is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. Merely to be penniless or out of work is not an offence. If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under Ss. 109 and 118 unless there is reasonable ground for suspecting that he is sustaining himself by dishonest means, for such an order can be made only where it is necessary for keeping peace or good behaviour.

In such a case the prosecution must satisfy the Magistrate that suspicion that he is living dishonestly attaches to the accused because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found. 93 Ind. Cas. 961=53 Cal. 345=43 C. L. J. 202=30 C.W.N. 380=27 Cr. L. J. 497=A.I.R. 1926 Cal. 648.

——**S. 109—Magistrate satisfied that security need not be provided—High Court, if can demand security later—Reversal of order of Magistrate.**

Failure of a person to give a satisfactory account of himself in suspicious circumstances brings the case of the person proceeded against under S. 109 (*b*), Cr. P. C. The question of whether the circumstances are suspicious is mainly a question of fact, and if a Magistrate is satisfied that the circumstances in which a person who is brought before him under S. 109, Cr. P. C., was found are not suspicious and that there is no need for him to call upon that person to provide security, it is not the part of the High Court to reverse his order and to demand security a year later on the ground that the circumstances had been suspicious. Section 109, Cr. P. C., is one of the preventive sections which are to be employed by Magistrates for the prevention of crimes, and it must be rarely, if ever, that a High Court will feel called upon to reverse an order of a Magistrate refusing to demand security under any of those sections. A.I.R. 1934 All. 24=1933 A. L. J. 1201=35 Cr. L. J. 446=147 Ind. Cas. 433.

——**Ss. 109, 119, 439—Order of discharge under S.119—Reference to High Court to set aside order—Mere conflict of opinion on value of evidence—Interference.**

Where a District Magistrate made a reference to the High Court recommending that an order of a Magistrate passed under S. 119, Cr. P. C., discharging an accused person who had been ordered to show cause why security should not be taken from him under S. 109, on the ground that while the trying Magistrate did not believe certain witnesses he believed them:

Held, that there was a mere conflict of opinion on the value of evidence and that there was no ground for interference on the revisional side. In such cases, the Court would not go into the merits of the case unless there was something to show that there was a material departure from the legal principles according to which the case ought to have been dealt with; or if it were asked to go into the facts, it would only do so if something were shown which particularly indicated that it was desirable to enter into those facts. 146 Ind. Cas. 831=1933 A. L.J. 272=35 Cr. L. J. 189.

7. Sentence.

——**S. 109—Imprisonment under S. 109 should be simple in absence of special reasons.**

Section 109, Criminal P. C., is a preventive and not a punitive section, and so, in the absence of special reasons, the type of imprisonment should be simple. A.I.R. 1936 Nag. 265=38 Cr. L. J. 388=I. L. R. (1937) Nag. 173=167 Ind. Cas. 403.

——**Ss. 109, 112—Order specifying period of imprisonment in default—Legality of.**

Section 109, Criminal P. C., merely requires a Magistrate to issue a notice and does not empower him to pass the final order. This is done under S. 118, which in its turn is dependent upon the order passed under S. 112. All that the final order can contain is a direction to furnish security to be of good behaviour for a period which cannot, in any case exceed one year, and which must not be beyond that specified in the order under S. 112. Any order which specifies a period of imprisonment in default is to that extent illegal.

No person committed to prison under S. 120 (1) can be detained there if he furnishes the security required of him after his commitment. Consequently, an order stating that he should suffer a period of imprisonment in default is illegal. A.I.R. 1936 Nag. 265=I.L.R. (1937) Nag. 173=38 Cr. L. J. 388=167 Ind. Cas. 403.

——**Ss. 109, 397, proviso 2—Imprisonment for default in furnishing security under S. 109—Subsequent conviction under Opium Act for offence committed prior to order under S. 109—Order that sentence under Opium Act should commence after expiry of sentence under S.109.**

Where in default of furnishing security under S. 109, Criminal P. C., the accused was sent to jail, and subsequently, the accused was convicted by another Magistrate of an offence, punishable under S. 9, Opium Act, committed prior to the order under S. 109, Criminal P. C., and that Magistrate ordered that the sentence under the Opium Act should begin after the sentence imposed under S. 109, Criminal P. C., had expired:

Held, that the order that the second sentence should run consecutively was incorrect and should be set aside, inasmuch as having regard to the second proviso to S. 397, Criminal P. C., the sentence imposed under the Opium Act had to commence immediately, and it had, therefore, come to a end long before the expiration of the sentence imposed in default of furnishing security under S.109, Criminal P. C. A.I.R. 1933 Oudh 381=10 O.W.N. 786=34 Cr. L. J. 1152=145 Ind. Cas.1007.

8. Sureties.

——**S. 109—Stability of sureties.**

Immovable properties should be taken into consideration in deciding whether sureties under sec. 109 are stable. 17 Cr. L. J. 91=32 Ind. Cas. 683.

——**S. 109— Surety under—Fitness.**

The fitness of the surety should be considered from his general stability and the property and not from his movable property only. 7 P.W.R. 1916 Cr.—17 Cr. L. J. 97=32 Ind. Cas. 833.

——**S. 109—Fitness of sureties.**

In a bad livelihood case when several sureties are required, it is not necessary that each one of them should live in

the neighbourhood of the accused. 17 Cr. L. J. 95=32 Ind. Cas. 687.

——Ss. 109 and 122—Fitness of sureties.

Sureties for good behaviour ought not to be rejected merely on the strength of a report of a Tahsildar or Sub-Inspector without an opportunity being given to the sureties to meet the allegations made against them. 15 Cr. L. J. 727=26 Ind. Cas. 175.

——Ss. 109, 121—Forfeiture of bond—Sureties, time for proceeding against—Person found in suspicious circumstances.

Where a security bond has been forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period. A.I.R. 1932 All. 58=54 All. 335=1932 A.L.J. 112=33 Cr. L. J. 281=136 Ind. Cas. 373.

9. Terms explained.

——Ss. 109 and 118—Good behaviour—"Ostensible means of living"—Meaning of.

The mere fact that a person lives by means of a certain game, *i.e.*, ring game, does not justify the conclusion that he has no ostensible means of subsistence if the game itself can be honestly conducted. 40 Cal. 702=17 C.W.N. 883=14 Cr. L. J. 452=20 Ind. Cas. 612.

—S. 109 (a) and (b)—Cl. (a), if refers to isolated acts of concealment—Words "has failed to give satisfactory account of himself" in cl. (b), meaning of—Person concealing in deserted hut running out at approach of some persons—Person caught—Being questioned giving out identity and place of residence but admitting that he along with others had come to commit theft—Sindh cutter and gunny-bag found in hut—S. 109, cl. (a) held did not apply but cl. (b) applied.

Persons arrested under S. 55, Cr. P. C., do not necessarily come under S. 109 (a) but may come under the provisions of S. 109 (b). In interpreting S. 109 (a), the ordinary meaning of the words should be followed. Section 109 (a) therefore refers to a continuous concealment and not to an isolated act of concealment. The expression "has failed to give a satisfactory account of himself" in cl. (b) means a satisfactory account of himself generally, and not a satisfactory account of his presence at the place and in the circumstances in which he was found.

A person was hiding in a deserted hut in an orchard, and at the approach of some persons, ran out of the hut, was chased and caught. When questioned, he gave out his identity and was living openly at the address given by him. He further admitted that he had come there with two other persons for the purpose of committing theft and that his two companions had gone away to select a house for the purpose, leaving him in the hut. When the hut was searched, a *Sindh* cutter and a gunny-bag were found there. Proceedings under S. 109 were started against him.

Held, that S. 109 (a) did not apply but cl. (b) applied as he must be held to have failed to give a satisfactory account of himself. A.I.R. 1938 Cal. 409=42 C.W.N. 588=39 Cr. L. J. 647=I. L. R. (1938) 2 Cal. 221=175 Ind. Cas. 722.

——S. 109 (a)—Words 'is taking' in cl. (a), significance of.

In S. 109, cl. (a) the words 'is taking' 'mean' has taken or 'has been taking'. A.I.R. 1935 Pat. 69 =15 P.L.T. 836=1 B.R. 482=36 Cr. L. J. 846=155 Ind. Cas. 729.

——S. 109—'A satisfactory account of himself'—Simply avoiding Police or taking unfrequented route.

"A satisfactory account of himself" does not necessarily mean that a person should give his correct name and address or even the object of his being present at night, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. Simply avoiding the Police by a bad character or taking an unfrequented route is by itself no ground for action under S. 109. It may be that in some cases simply not giving an explanation may not be enough, for instance, an apparently respectable person returning from the house of his mistress very late at night is using unfrequented streets and avoiding being seen. He cannot come under S.109. Cr. P. C. Each case must be decided on its own facts, A.I.R. 1935 Pat. 69=15 P.L.T. 836=1 B.R. 482=36 Cr. L. J. 846=155 Ind. Cas. 729.

——S. 109—Satisfactory account.

The whole object of the latter part of cl. (b) is to enable the Magistrate to take action against suspicious strangers lurking within their jurisdiction. The expression "give a satisfactory account of himself" does not mean that the person should satisfy the Magistrate how he spends his time, but it means that he has satisfactorily accounted for his presence within the limits of the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits, to which place he does not belong, and there are circumstances justifying a suspicion that he is there not for an innocent purpose, he has got to explain his presence.

Where the accused's explanation was that he came to the city in question about a month and a half before and that he worked as a cooly but had no fixed abode :

Held : that if true it was a satisfactory explanation as to his presence and the accused must be taken to have given a satisfactory account of himself. A finding that the accused has no work and no place to live in did not mean that the accused had not come to the city as he stated to work as a cooly or that he did not work as such at any time within the period, but was in the city for some ulterior object. 86 Ind. Cas. 666=41 C.L.J. 142=26 Cr. L. J. 842=A.I.R. 1925 Cal. 616.

——S. 109—'Ostensible means'—Scope of.

A person dependent upon his father who earns an honest living is not a person who has no ostensible means of subsistence. Where a person, arrested under suspicious circumstances gives a wrong name and address he fails to give a satisfactory account of himself and proceedings against him under S. 109 are perfectly justified. 64 Ind. Cas. 141=22 Cr. L. J. 749 (All.).

——S. 109—Interpretation—Give a satisfactory account.

Per *Full Bench*—If the words "give a satisfactory account of himself" are given the meaning "explain what he was doing" or "explain his conduct" at any particular time or place it would make the scope of S. 109 (*b*) too wide. The legislature did not contemplate such an extension of its scope. The expression is somewhat akin to the other expression used in the same clause, namely "who has no ostensible means of subsistence". If a man is unable to explain his course of conduct, as distinct from failure to explain a momentary behaviour, he may very well come under the clause, but a man's failure to explain his presence does not bring him within the section. 8 A.L.J. 1097; 17 A.L.J. 432; and 17 A.L.J. 891. Rel. on. 113 Ind. Cas. 417=50 All. 909=26 A.L.J. 1257=9 L.R.A. Cr. 149=10 A. I. Cr. R. 531=30 Cr. L. J. 145=A.I.R. 1929 All. 33 (F.B.).

——S. 109—"Within the local limits".

The words "within the local limits of such Magistrate's jurisdiction" are part of the predicate "to conceal his presence" and are not words defining the tribunal which has jurisdiction. A.I.R. 1927 All. 50, Foll. 102 Ind. Cas. 503=49 All. 844=8 L.R.A. Cr. 106=28 Cr. L. J. 567=25 A.L.J. 679=8 A.I. Cr. R. 102=A.I.R. 1927 All. 592.

——S. 109—'Satisfactory account'.

The words "satisfactory account" as used in S. 109 mean satisfactory in accordance with the known facts that are consistent with the surrounding circumstances. 102 Ind. Cas. 503=49 All. 844=8 L.R.A. Cr. 106=28 Cr. L. J. 567=25 A.L.J. 679=8 A.I. Cr. R. 102=A.I.R. 1927 All. 592.

——S. 109—'Concealment'.

It is an entire mistake to read that clause as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood. The section does not contemplate such a situation. 97 Ind. Cas. 428 =49 All. 240=7 L.R.A. Cr. 183=27 Cr. L. J. 1116= 25 A.L.J. 94=A.I.R. 1927 All. 50.

——S. 109—"Within the local limits of such Magistrate's jurisdiction" must be read with "conceal his presence"—'Jurisdiction'.

The passage "within the local limits of such Magistrate's jurisdiction" is part of the predicate "to conceal his presence," and the offence, contemplated is that of a person, probably, although not necessarily, coming from outside the jurisdiction, into the Magistrate's jurisdiction, for some nefarious purpose and taking precautions to conceal the fact that he is present in that jurisdiction. 97 Ind. Cas. 428=49 All. 240=7 L.R.A. Cr. 183=27 Cr. L. J. 1116=25 A.L.J. 94=A.I.R. 1927 All. 50.

——S. 109 (c)—Ostensible means of subsistence—Cattle-dealers—Encamping on open ground.

Petitioners were professional cattle-dealers who were residents of Bindki district, Fatepur. They had money in deposit with bankers there, and their occupation was to go about selling cattle for about eight months, in the year after which they returned to their homes for the rainy seasons. *Held*, that the men had ostensible means of subsistence and had given a satisfactory account of themselves within S. 109 (*b*). 18 A.L.J. 321=2 U.P.L.R. (All.) 87= 21 Cr. L. J. 366=55 Ind. Cas. 734.

——S. 109 (b)—Applicability—Person "who cannot give a satisfactory account of himself"—Meaning of—Failure to explain presence—If ground for binding over person.

The words "give a satisfactory account of himself" cannot be read as meaning "explain what he was doing" or "explain his conduct" at any particular time or place. If such an extended meaning were given to those words, a man can be bound over merely because he does not discharge the burden of satisfying a magistrate as to his conduct at a particular time or place. If a man is unable to explain his course of conduct, as distinct from failure to explain a momentary behaviour, he may very well come under this clause, but a man's failure to explain his presence does not bring him within the section. 1929 All. 33 (F.B.) foll. 3 A.I. Cr. D. 386.

10. Miscellaneous.

——S. 109—Time limit—Taking precautions.

Sub-section (*a*) cannot be interpreted too literally so as to necessitate the continuance of taking precautions till the information is received by the Magistrate. No time-limit can be put on the taking of precautions. In every case it would be a question of fact whether the circumstances justify the inference that he has been taking precautions to conceal his presence and that there was the intention to commit an offence. 113 Ind. Cas. 417=50 All. 909=26 A.L.J. 1257=9 L.R.A. Cr. 149=10 A.I. Cr. R. 531=30 Cr. L. J. 145=A.I.R. 1929 All. 33 (F.B.).

——Ss. 109 and 55—Proceedings under S. 109—Arrest in accordance with S. 55—Necessity.

It cannot be said that a person must be arrested in accordance with the provisions of S. 55, Cr. P. Code, before he can be proceeded against under S. 109, Cr. P. Code, or that a person not arrested in accordance of the provisions of the former section cannot be proceeded against under the latter section. 1949 A.L.J. 413=A.I.R. 1950 A. 134 =51 Cr. L. J. 436.

——S. 109—Discretion of magistrate—Exercise of—Duty to strictly comply with section.

It is within the discretion of a magistrate to proceed or not to proceed against a person under S. 109, Cr.P. Code, but in exercising his discretion care should be taken to see that the stringent provisions of the section are not abused and made an engine of oppression. 3 A. I. Cr. D. 386.

——S. 109—Breach—Commission of offence under S. 452, I. P. Code.

According to S. 121, the commission or attempt to commit or abetment of any offence punishable with imprisonment wherever it may be committed is a breach of bond taken under S. 109 or S. 110 for good behaviour. When therefore a person is convicted of an offence under S. 452, Penal Code, and sentenced to imprisonment, a breach of bond does take place and it is liable to forfeiture. 120 Ind. Cas. 605=130 Cr. C. 240=31 Cr. L. J. 130=A.I.R. 1930 Lah. 227.

——Ss. 109 and 110—Bond under both the sections.

There is no provision for taking a bond from the accused under the two sections together. 6 M.L.T. 158=10 Cr. L. J. 243=3 Ind. Cas. 77=11 Cr. L. J. 50=5 Ind. Cas. 156 and 38 Mad. 556 (note)=16 Cr. L. J. 626= 30 Ind. Cas. 450 and 38 Mad. 555=16 Cr. L. J. 631=30 Ind. Cas. 455.

——Ss. 109 and 162 and Evidence Act (I of 1872), S. 26—Statement of person proceeded against under S. 109—If affected by S. 162 of the Cr. P. Code and S. 26 of the Evidence Act.

The person proceeded against under S. 109, Cr. P. Code, is not prosecuted for an offence, so that the statement made by him is not a confession. The statements made by him are, therefore, not affected either by S. 162, Cr. P. Code, or by S. 26 of the Evidence Act. 1949 A.L.J. 413=A.I.R. 1950 A. 134=51 Cr. L.J. 436.

——Ss. 109 and 256—Trial under S. 109—Right of accused to further cross-examine the prosecution witnesses under S. 256.

An accused in a case under S. 109, Cr. P. C., has no right to cross-examine the prosecution witnesses for the second time under S. 256. The trial would not be illegal on account of the fact that the accused was not given an opportunity to further cross-examine the prosecution witnesses. I.L.R. (1948) A. 265=A.I.R. 1948 A. 227=49 Cr. L. J. 259=1948 A.L.J. 85=1948 A.L.W. 107=1948 A.W.R. (H.C.) 39.

——Ss. 109, 123, 399—Penal Code (Act XLV of 1860) S. 379—Concurrent sentences—Consecutive sentences.

The accused was proceeded against under S. 209 of the Criminal Procedure Code, and sentences under S. 123 of the code to rigorous imprisonment for nine months, in default of security for good behaviour, on the 6th July 1909. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for 3 months: the second sentence was directed to take effect on the expiry of the first sentence. *Held*, that the sentence could not run consecutively, but must run concurrently. 11 Cr. L. J. 271=12 Bom. L. R. 129=5 Ind. Cas. 861= 34 B. 326.

——Ss. 109 and 110—Joint enquiry.

Two persons unless they are proved to have acted in concert should not be tried jointly under Ss. 109 and 110. 11 Cr. L. J. 50=5 Ind. Cas. 156.

——S. 110.

Synopsis.

1. Applicability and scope.
2. Object and scope.
3. Appeal.
4. Detention.
5. Evidence required.
6. Evidence—Sufficiency of.
7. Evidence of Police.
8. Evidence of general repute.
9. Evidence of good character.
10. Evidence of bad livelihood.
11. Exercise of powers under—Specific cases.
12. Fresh proceedings.
13. Habitual offender.
14. Joint Trial.
15. Jurisdiction.
16. Notice under.
17. Power and duty of Court.
18. Practice and procedure.
19. Revision.
20. Reputation—What is.
21. Security.
22. Surety.
23. Suspicion—If ground for action.
24. Specific offences.
25. Terms explained.
26. Transfer of cases—Grounds for.
27. Miscellaneous.

1. Applicability and scope.

——S. 110—Applicability—Desperate and dangerous men—Persons carrying lathis for protection against attack by ruffians—Order against—Legality.

It is impossible to hold by any stretch of language that persons who carry *lathis* when they go out in order to protect themselves from an attack by a gang of ruffians and *Goondas* are desperate and dangerous men, so as to render them liable to be called upon to execute bonds to be of good behaviour, without proof of any specific incident against them suggesting that they are really desperate and dangerous men. 230 Ind. Cas. 143=A.I.R. 1948 Cal. 107=48 Cr. L.J. 541.

——S. 110—Applicability—Proceedings against local bosses and faction leaders—Legality.

To apply S. 110, Cr. P. Code, to local bosses and faction leaders is to abuse the section, which is in fact intended only to apply to criminal maniacs and desperadoes against whom the only weapon to be used is the weapon of public opinion. I.L.R. (1949) Cut. 751.

——S. 110—Applicability and scope.

Where sub-s. (3) of S. 117 refers to the commission of an offence, it means an offence of the nature set out in S. 110, Cr. P.C. A.I.R. 1943 Sind 173=I.L.R. (1943) Kar. 275=45 Cr. L. J. 147=209 Ind. Cas. 477.

——S. 110—"Dangerous and desperate character"—Person threatening and beating people.

A person who threatens and beats people can certainly be called a desperate and dangerous character. A.I.R. 1942 Oudh 356=43 Cr. L. J. 398=1942 O.W.N. 39=1942 A.W.R. 51=198 Ind. Cas. 547.

——S. 110—Order under, if can be based on opinion of Sub-Inspector—Duty of Sub-Inspector.

There is no sanction in law for basing an order under S. 110, Cr. P. C., on the opinion of the Sub-Inspector. The Sub-Inpsector no doubt is a competent witness. But the Sub-Inspector must place facts before the Court to prove that his allegations against the accused are correct. It would be very dangerous to base an order under S.110 on the bare *ipse dixit* of the Sub-Inspector.

Mode of proof by Sub-Inspector indicated. A.I.R. 1942 Pesh. 84=44 Cr. L.J. 6=203 Ind. Cas. 458 (D.B.)

——Ss. 110 and 495 (1), (4)—Inquiry under S. 110—Whether S. 495 (1) or (4) applies—Discretion of Magistrate.

A person in respect of whom an inquiry is being made under S. 110, Criminal P. C., is not being prosecuted for any offence. Hence sub-s. (4) of S. 495 does not apply in the case of an inquiry under S. 110, but on the other hand, sub-s. (1) of S. 495 does apply, since the Magistrate is enquiring into a case. Under that sub-section, the Magistrate has a discretion whether to allow the Police Sub-Inspector to conduct the prosecution or not, and he is entitled to exercise his discretion by analogy to sub-s. (4). It is generally undesirable for the Police Sub-Inspector, who has been inquiring into a case under S. 110, to conduct such case. A.I.R. 1940 Bom. 416=42 Bom. L.R. 909=42 Cr. L.J. 150=13 R.B. 194=191 Ind. Cas. 334.

——S. 110—Order under S. 110 read with S. 118, cannot be made on vague allegations.

An order under S. 110 read with S. 118, Criminal P.C., cannot be made on vague allegations, as person proceeded against had been suspected in several cases of having committed offences against property, otherwise none would be safe. Unless the requirements of S. 110 are fulfilled or in other words, a man is proved by habit a robber, housebreaker, thief or forger or by habit a receiver of stolen property, etc., this drastic measure cannot be taken against him, and if in all cases in which the person proceeded against were sent up, he was either discharged or acquitted, it cannot be urged that the requirements of S. 110, Criminal P. C., are satisfied. A.I.R. 1939 Lah. 269=41 P.L.R. 431=I.L.R. (1939) Lah. 53=40 Cr. L. J. 753=183 Ind. Cas. 269.

——Ss. 110, 112, 145—Substance of information relating to disputes relating to land.

Where the substance of information received under S. 110, Criminal P.C., as set out under S. 112, relates to dispute concerning land, special provisions of S. 145, apply excluding the general provisions of S. 110. A.I.R. 1939 Sind 261=40 Cr. L. J. 887=184 Ind. Cas. 189.

——S. 110 (e)—Attempt to commit rape, if involves breach of peace.

Section 106, Criminal P.C., makes it quite clear that an assault is an offence involving a breach of the peace ; and an attempt to rape does involve an assault, force and violence upon the person against whom this offence is committed, and, therefore, involves a breach of the peace within the meaning of S. 110 (*e*), Criminal P.C. A.I.R. 1938 Mad. 615=47 M.L.W. 640=1938 M.W.N. 601=39 Cr. L. J. 816=176 Ind. Cas. 815.

——S. 110—Scope—Section, if intended to deal only with strangers to locality in which offences are committed—Proof of previous convictions, if necessary—Evidence of reputation requires material corroboration.

Section 110, Criminal P.C., is intended to deal with persons who cannot readily be brought under the ordinary law and who for special reasons could not be con-

victed under the Penal Code, in respect of the offences said to have been committed by them. There is nothing in the wording of S. 110, or of any other section of the Code that leads to the inference that S.110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons or the acts which they commit are such as to make it difficult to deal with them under the ordinary provisions of law, then S. 110 can be used. Before a person can be bound over under this or similar sections, it is not necessary that a certain number of previons convictions should have been proved, if the evidence that a person is a habitual robber or house-breaker or thief can be proved otherwise. If there are nor previous convictions, the quantum of proof necessary would naturally be greater. Evidence of reputation is the weakest form of evidence and requires material corroboration by other evidence proving the habits of the persons against whom the Police are proceeding. A.I.R. 1938 Mad. 482=1938 M.W.N. 93=47 M.L.W. 196=(1938) 1 M.L.J. 178=39 Cr. L. J. 588=175 Ind. Cas. 417.

——S. 110 (e) and (f)—Person, leader of local factions responsible for bullying—He is nonetheless dangerous because he owns house and lands.

A person who is a leader of local factions responsible for constant threat and bullying is nonetheless dangerous to the community because he lives in a house and owns lands and S. 110 (*e*) and (*f*) of the Criminal P. C., applies to such a type of person. A.I.R. 1938 Mad. 448=47 M.L.W. 139=1938 M.W.N. 213=39 Cr. L. J. 595=175 Ind. Cas. 491.

——S. 110—Section if can be used against undisciplined people.

Section 110 is intended to protect the public against irresponsible criminal maniacs and desperadoes and the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators. Section 110, Criminal P. C., is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. A.I.R. 1938 Mad. 35=1937 M.W.N. 1065=(1937) 2 M.L.J. 749=46 M.L.W. 858=39 Cr. L. J. 230=172 Ind. Cas. 866.

——S. 110—Accused thief by habit.

Evidence showing accused to be thief by habit—Proper order is one under S. 110, and not under S. 109 (*b*). A.I.R. 1937 Rang. 544=39 Cr. L. J. 285=173 Ind. Cas. 213 (2).

——S. 110—Proceedings under S. 110—Previous Conviction—Proof of, if necessary.

In proceedings under S. 110 of the Cr. P. C., it is not necessary for the prosecution to prove a previous conviction of any person in the same formal manner as that required by the provisions of Ss. 310 and 311 of the Cr. P.C., in respect of offences tried in the Court of Session. A.I.R. 1936 Oudh 238=1936 O.W.N. 247=37 Cr. L.J. 390=12 Luck. 36=160 Ind. Cas. 1039.

——S. 110—Person warning assessor that he would be shot—Whether liable to be proceeded with.

The applicant, who was not one of those accused in conspiracy case, had been present in the precincts of the Court and had threatened one of the assessors in unmistakable terms. He was proved to have warned him that if he did not give his opinion in favour of the accused, he would be killed by a pistol or a bomb, and to have made use of other threatening expressions, and he was proved by the evidence of the said assessor and another witness to have sent a threatening message, worded in a similar way :

Held, that he was a desperate and dangerous character who had unmistakably laid himself open to proceedings under S. 110, Cr. P. C. A.I.R. 1935 All. 638=1935 A.W. R. 795=36 Cr. L. J. 1142=1935 A.L.J. 1069=157 Ind. Cas. 413.

——S. 110—Allegation that a person is a smuggler—Whether a person contemplated by cls. (e) and (f), S. 110—Nature of proof necessary for action.

The allegation that a person is a smuggler does not, by itself necessarily lead to the conclusion that he is one of the individuals contemplated by cls. (*e*) and (*f*) S. 110, Cr. P. C. The activities which point to a tendency to cause breach of the peace or to violence of character in the person concerned must, in addition, be definitely proved according to the law of evidence, before he can be asked to furnish security for good behaviour under that portion of the section. A.I.R. 1935 Pesh. 80=36 Cr. L. J. 1127=156 Ind. Cas. 659.

An order under S. 110, Cr. P. C., cannot be used in order to bring an offender within the ambit of S. 75, I. P. C. A.I.R. 1934 Sind 195=28 Sind L.R. 199=36 Cr. L. J. 326=153 Ind. Cas. 316.

——S. 110—Whether can be used to punish accused persons for offences committed.

Section 110, Criminal P. C., is one of the preventive sections of the Code and is not intended to be used to punish accused persons for offences that have been committed but to prevent them from committing offences which they are, by their nature or habit, likely to commit. A.I.R. 1933 All. 859=1933 A.L.J. 883=35 Cr. L. J. 435=147 Ind. Cas. 551.

——S. 110—Police report that accused are 'reputed' to have been habitually committing theft of electricity.

Where a Police report speaks of certain persons being "reputed" to have been habitually committing theft of electric current, and when the Magistrate repeats the phrase in his notice, what is really meant is that they are "suspected" of stealing the current, and the only reason for not prosecuting them for a definite offence is that the evidence is not sufficient, and S. 110, Criminal P. C., cannot be used on the information referred to in the report. A.I.R. 1933 All. 859=35 Cr. L. J. 435=1933 A.L.J. 883=147 Ind. Cas. 551.

——S. 110—Applicability and scope—Scope of—Powers when to be exercised.

The powers under S. 110, Cr. P. C. are to be exercised very sparingly and in only those cases where the evidence is very clear and precise. It was never intended by the Legislature to provide a means of punishment by enacting S. 110. 2 Lah. L. J. 237.

——S. 110—Applicability of—Persons registered under the Criminal Tribes Act (III of 1911), S. 4—Expediency of proceedings.

Proceedings under S. 110 of the Cr. P. Code against persons who have been registered under S.4 and the following sections of the Criminal Tribes Act are not illegal. *Per Huda, J.*—Such proceedings though not illegal, are inexpedient. 20 Cr. L. J. 30=48 Ind. Cas. 510.

——Ss. 110 and 108—Applicability—Persons whose objects are directed against the security of person—Person arrested outside jurisdiction, in custody within jurisdiction.

S. 110, Cr. P. C., applies where the objects of the accused are primarily directed against the security of persons and not against that of property. (18 I.C. 149, Not foll ; 11 C.W.N. 789 Foll.) The fact that S. 108, Cr. P. C., is applicable does not make S. 110, Cr. P.C., inapplicable. An order may be made under S. 110 against a person in cusotody. A person arrested outside the limits of the jurisdiction of a Magistrate for an offence committed within,

can, on failure of the charge of the substantive offence, be proceeded against under S. 110. 46 Cal. 215=19 Cr. L. J. 696=28 C. L. J. 25=23 C.W.N. 193=46 Ind. Cas. 152.

——S. 110 (e)—Applicability of.

S. 110 (*e*) of the Code can be applied only when persons are found to have habitually committed, attempted to commit or abetted the commitment of such an offence, It must be applied cautiously, lest the court should be utilized for wreaking private vengeance. 38 Cal. 156=15 C.W.N. 366=12 Cr. L. J. 164=9 Ind. Cas. 916.

——S. 110—Applicability of—Combining together for cheating and bullying.

S. 110, Cr. P.C., can be used against persons combining together for purposes of cheating and bullying. (1902) 4 Bom. L. R. 38=26 B. 418.

——Ss. 110, 117—*Held* (i) Rumour that a man is a bad character is not evidence of general repute; (ii) that where the evidence for the defence to the effect that the accused is a man of good character is as weighty or weightier than the evidence for the prosecution, it cannot be held as proved that the accused is by general repute a bad character. (1904) 1 A.L.J. 611.

——S. 110, cl. (e)—Security for good behaviour—Immoral and indecent acts 'not offences involving a breach of the peace'. *See* CRIMINAL PROCEDURE CODE, S. 106. (1902) 30 C. 366.

——S. 110 (f)—Applicability—Accused caught while committing offence of adultery.

The mere fact that the accused is caught while committing adultery does not bring his case under S. 110 (*f*). 1930 Cr. C. 1227=32 P.L.R. 92=129 Ind. Cas. 276= A.I.R. 1930 Lah. 1051.

——S. 110 (f)—Applicability—Person being of litigious nature.

The mere fact that a man happens to be of a litigious disposition does not bring his case under Cl. (*f*) of S. 110. 1930 Cr. C. 1227=32 P.L.R. 92=129 Ind. Cas. 276 =A.I.R. 1930 Lah. 1051.

2. Object and scope.

——S. 110—Object of.

S. 110, Cr. P. C., is not punitive but preventive and so it is very undesirable to proceed under that section against a person who is trying to reform and to lead an honest life for a fortnight. 12 Cr. L. J. 328=10 M.L.T. 333= 10 Ind. Cas. 624.

——Ss. 110 and 439—Object—Bona fide—Interference by the Court—Police Report—Value of—Gazetteer—Extract from evidence.

The object of S. 110 is not punitive but preventive, to afford protection not only where the security of persons is menaced by crimes, but also where the *safety of property* is menaced. It is necessary that the power given under S. 110 should be exercised with caution and discretion. The section was never intended to be applied to coerce landlords to adopt methods of managing their estates. A Police report is not in every case an answer to the application that the proceedings under S. 110 are not *bona fide*. A High Court is competent and bound to interfere with the proceedings at the initial stage if it is satisfied that they are not *bona fide* and that their continuance would mean an abuse of the statutory provisions. 17 C.W.N. 238=16 C.L.J. 467=14 Cr. L. J. 5=18 Ind. Cas. 149.

——S. 110—Object of—Proceedings after acquittal.

If proceedings under S. 110, Cr. P.C. (1898) follow soon after the acquittal of the accused, on a charge of burglary, it should be made clear that they were not taken for punishing him in an indirect way. 6 A L. J. 487= 9 Cr. L. J. 528=2 Ind. Cas. 225.

——S. 110—Scope and applicability.

S. 110, Cr. P. Code, is intended to deal with ex-convicts, or habitual criminals, and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public. The fact that a man is by his temperament quarrelsome and that he occasionally gives threats does not make him a desparate character or one who is dangerous to the community. I. L. R. (1947) Nag. 237=229 Ind. Cas. 117=48 Cr. L. J. 252=A.I.R. 1948 Nag. 28=1947 N.L.J. 141.

——S. 110—Scope of inquiry—Evidence requisite—Nature of.

The evidence to prove a charge against a person under S. 110, Cr. P. Code, should not be vague generally and of a hearsay character. The police authorities responsible for the initiation of such proceedings should very seriously consider the propriety of clubbing together acts, real or imaginary, extending over a long period of time (about 12 years) and trying to prove them at great expense and waste of time. I.L.R. (1949) Cut. 751.

——S. 110—Scope.

Solitary confinement cannot be awarded for failure to furnish security under S. 110 Cr. P. C. 102 Ind. Cas. 342 =8 L.R.A. Cr. 74=7 A.I. Cr. R. 516=28 Cr. L. J. 534= A.I.R. 1927 All.472.

——S. 110—A Magistrate has no jurisdiction to pass order that a certain person should leave a certain place or he would be prosecuted as a bad character. 65 Ind. Cas. 554=19 A. L.J. 951=23 Cr. L. J. 122=A.I.R. 1921 All. 145.

3. Appeal.

——S. 110—Appeal from order.

Proceedings under S. 110—Sentence for a period of three years passed in default of execution of bond :

Held, that the appeal did not lie to the District Magistrate. A.I.R. 1935 Pesh. 55=36 Cr. L. J. 936=156 Ind. Cas. 284.

——S. 110—Appeal—Retrial.

An order of retrial can be passed only in cases of appeal against a conviction. In an appeal from any other order the appellate Court can only alter or reverse such an order. A District Magistrate, therefore while setting aside, on appeal, an order requiring a person to furnish security under S. 110, cannot remand the case for a *de novo* trial, *i.e.*, for fresh enquiry. 115 Ind. Cas. 544=30 Cr. L. J. 491=30 P.L.R. 416=12 A.I. Cr. R. 273= A.I.R. 1929 Lah. 28.

——S. 110—Appeal—Judgement—Appeal from an order for security.

A District Magistrate should dispose of an appeal from an order to furnish security for good behaviour by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on record and of the pleas raised by the appellant, both in the lower court and in his memo. of appeal. 38 All. 393=14 A.L.J. 445=17 Cr. L. J. 309=35 Ind. Cas. 485.

——S. 110—Appeal—Evidence—Not duly weighed.

An appeal is not properly disposed off where, the evidence against or for the accused is not duly weighed and examined by the Court. 14 A. L.J. 279=17 Cr. L.J. 167=33 Ind. Cas. 647.

——Ss. 110, 118, 123 and 406—Appeal—Security for good behaviour—Appeal to Dt. Magistrate—Proceedings of the Sessions Judge.

Where a person ordered to give security presented an appeal to the Sessions Judge, *Held*, that the Sessions Judge should have returned the memo. of appeal to him for

presentation to the Dt. Magistrate instead of forwarding the appeal to the Dt. Magistrate directly. The right of appeal against the order directing to give security for good behaviour is lost as soon as the Sessions Judge passes orders on the case under S. 123 (3). The Sessions Judge on receiving the record should give notice under S. 132 (2). If the person does not object to the case being taken up by the Sessions Judge on the ground that he has appealed or the Judge does become aware of the appeal before the Dt. Magistrate, the Sessions Judge should dispose of the case. Otherwise he should wait till the disposal of the appeal. 13 O.C. 354=8 Ind. Cas. 879.

——Ss. 110 (e) and (f) and 537—Alteration of charge—Accused bound over under S. 110 (f)—Appeal—Finding altered into S. 110 (e)—Effect of.

The accused was bound over under S. 110 (*f*), Cr. P. Code. On appeal the District Magistrate found S. 110 (*e*) was more appropriate and reduced the period and the amount of the security. *Held*, that inasmuch as cl. (*f*) of the section described the offence in cl. (*e*) in an aggravated form and the accused was not prejudiced, there was no ground for interference in revision. 21 Cr. L. J. 352 =55 Ind. Cas. 688.

——S. 110—Case under—High Court if a Court of appeal—Interference.

The High Court is not a Court of appeal for cases under S. 110 of the Cr. P. Code, and does not ordinarily interfere with the findings of fact recorded by the Courts below in such cases. 1948 A.L.J. 332=1948 A.W.R. (H.C.) 233=A.I.R. 1949 All. 12=50 Cr. L. J. 22.

4. Detention.

——S. 110—Detention in jail.

A Magistrate should not detain a person under S. 110 unless he has the information upon which he can make the order required by S. 112. 10 A.L.J. 351, Appr. 42 All. 646=18 A.L.J. 673=60 Ind. Cas. 420=22 Cr. L. J. 228=L.R. 1 A.)(Cr.) 182.

——Ss. 110 and 167—Detention by police—Proceedings under S. 110.

In proceedings under S. 110 the Magistrate cannot remand an accused person to custody. S. 167 applies to proceedings under Ch. XIV and not to those under S. 110. 39 Mad. 928=18 Cr. L. J. 403=38 Ind. Cas. 963.

——S. 110—Detention in jail.

Sending a person to jail while an inquiry under S. 110 is in progress, will prejudice his interest and render the inquiry unfair. 16 Bom. L. R. 943=16 Cr. L. J. 91= 26 Ind. Cas. 1003.

——S. 110—Detention by police.

Under S. 110, the police cannot keep a suspected person until they prepare a case against him. Any such action by the police throws doubt on their work. A Magistrate should not detain a person under this section unless he has sufficient information to make an order under S. 112. 10 A.L.J. 351=13 Cr. L. J. 827=17 Ind. Cas. 571.

——Ss. 110 and 123—Detention in jail—Period mentioned in security bond.

A Magistrate cannot keep a man in jail beyond the period for which security was ordered. 4 Bur. L. T. 270 =13 Cr. L. J. 62=13 Ind. Cas. 398.

5. Evidence required.

——S. 110—Charge under—Evidence—Quantum and nature. A.I.R. 1946 Oudh 50=1945 O.W.N. 361.

——S. 110—Evidence of reputation—Specific crimes but not evidence to bring home guilt to accused.

In a case under S. 110, the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based, wholly or partly on the belief that the accused person committed a crime which has not been brought home to him the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based. Hence instances of specific crimes are admissible in evidence in these proceedings although they are not supported by evidence of such amount and value as would secure a conviction for the substantive offence. 7 O.W.N. 493=126 Ind. Cas. 501=31 Cr. L. J. 1020= A.I.R. 1930 Oudh 357.

——S. 110—Previous convictions.

The existence of a number of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L.R.A.Cr. 66= 11 A.I.Cr.R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—The evidence going to show that a substantive offence had been committed, or, which might form the basis of a charge of a substantive offence is not necessarily to be excluded in proceedings under S. 110. A.I.R. 1925 All. 694, Foll. 8 L.R.A.Cr. 70=7 A.I.Cr.R. 482= 102 Ind. Cas. 211=28 Cr. L. J. 515=A.I.R. 1927 All. 473.

——S. 110—Inquiries under Chap. 8 are governed by the ordinary rules of evidence, and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under S. 110. 12 A.L.J. 937, Foll. 101 Ind. Cas. 886=25 A.L.J. 393=8 L.R.A.Cr. 53= 7 A.I.Cr.R. 353=28 Cr L. J. 502=A.I.R. 1927 All. 394.

——S. 110—Weight of evidence.

The mere fact that some of the witnesses are persons who have had commercial dealings with the appellants, and others are persons of the same class and position as the appellant, is not a sufficient ground to exclude their evidence in a case under S. 110. 97 Ind. Cas. 43= 7 A.I.Cr.R. 159=27 Cr. L. J. 1067.

——S. 110—Evidence of substantive offence.

Evidence going to show that a substantive offence had been committed, or evidence which might possibly form the basis of a charge of a substantive offence need not necessarily be excluded in proceedings under S. 110 and can form the basis of an order under S. 112 and a finding under S. 118. 88 Ind. Cas. 362=47 All. 733= 23 A.L.J. 507=26 Cr. L. J. 1130=6 L.R.A.Cr. 129= A.I.R. 1925 All. 694.

——S. 110—When the charge against the accused is that of being a habitual robber, the facts that the accused gathered bad characters at his house does not go far enough to be in itself relevant. It would be necessary to show that these bad characters were robbers, or were gathered there for the purpose of robbery or theft. 88 Ind. Cas. 362=47 All. 733=23 A.L.J. 507=26 Cr. L. J. 1130=6 L.R.A.Cr. 129=A.I.R. 1925 All. 694.

——S. 110—Acquittal of a particular charge.

The fact that the accused person has geen acquitted of a particular charge may diminish in many cases, and may even destroy wholly, the value of the evidence as to the allegations made against the accused in the case in which he was acquitted, but does not render it inadmissible. 88 Ind. Cas. 362=47 All. 733=23 A.L.J. 507=26 Cr. L. J. 1130=6 L.R.A.Cr. 129=A.I.R. 1925 All. 694.

——S. 110—Opinion.

If a witness is asked what the man's character is, and he were to say that in the general opinion of the man's neighbours the man is an habitual thief, that statement is 'evidence of general repute' and if he were to say that he did not know what the neighbours in general thought of the man, but his opinion was that the man was an habitual thief, that also would be admissible as evidence of the man's character. Evidence of what is generally said of a man by his neighbours is a direct evidence of the fact in issue. 5 O.C. 203 and 10 O.C. 132, Foll. Admissibility of a witness's answer depends upon the substance of it, not upon its form. The real test is whether the answer shows what is the general reputation of the man in question, and the opinion given by the witness need not be the opinion of the entire community but it must at least give the opinion of a considerable number of persons and not be merely a repetition of what one or two persons have said to the witness. 89 Ind. Cas. 147=12 O.L.J. 413=26 Cr. L. J. 1283=29 O.C. 44=A.I.R. 1925 Oudh 473.

——S. 110—Consideration of evidence.

Where the District Magistrate in an appeal from a case under S. 110 disposed of the appeal in few lines by making some general observations upon the volume of evidence which was put before him without considering it.

Held, that, that is not a proper way of disposing of an appeal of this kind. 23 Cr. L. J. 378=19 A.L.J. 921=67 Ind. Cas. 202.

——S. 110—It is not an absolute rule of law that the repute under S. 110 should only be proved by immediate neighbours. The meaning of the word 'place' necessarily varies with the circumstances of the case. But where the witnesses are living at a considerable distance from the accused the Court should satisfy itself that the evidence is true. Evidence of witnesses sufficiently near is admissible. 85 Ind. Cas. 368=26 Cr. L. J. 528=4 Bur. L. J. 6=2 Rang. 686=A.I.R. 1925 Rang. 174.

——S. 110—Confession of co-accused in another case.

Where two persons are involved in a Section 110 case, the confession made by one of them when they were co-accused in another case, cannot be used as evidence against the other in the Section 110 case. (22 C.W.N. 408, Foll.) 61 Ind. Cas. 793=33 C. L. J. 70=25 C. W.N. 239=22 Cr. L. J. 441=A.I.R. 1921 Cal. 557.

——S. 110—Admission of bad character—Good behaviour—Security—Habitual thief—Proof.

Security for good behaviour should not be demanded from an accused who has not been shown to be a habitual thief by evidence on the record. The admission by an accused that he is of bad character and has been in jail is insufficient to warrant an order for security. 3 Bom. L. R. 269.

——S. 110—Dacoits living with father—Son, if guilty of harbouring dacoits—Quashing of proceedings against son.

If certain dacoits have been living with a person, his son cannot be held to be guilty of harbouring them. If a mare which was alleged to have been lent them by the son, presumably belonged to the father, proceedings against the son should be quashed and he should be discharged. A.I.R. 1934 Lah. 62=35 Cr. L. J. 653=148 Ind. Cas. 325.

——S. 110—Evidence—Quantum—General repute—Habitual offender—S. 117 (4).

No hard and fast rule can be laid down as to the quantum of evidence necessary before a Court can act thereon, nor is it necessary that the suspicion against a person charged under S. 110 must be embodied in some document.

When a large body of persons have come forward to swear as to the reputation of a person and he is not able to show anything as to why the witnesses have come forward to give him a bad character, such evidence cannot be lightly brushed aside. A.I.R. 1946 Oudh 50=1945 A.W.R. (C.C.) 231=1945 O.W.N. (C.C.) 361.

——S. 110—Witnesses not belonging to accused's place of residence—Admissibility of evidence.

In proceedings under S. 110, Cr. P. C., it is not necessary that the witnesses who speak to the general reputation of the accused must be residents of the same village where the accused lived. Evidence of witnesses of other villages is certainly admissible in evidence. A.I.R. 1942 Oudh 356=43 Cr. L. J. 398=1942 O.W.N. 39=1942 A.W.R. (C.C.) 51=198 Ind. Cas. 547.

——S. 110—Defence witnesses more numerous than prosecution witnesses—Whether ground for acquittal.

The accused is not entitled to an acquittal in a case under S. 110, Cr. P. C., merely because the defence witnesses were as numerous or more numerous than the prosecution witnesses. It is the weight of the evidence and not the number of witnesses which the Court has to consider. A.I.R. 1942 Oudh 356=43 Cr. L. J. 398=1942 O.W.N. 39=1942 A.W.R. (C.C.) 51=198 Ind. Cas. 547.

——S. 110—The general reputation of a man amongst the community may no doubt be evidence in inquiries under S. 110, Cr. P.C., the nature of which is such as to render admissible what persons who know him think of him. But the fact in no way nullifies the provisions of S. 50, Evidence Act. A.I.R. 1940 Rang. 181=1940 Rang. L. R. 562=192 Ind. Cas. 49.

——S. 110—Evidence—Prosecution—Duty of.

In a case under S. 110, the decision rests not on the point whether the defence evidence outweighs that of the prosecution, but on the point whether the prosecution evidence is sufficient to establish the case or not and whether the court ought to come to a decision on the point. 21 Cr. L. J. 826=58 Ind. Cas. 826 (Cal.).

——S. 110—Evidence—Rejection on improper grounds.

The mere fact that some of the witnesses produced by a person against whom proceedings have been instituted under S. 110, Cr P. Code, are his caste fellows is not by itself a sufficient reason for discrediting their testimony. 21 Cr. L. J. 60=6 O.L.J. 541=54 Ind. Cas. 412.

——S. 110—Evidence—Previous acquittal—Legality of—Question as to.

Where an accused is being tried by a Magistrate under S. 110 of the Cr. P. Code, and it is found that in a previous case of dacoity he was acquitted by the Court of Sessions it is not for the Magistrate to question in his judgment the decisions of the Session Judge 20 Cr. L. J. 727=6 O.L.J. 327=52 Ind. Cas. 887.

——S. 110—Evidence—Right of further cross-examination.

In proceedings under S. 110, the accused is not entitled to call again the prosecution witnesses for further cross-examination. 1 P.R. Cr. 1916=17 Cr. L. J. 84=58 P.W.R.Cr. 1915=32 Ind. Cas. 676.

——S. 110—Evidence—Indecent overtures to passers-by—Nuisance.

Making indecent overtures to boys passing by shop and abusing people is not a ground for proceeding under S. 110, Cr. P. Code. 16 Cr. L. J. 582=30 Ind. Cas. 134.

——S. 110—Evidence—Judgment of Criminal Court —Evidence of defence not considered—Effect.

In an appeal under S. 110 of the Code, the Appellate Court must look into the defence evidence even if the Counsel for the defence did not make any reference to it ; and where this is not done, retrial may be ordered by the High Court. 40 Cal. 376=14 Cr. L. J. 419=20 Ind. Cas. 403.

——S. 110—Evidence—Ex-convict.

No security can be demanded of an ex-convict, where there is nothing to show that since he got out of jail he has been a bad character or has done something that would justify an order under S. 110. 29 P.R.Cr. 1910=196 P.L.R. 1910=11 Cr. L. J. 635=8 Ind. Cas. 385.

——S. 110, Cls. (a) to (f)—Evidence—Dangerous character.

Where in a case under S. 110, Cr. P. Code,it was found that the accused, father and sons were formed into a gang and the evidence against them all was the same, *Held*, that it was a clear case of association and no minute inquiry into the complicity of each of the accused individually need be made. Where evidence has been let in to show that a man is ahabitual offender under the clauses of S. 110 other than (*f*) it is a mere inference of fact from the nature of the offences whether he is a dangerous and desperate character or not, within the meaning of the latter clause. 13 C.W.N. 244=10 Cr. L. J. 460=4 Ind. Cas. 10.

——S. 110—Evidence—Previous conviction.

Previous convictions are not substantive evidence in a case under S. 110 though they may affect the period for which the accused is to be bound down. 9 C.L.J. 439=13 C.W.N. 318=10 Cr. L. J. 122=2 Ind. Cas. 651.

——S. 110—Evidence of Repute—Good behaviour—Dangerous character.

Evidence of repute is not admissible in cases coming under Cl. (*f*) of S. 110 of the Code of Criminal Procedure. (1900) 5 C.W.N. 249.

6. Evidence—Sufficiency of.

——S. 110 (f)—Evidence—Sufficiency of—Evidence put forward in a previous case in which the person had been acquitted.

An accused person who had been acquitted of the offence of dacoity, etc., could not be called upon to furnish security under S. 110, (*f*) on the same evidence. 3 O.L.J. 43=17 Cr. L. J. 184=33 Ind. Cas. 824.

——S. 110—Evidence—Evenly balanced.

In a case under S. 110 of the Cr.P. Code, if the evidence for the defence is as good as that for the prosecution no bonds should be taken from the accused. 20 Cr. L. J. 716=1 U.P.L.R. (H.C.) 140=52 Ind. Cas. 796.

——S. 110—Evidence—Evenly balanced.

Where in a case under S. 110 of the Code the evidence is equally balanced, no order requiring security should be made. 11 A.L.J. 461=14 Cr. L. J. 407=20 Ind. Cas. 231.

——S. 110—Evidence—Defence evidence as good as prosecution.

If the defence evidence is as good as the prosecution, the accused ought to be acquitted. 10 A.L.J. 383= 13 Cr. L. J. 772=17 Ind. Cas. 404.

——S. 110—Evidence—Bad character.

Evidence of bad character is not sufficient to put a man on security. 30 P.L.R. 1916=17 Cr. L. J. 142= 33 Ind. Cas. 318.

——S. 110—Evidence—Weight on both sides—Instances of suspicion—Previous discharge.

Where in a proceeding under S. 110 of the Cr.P. Code, the evidence for the prosecution consisted mostly of witnesses produced by the police and a few instances of suspicion and the accused gave evidence of a previous discharge on similar facts the evidence was insufficient to justify the taking from the accused of security for good behaviour. 33 P.W.R. (Cr.) 1913=316 P.L.R. 1913= 14 Cr. L. J. 603=21 Ind. Cas. 475.

——S. 110—Evidence—Disreputable friendship.

Disreputable friendship with certain *pasis*, for immoral relations with some of the women of *pasis* without a conviction of any criminal offence, is not sufficient to bind the accused under S. 110. 12 Cr. L. J. 512=12 Ind. Cas. 518.

——S. 110—Evidence—Bad character if sufficient ground for bond.

A mere proof of bad character does not bring the case under S. 110. 8 M.L.T. 246=11 Cr. L. J. 638=8 Ind. Cas. 320.

——S. 110—Evidence to support an order for security.

Where a person had been imprisoned for three years in default of finding security to be of good behaviour, a period of under two months from his release from jail was not a sufficient time to give him an opportunity of showing that he was willing to adopt an honest livelihood. Mere allegation by the Police that he was suspected in several cases, where there was no complaint of such offences to the police or to the Magistrate,is not sufficient to warrant an order under Ss. 110 and 118, Cr. P. C. (1904) 1905 A.W.N. 34.

——S. 110—Evidence—sufficiency of—Insufficient evidence.

Belief of prosecution witnesses of accused being man of desperate and dangerous character based upon suspicion that accused committed crime and certain acts of oppression—But Court holding suspicion not proved and acts of violence only youthful frolics—Many other persons including accused's tenant deposing to his being peaceful citizen and good landlord—Court should not demand security. 7 O.W.N. 493=126 Ind. Cas. 501=31 Cr. L. J. 1020=A.I.R. 1930 Oudh 357.

——S. 110—An order under S. 110 cannot be maintained unless the record upon which the order is passed is such that it proves conclusively the charge read out to the accused person under that section. 99 Ind. Cas. 40= 28 Cr. L. J. 8=A.I.R. 1927 All. 146.

——S. 110—S. 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. When a person is sought to be proceeded against under this section it must be made clear as to which sub-section he is charged. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes or to charge him generally with having committed an offence under S. 110. Moreoever, the evidence must prove the accused person to come within one or more of the descriptions set out in the section. General evidence of the accused's bad character and of his association with people of bad character does not bring his case within the provisions of S. 110. Evidence of general ill repute is not sufficient to base an order under S. 110, nor can the accused person be condemned upon suspicion. 26 Cr. L. J. 1377=89 Ind. Cas. 513 =A.I.R. 1926 Lah. 45.

——S. 110—Prosecution witnesses enemies of accused.

Where the prosecution witnesses were mostly enemies

of the accused and they were men of influence so as to procure a large number of people to speak as to the general bad character of the accused,

Held, the accused should not be convicted on such evidence especially when there was a large number of persons who deposed to his good character. 83 Ind. Cas. 659=26 Cr. L. J. 99=A.I.R. 1925 Oudh 277.

——**S. 110**—Evidence to prove the charge against the accused under Section 110, Clauses (*a*), (*d*) and (*f*) should not be vague, general and of hearsay character. 86 Ind. Cas. 274=6 P.L.T. 810=1925 P.H.C.C. 6=26 Cr. L. J. 738=A.I.R. 1925 Pat. 131.

——S. 110—Private knowledge of magistrate.

Private knowledge of a Magistrate is not in itself substantive evidence which may be used against the accused, but it is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal, and to negative, for example, a suggestion that the police investigation has been unfair. A finding for example that "inquiries about the accused satisfy me that he is a badmash", would be objectionable, but "the result of my inquiries in the neighbourhood, so far as they appear in the case of this accused tend to show that the case against him has not been got up without reason," would be quite legitimate. 81 Ind. Cas. 269=45 All. 749=25 Cr. L. J. 781=A.I.R. 1924 All. 451.

——S. 110—Offence for which accused was not charged.

Evidence showing that the applicant took part in a dacoity, that he was actually arrested in connection with the dacoity but the police considered the evidence against him of so little value that he was released under S. 169 of Cr. P.C., without even being placed before the Court, is totally insufficient for binding the accused over on a charge of being a bad character. 75 Ind. Cas. 733=4 L.R.A.Cr. 216=25 Cr. L. J. 45=A.I.R. 1924 All. 142.

——S. 110—Vague.

Where the only evidence against the applicant was that the applicant was a thief and the neighbourhood believed in such a rumour, but there was no evidence as to who the applicant's associates were, what were his means of subsistence, or whether increase of thefts synchronised with his appearance in any particular locality.

Held, that an order against the applicant was not justified. 74 Ind. Cas. 535=24 Cr. L. J. 791=A.I.R. 1924 Oudh 187.

——**S. 110**—Instances of mere suspicion are not sufficient in order to bind down a person to be of good behaviour under S. 110. The evidence in such a case must be evidence by which the petitioner is proved to have been concerned or some direct evidence to establish the complicity of the petitioner in such cases. The evidence ought to be of such a nature as to lead to a reasonable and definite ground for coming to the conclusion that the petitioner is a habitual offender. 75 Ind. Cas. 723=5 P.L.T. 129=2 Pat. L. R. Cr. 79=25 Cr. L. J. 35=A.I.R. 1924 Pat. 498.

——S. 110—Inconclusive—Private inquiries of Magistrate.

Where the evidence for the prosecution is partly inadmissible, partly inconclusive and hearsay, vague and unsubstantial and there is nothing definite proved against the accused and no evidence called against them from their own village, but there are a number of persons of good character and position from their village itself and from the neighbouring villages who speak well of these men, while nobody has been able to suggest that they have got resources for living as they do live, without support from theft or bad means of livelihood.

Held, that it would be unfair to brand such men as bad characters upon such evidence. No doubt a Magistrate is compelled in the performance of his duties to make private enquiries as to the character of his neighbourhood and as to the persons reputed to be of bad character and be likely to cause trouble. These enquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge but where it is shown, that the Magistrate has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, his order would be quashed as being vitiated by the admission of such information. 73 Ind. Cas. 337=21 A.L.J. 513=4 L.R.A.Cr. 126=24 Cr. L. J. 593=A.I.R. 1923 All. 596.

——S. 110—Suspicion—Good character.

The evidence against the petitioner consisted of the statements of a Sub-Inspector of Police, a *Sufed-Posh*, a *Zaildar*, some *Lambardars* and of one Fazal who stated that the petitioner was a habitual thief, that he associated with persons of bad character. In 1922 the petitioner was suspected on three occasions under Section 457, Penal Code, and on two of these occasions his house was searched. It was, however, admitted that though the petitioner's house was searched on two occasions no stolen property was ever found in his house and as to his having been suspected of having committed an offence under Section 457, the petitioner was never criminally prosecuted and no written complaints were ever made to the police against him. Fazal was admitted not on good terms with the petitioner. The petitioner had produced 17 witnesses of respectable position who testified to the petitioner's good character and deposed to the fact that he was not a habitual thief by reputation.

Held, that the evidence on the record is not sufficient to justify action being taken against him under Section 110. 76 Ind. Cas. 1034=25 Cr. L. J. 314=A.I.R. 1923 Lah. 419.

——S. 110—Relationship with a person bound over.

Relationship of a person with another bound down under S. 118 is not a sufficient corroboration of an approver's evidence against the former in a proceeding under S. 110. 22 Cr. L. J. 486=62 Ind. Cas. 182 (Cal.).

——S. 110—Intention.

S. 110 is intended to put a curb upon the activities of persons who set the ball of discord in motion and try to create or foment dissensions between man and man or between one community and another in matters which result in or have a tendency to result in breach of peace. 120 Ind. Cas. 193=31 Cr. L. J. 1=1930 Cr.C. 39=1930 A.L.J. 254=A.I.R. 1930 All. 23.

——**S. 110**—What S. 110 desires to guard against is the freedom of a dangerous man without security and not freedom entirely. 117 Ind. Cas. 346=10 L.R.A.Cr.C. 99=30 Cr. L. J. 756=12 A.I.Cr.R. 72=1929 Cr.C. 174=A.I.R. 1929 All. 608.

7. Evidence of Police.

——S. 110—Admissibility of evidence—Testimony of police officer.

The testimony of a police officer that a person is by habit a thief is inadmissible in evidence against a person against whom proceedings are instituted under S. 110 when such evidence is only a matter of opinion and hearsay. This fact, however, is not sufficient to set aside the order passed against him under S. 110 when the latest incident is coupled with two previous convictions on charges of his belonging to, and associated with, a gang of habitual thieves and robbers. 120 Ind. Cas.

734=31 Cr. L. J. 165=1930 Cr. C. 504=A.I.R. 1930 Nag. 148.

——S. 110—Evidence of police—Police Officer, if a good witness.

A Police Officer is as good a witness as any other person, if he has proved facts which establish that the person concerned is acting in a manner likely to cause breach of the peace or is of a dangerous character. A.I.R. 1935 Pesh. 80 (2)=36 Cr. L. J. 1127=156 Ind. Cas. 659.

——S. 110—*Mukhias* and *Sarpanches*—Whether to be treated as *quasi* Police witnesses—Presumption, if can be made against them.

Mukhias and *Sarpanches* are respectable persons and they are appointed to these offices because of their respectability. It is totally wrong to describe them as "*quasi*-Police witnesseses". On account of the position held by these men in villages in which they reside, they are in a far better position to know about the bad characters residing in their villages. It is altogether absurd to start with a presumption against them. The proper way of judging the evidence of a witness is to consider the statement made by him and then to arrive at a conclusion whether he has given true evidence or not. No presumption should be made against him merely on the ground that he happens to be a *Mukhia* or a *Sarpanch*. A.I.R. 1935 All. 850 (851)=36 Cr. L. J. 1362=1935 A.W.R. 1089=158 Ind. Cas. 424.

——S. 110—Evidence of general repute by Crown—Admissibility—Nature of evidence required to establish —Hearsay evidence—When admissible—Demand of security.

In proceedings under sub-s. (*f*) of S. 110 of the Cr. P. C., evidence of general repute may be tendered by the Crown to prove that a person is so desparate and dangerous as to render his being at large without security hazardous to the community. Evidence of association with proved revolutionaries is also evidence of reputation. A Police Officer is certainly a competent witness to speak to the reputation of a person who resides within his circle or to the reputation of a person with regard to whom he has had special occasion to make observations and enquiries in the course of his official duties. If the evidence given by such officers is evidence of general repute and of association with proved revolutionaries, and not merely rumour or suspicion, it is undoubtedly admissible.

Hearsay evidence does amount to evidence of general repute for the purpose of S. 110, provided there is a reasonable foundation for it. This relaxation of the ordinary rules of evidence is justified by the fact that the object of proceedings under S. 110 is the prevention of crime and not its punishment.

When security is demanded from a person who, though anxious to find it, finds it difficult to get the amount which is too much for his financial status, it is preferable that he should be at large, when there is a chance of moderating influences being brought to bear on him, than that he should be associating with confirmed criminals in jail. A.I.R. 1933 All. 674=1933 A.L.J. 927=35 Cr. L. J. 183=146 Ind. Cas. 875.

——Ss. 110 and 118—Evidence—General repute—Dacoity cases—Statements of approvers—Corroboration—Police suspicion—Good character.

The Police instituted proceedings under S. 110 though they failed to prove guilt in regard to charges of dacoity. *Held*, the Magistrate was not wrong in initiating proceedings under S. 110 but the evidence against the accused must be very satisfactory. Statements of approvers in different dacoity cases implicating the accused in a proceeding under S. 110 ought to be left out of consideration if there is nothing to corroborate them. Where in a proceeding under S. 110 the prosecution witnesses for general repute say in cross-examination that their suspicion about accused being a thief is the outcome of house searches and arrests by the police, the accused is entitled to the benefit of the admission by the prosecution witnesses as to the origin of their suspicion. Where there is positive evidence for the defence that the accused is a good man want of proof of malice against the accused on the part of prosecution does not justify the rejection of the defence evidence. 54 Ind. Cas. 778 (Cal.).

——S. 110—Evidence—Police list—Cases in which accused suspected—Admissibility of evidence.

In cases under S. 110, a list of cases in which the accused was suspected of having been concerned in, is not admissible in evidence. 10 O.C. 132; 10 O.C. 168, Foll. 21 O.C. 132=19 Cr. L. J. 825=46 Ind. Cas. 841.

——S. 110—Evidence—Police Officers—Diaries.

In proceedings under S. 110, a Police Officer was examined at great length; but no security was demanded. The accused applied for and obtained sanction to prosecute the Police Officer. *Held* that sanction should not be granted inasmuch as the Police Officer had made the statements about the accused from what he had heard from others. Police diaries even if evidence at all, they are dangerous evidence against an accused person. 13 A.L.J. 412=16 Cr. L. J. 281=28 Ind. Cas. 329.

——S. 110—Evidence—General repute—Statements to Police.

Statements made by Police Officers to the effect that three other persons made certain statements are not admissible except as evidence of general repute. 16 Cr. L. J. 221=27 Ind. Cas. 845.

——S. 110—Police Records—Evidence—History sheets of police.

History sheets kept by police of persons proceeded against under the section cannot be considered by the Court. 21 Cr. L. J. 700=57 Ind. Cas. 940 (Cal.).

8. Evidence of general repute.

——Ss. 110, 117 and 439—Evidence—Powers of Magistrate—"General repute"—Evidence of character—Revision.

The High Court is not a Court of appeal for cases under S. 110 of the Cr. P. Code, and it is only in a very rare case that it will interfere. Specific instances of crime in which the accused is "suspected" are not good evidence and do not fall within "general repute" under S. 117, because suspicion cannot take the place of proof that a man has committed offence. Similarly, history sheets are not evidence, especially where the official who produces them is not himself responsible for all the entries therein. The mere fact that, assuming the accused is guilty, it was easy for the accused to get witnesses of fairly good status to give evidence on his behalf, is no ground for disbelieving the witness. 20 Cr. L. J. 689=1 U.P.L.R. (H.C.) 143=52 Ind. Cas. 657.

——S. 110—Evidence—General repute.

The belief of a class of persons that a particular individual has done particular acts or has characteristic of a certain kind because there are rumours to that effect in a particular place, is not admissible as evidence of repute where no facts are mentioned to justify the impression. Inferences drawn by forest officers as to the persons who committed forest offences are not evidence of repute. The Court should test the sources of the information that led the officials to infer that the accused had anything to do with the offences. 8 L.W. 461=(1918) M.W.N. 751=19 Cr. L. J. 905=47 Ind. Cas. 277.

——S. 110—Evidence—General repute—Habitually bringing false cases.

S. 110 does not apply to a person who has the reputation of habitually bringing false claims in Civil Courts. In proceeding against such a person although evidence of general repute is admissible, it cannot be allowed to override the findings arrived at by the Civil Courts after trial. 19 Cr. L. J. 885=47 Ind. Cas. 81.

——Ss. 110 (f) and 117 (3)—Evidence—General repute.

General repute is not sufficient to bring a case within cl. (*f*) of S. 110 ; specific acts showing that the accused disregards the safety and property of persons and actually endangers them must be proved. S. 117 (3) being strict in sense is inapplicable where the charge falls under cl. (*f*) of S. 110. 19 Cr. L. J. 871=47 Ind. Cas. 67.

——S. 110—Evidence—General repute—Offence alleged to be proved.

In a proceeding under S. 110 of the Cr. P. Code, any particular offence alleged against the person or persons called upon to furnish security must be proved by relevent evidence and not by general evidence of repute that he or they are habitual offenders. 40 A. 372=16 A.L.J. 208 =19 Cr. L. J. 351=44 Ind. Cas. 463.

——S. 110 Cl. (f)—Evidence—General repute—Dangerous character.

The dangerous and desperate character of the accused, rendering his liberty without security, hazardous to the community, should be definitely proved by evidence for a case to come under S. 110 cl. (*f*) and evidence as to general repute is inadmissible. 18 Cr. L. J. 119=8 P.W.R. Cr. 1917=37 Ind. Cas. 471.

——Ss. 110, 117—Evidence of general repute—Admissibility in proceedings under S. 110.

In proceedings under S. 110, Cr. P.C., if the witnesses have clearly deposed that the accused has the general repute of being an habitual offender such evidence is admissible under sub-s (4) of S. 117 of the said Code :

Held, that the evidence adduced on behalf of the prosecution was quite sufficient to justify the order passed against the accused under S. 118, Cr. P. C. A.I.R. 1936 Oudh 238=1936 O.W.N. 247=37 Cr. L.J. 390=12 Luck. 36 =160 Ind. Cas. 1039.

——Ss. 110, 117 (4)—Evidence that accused has the general reputation of being habitual thief and burglar—Admissibility of.

Evidence showing clearly that the person sought to be proceeded against under S. 110, Cr. P.C., has the general reputation of being a habitual thief and burglar is admissible under sub-s. (4) of S. 117, Cr. P. C. A.I.R. 1934 Oudh 49 =35 Cr. L. J. 403=11 O.W.N. 84=147 Ind. Cas. 388.

——Ss. 110, 117 (4)—Evidence of general repute of accused—Admissibility of.

Evidence as to the general repute of the accused as being a habitual offender, where clearly deposed in proceedings under S. 110, Cr. P. C., is admissible under the provisions of S. 117, sub-s (4), and is sufficient ground for requiring the accused to give security. A.I.R. 1933 Oudh 58=9 O.W.N. 1012=34 Cr. L. J. 160=141 Ind. Cas. 251.

——S. 110—Evidence—"General repute".

Where in a bad livelihood case the only evidence against an accused is that of general repute which is not universal or beyond doubt, it is not safe to bind him over. 48 P.W.R. Cr. 1914=16 Cr. L. J. 106=215 P.L.R. 1915 =27 Ind. Cas. 154.

——S. 110—Evidence—General repute—Evidence of.

Where the chairman of a municipality was proceeded against under S. 110 the evidence of general repute let in against the accused must be the evidence of a reputation acquired by the accused since his appointment to the chairmanship. 16 Bom. L. R. 943=16 Cr. L. J. 91=26 Ind. Cas. 1003.

——Ss. 110 (f) and 117—Evidence —General repute —Security for good behaviour.

The accused were required by an order of the Sub-Divisional Magistrate of Sattur to show cause under S. 110 (*f*). The only evidence against them was that they were habitual offenders by repute that some of the accused committed an assault for which they were tried and acquitted, and that another assault was committed by them which is disbelieved. *Held*, that evidence of general repute is not admissible under S. 110 (*f*) though it may be admissible under S. 110 (*f*) coupled with some other subclause, under which it may be admissible and that exceptions such as in S. 117 to the general rules of evidence, must be applied to cases specified by the Legislature. 34 Mad. 255=21 M. L. J. 488=(1911) 1 M.W.N. 34=8 M.L.T. 347=11 Cr. L. J. 663=8 Ind. Cas. 493.

——Ss. 110, 117—Evidence of general repute.

Held, (i) That the words "evidence of general repute" in S. 117, Cr. P. C., have received a very wide interpretation in U.P. ;(ii) that a vague and general statement that a man is a habitual offender is not sufficient evidence on which an accused person is liable to be bound down under S. 110, Cr. P. C.; (iii) that the evidence must be of persons who are speaking to from matters within their personal knowledge and not mere hearsay. (1904) 1 A.L.J. 616.

——Ss. 110 (a) and (f) and 117 (3)—Evidence—General repute—Hearsay—Police reports.

When a person is charged under S. 110 (*f*) of the Cr.P.Code, evidence of general repute is not admissible to prove that he is a desperate and dangerous character. To prove the charge against him evidence of special acts showing that he is a desperate and dangerous character is necessary. Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions. In proceeding under S. 110 of the Cr.P. Code, police evidence should, if not wholly discarded, be allowed to influence the judgment of the Magistrate as little as possible. Hearsay evidence amounts to evidence of repute and is admissible for the purpose of proving a charge under S. 110 (*a*) of the Cr. P. Code. When it is sought to prove the reputation of a person the evidence required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. 43 Mad. 450=38 M.L.J. 97=11 L.W. 331=21 Cr. L.J. 354=(1920) M.W.N. 398=55 Ind. Cas. 722.

9. Evidence of good character.

——S. 110—Evidence of good character.

Where a large body of apparently respectable witnesses of the neighbourhood testify to the good character of the accused as against meagre prosecution evidence or the evidence of police officers, an order demanding security is not justifiable. 37 P.W.R. 1910, Cr., Foll. When as good witnesses come forward to state that a man's reputation is good as those who state the contrary it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him. 2 P.R. 1898, Cr. Foll. 9 Lah. 133=28 Cr. L. J. 813=104 Ind. Cas. 253=29 P.L.R. 368=A.I.R. 1928 Lah. 49.

——S. 110—Where a number of witnesses who are considered to be respectable and reliable by the Court have deposed that the accused are men of good character, this is quite sufficient to entitle them to an acquittal. 85 Ind. Cas. 370=26 Cr. L. J. 530=27 O.C. 327= A.I.R. 1925 Oudh 501.

——S. 110—Rejection of.

The Court ought to pay particular attention to evidence adduced on behalf of the accused who speak of his good character without susbstantial reasons it should not

disbelieve such evidence. 81 Ind. Cas. 633=5 P.L.T. 166=2 Pat. L.R. Cr. 98=25 Cr. L. J. 985=A.I.R. 1924 Pat. 500.

Where proceedings under S. 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character the Court ought to pay particular attention to such evidence. The Court should find substantial reason for not believing the evidence before it makes an order. Powers given by the Code under S. 110 should be exercised with extreme caution and with very great discretion. A person must be found upon evidence to have habitually committed or attempted to commit offences before he could be bound down to be of good behaviour. 31 I.C. 826, Foll. 75 Ind. Cas. 723=5 P.L.T. 129=2 Pat. L. R. Cr. 79=25 Cr. L. J. 35=A.I.R. 1924 Pat. 498.

——S. 110—Good character.

The general reputation of a man is that which he bears amongst his fellow townsmen or in the neighbourhood in which he lives. Where such persons depose to good character of a man proceeded against under S. 110 and there is no other evidence worth the name coming forth against him, he cannot be bound over under S. 110. , 110 Ind. Cas. 674=10 A.I.Cr.R. 529=29 P.L.R. 539=29 Cr. L.J. 738.

10. Evidence of bad livelihood.

——Ss. 110, 117, 523 and 530—Bad livelihood—Accused living out of the jurisdiction of Magistrate—Issue of notice—Judicial or executive act—Initiations of proceedings.

The issue of notice under S. 110 of the Cr.P. Code, is not a formal matter but it is a judicial act to be exercised after a due consideration of the materials placed before the Magistrate. A Magistrate has no jurisdiction to issue the notice under S. 110 of the Cr. P. Code, unless the person to be bound over resides within the limits of his jurisdiction. 41 Mad. 246, Foll. A Magistrate to whom the information referred to in S. 110 is given by the Police, cannot be said to have initiated the proceedings until he issues notice to the person charged to show cause why he should not be proceeded against. Where a Dt. Magistrate to whom information was given by the Police merely passed it on to the Head-Quarters Deputy Magistrate who had no jurisdiction over the place where the persons informed against resided and the Deputy Magistrate thereupon drew up proceedings against them, the Dt. Magistrate cannot be said to have intiated proceedings and then transferred the case to the other. The Sub-Divisional Magistrate had no jurisdiction to issue the notice and try the case and that the proceedings were void. 8 L.W. 461=19 Cr. L.J. 905=(1918) M.W.N. 751=47 Ind. Cas. 77.

——Ss. 110 and 118—Bad livelihood—Vague evidence—High Court refusing to confirm.

Where the evidence against persons charged with bad livelihood under S. 110 is vague and general, the High Court would refuse to maintain the Magistrate's order under S. 118. 43 Cal. 1128=20 C. W. N. 725=17 Cr. L. J. 185=33 Ind. Cas. 825.

——S. 110—Bad livelihood—Taking precaution to conceal—Failure to give satisfactory account of himself—Delivering letters secretly.

Where a person charged with endeavouring to secretly deliver letters containing an incitement to commit crime, was unable to give a satisfactory account of himself, *held* that was sufficient to bring him under S. 110 of the Code. 15 Cr. L. J. 255=23 Ind. Cas. 207.

——Ss. 110 and 439—Bad livelihood—Proof.

The following circumstances were insufficient to place a person on security. (1) Two successful searches of his house. (2) His having been seen in the company of some suspected persons none of whom has however ever been convicted of theft. (3) Allegations of some *Sufedposhes and Lambardars*, to the effect that the people of their villages know him to be a *Badmash* while no one has ever suspected him in a theft case. 20 P.W.R. Cr. 1912=13 Cr. L. J. 550=15 Ind. Cas. 966.

——Ss. 110, 118—Bad livelihood—Sureties, fitness of—Pecuniary fitness of the surety, whether the only test.

In deciding whether sureties tendered in bad livelihood cases are to be accepted or refused, the first matter to be inquired into is the ability of the sureties to pay the sums for which they become bound in case of default of the persons who are bound down for good behaviour; but there may be other objections to be considered, and any such objection must be dealt with in each case as it arises. (1902) 6 C.W.N. 593; (1908) I. L. R. 35 C. 400 foll. Where the sureties were found to be competent from the pecuniary point of view but no other cause of unfitness was made out, the sureties were wrongly rejected. 15 C.W.N. 666=11 Cr. L. J. 392=14 C.L. J. 118=10 Ind. Cas. 8.

——Ss. 110 and 117—Evidence—General repute—Bad livelihood—Hearsay evidence of general repute—Current repute.

In inquiries under S. 110, Cr. P. Code, the evidence strictly to the point at issue is admissible. Statements of general repute of the accused though hearsay are admissible to show bad livelihood of the accused, especially where these statements are followed by particular instances involving suspicion and by statements that the accused had no work and was a wanderer and associate of bad characters. The evidence recorded by a Magistrate was that the accused was currently reputed to be a thief and a robber; *Held*, that what the witnesses meant by "current repute" was general repute. 5 L.B.R. 72=10 Cr. L. J. 355=3 Ind. Cas. 681 (F.B.)

——S. 110. Cl. (a) (f)—Bad livelihood—Evidence—How to be considered where several persons are proceeded against and their association is proved—General repute, evidence of —How far admissible in a charge under Cl. (f)—Judgment in appeal—Defects of.

Where in a proceeding under S. 110, Cr. P. C., it was clearly established that the petitioners who were members of the same family being the father and his 3 sons, were associated together and formed a gang, and the evidence against all of them was the same. *Held*—That the case was one in which the evidence against the petitioners could rightly be dealt with together and that any minute inquiry into the complicity of each of the accused individually was not necessary. How far evidence of general repute may be taken into consideration in establishing the charge under Cl. (*f*) discussed. (1908) 13 C.W.N. 244=4 Ind. Cas. 10=10 Cr. L. J. 460.

11. Exercise of powers under—Specific Cases.

——S. 110—Evidence showing complicity in thefts—Order under S. 110, if proper.

Where in a proceeding under S. 110 of the Cr. P. C., there is evidence showing that the accused had been suspected of complicity in certain thefts and had been mentioned in each case in the reports made in the Police Station at the time of each theft and there is further unrebutted evidence of the residents of the village that he has the general repute of being a burglar and a thief, an order under S. 110 of the Cr. P. C., requiring the accused to execute a bond with sureties to be of good behaviour is a proper order. A.I.R. 1936 Oudh 238=1936 O.W.N. 247=37 Cr. L. J. 390=12 Luck. 36=160 Ind. Cas. 1039.

——S. 110—Exercise of powers—Evidence of substantive offence.

The mere fact that there is an allegation of a substantive offence is no obstacle to the using of the evidence such as

it is in regard to the commission of that offence in proceedings under S. 110. 1930 A.L.J. 389=31 Cr. L. J. 627=1930 Cr. C. 442=124 Ind. Cas. 40=52 All. 448=A.I.R. 1930 All. 274. (Overrules A.I.R. 1929 All. 813 and A.I.R. 1925 All. 250.)

——S. 110—Isolated instance.

An isolated instance of violence of a young zamindar on which no report was made would not be a sufficient cause for taking action against him under S. 110. 126 Ind. Cas. 501=31 Cr. L. J. 1020=7 O.W.N. 493=A.I.R. 1930 Oudh 357.

——S. 110—What must be considered.

But the existence of such convictions is not by itself sufficient to justify ordering the accused to furnish security. Weight must be given to a consideration of the period that has elapsed subsequent to the last of two convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or whether there are indications that he has during that period continued in his previous course, though he may not have actually brought himself within the clutches of the law. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L. R. A. Cr. 66=11 A.I. Cr. R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—Person undergoing sentence under S.109, Cr. P. Code.

Where a person resided within the jurisdiction of a Magistrate and habitually committed thefts and disposed of stolen property within his jurisdiction, the mere fact that he absconded and was brought back to the jurisdiction of the Magistrate and that an order had meanwhile been passed by another Magistrate sentencing him to 12 months' rigorous imprisonment in default of giving security on proceedings initiated under S. 109 does not oust the jurisdiction of the former Magistrate to take action under S. 110. 23 S.L.R. 438=117 Ind. Cas. 777=1929 Cr. C. 335=30 Cr. L. J. 849=A.I.R. 1929 Sind. 166.

——S. 110—Sunstantive offence.

The legislature did not desire that the provisions of S. 110 should be applied to a person suspected of harbouring dacoits, the intention being that such a man should be dealt with under the substantive portion of the Penal Code, *i.e.*, S. 216-A. 51 All. 459=11 A.I. Cr. R. 250=10 L. R. A. Cr. 34=30 Cr. L. J. 694=116 Ind. Cas. 804=1929 A.L.J. 93=A.I.R. 1928 All. 682.

——S. 110—Consent of accused.

Under S. 107, a Court is entiled to act upon a solemn and free consent amounting to a plea of guilty given before it by the person summoned. In such cases the person summoned might waive the formal production of evidence. A.I.R. 1924 All. 269, Appr.

Obiter.—Under S. 110 the procedure is somewhat different, but the principles applicable are not necessarily different. 112 Ind. Cas. 774=30 Cr. L. J. 6=9 L.R.A. Cr. 39=9 A.I. Cr. R. 291=26 A.L.J. 312=50 All. 599=A.I.R. 1928 All. 270.

——S. 110—Should not be used as a weapon in case substantive offence failing.

In cases where proceedings under S. 110 follow soon after a discharge or an acquittal, the Court, before passing an order binding over the person proceeded against, must be staisfied that the proceeding under S. 110 was not instituted with a view to get him punished when the police had failed to secure his conviction for a substantive offence and, as such in such cases the Courts are called upon to scrutinise the evidence with the greatest care. But if, notwithstanding such a scrutiny of evidence, the Court comes to the conclusion that there is sufficient evidence to warrant an order demanding security, the Court is bound to pass such an order. 6 A.L.J. 487, Foll. 8 L.R.A. Cr. 70=7 A.I. Cr. R. 482=102 Ind. Cas. 211=28 C.L.J. 515=A.I.R. 1927 All, 473.

——S. 110—Criminal tribes.

Person registered as member of criminal tribe may be proceeded against under S. 110—Each case will depend on its own facts but as in such cases evidence of repute will chiefly be of the fact of his being a member of the criminal tribe, the evidence should be acted upon with great caution and scrutiny. 54 Cal. 279=31 C.W.N. 165=44 C.L.J. 314=99 Ind. Cas. 234=28 Cr. L. J. 106=7 A. I. Cr. R. 243=A.I.R. 1927 Cal. 213.

——S. 110—Acquittal of substantive offence.

Where in a case under S. 411, I.P. Code, the accused is acquitted and immediately an order was passed against him under S. 110 of the Cr. P. Code :

Held, that he should not have been restricted under S. 110, Cr. P. Code, immediately after without a very strong case being made out againt him. 26 P.L.R. 789=27 Cr. L. J. 190=91 Ind. Cas. 1006=A.I.R. 1926 Lah. 190.

——S. 110—Burma Opium Act, S.3.

A person who earns his living in whole or in part by unlawful sale of opium can be placed on security under S.3, but an order of restriction cannot be passed under S.7 on those grounds. 2 Rang. 61, Diss. from. 98 Ind. Cas. 714=4 Rang. 123=5 Bur. L. J. 78=27 Cr. L. J. 1402=A.I.R. 1926 Rang. 182.

——S. 110—Burma Opium Act, S.3.

The effect of S. 3, Burma Opium Law Amendment Act is to introduce an additional ground on which S. 110 of the Code can be applied. 2 Rang. 61=3 Bur. L. J. 17=81 Ind. Cas. 546=25 Cr. L. J. 930=A.I.R. 1924 Rang. 244.

It is hard on accused to put them on their trial under the Badmashi Chapter shortly after they are released from jail, since they have no sufficient opportunity to reform. 19 S.L.R. 176=26 Cr. L. J. 1398=89 Ind. Cas. 710=A.I.R. 1926 Sind 69.

——S. 110—Acquitted of substantive offence of dacoity.

There is no legal bar to a prosecution for bad livelihood of men acquitted of the substantive offence of dacoity, but in weighing evidence such a matter is so be taken into consideration as indicating the desire of the Police to get rid of the presence of such men from villages whether satisfactory evidence of their bad character be available or not. 85 Ind. Cas. 370=27 O.C. 327=26 Cr. L. J 530=A.I.R. 1925 Oudh 501.

——S. 110—Discharge of substantive offence.

Where a man has been arrested on a substantive charge but released for the reason that that charge could not be sustained, a prosecution under S. 110 on the same evidence on which the charge for the substantive offence was founded or on evidence which arose as a natural sequel to the charge of the substantive offence is not desirable. But if the evidence in support of the charge under S. 110 is antecedent to charge for the substantive offence and is wholly independent of it, the proceedings under S. 110 are not illegal. 77 Ind. Cas. 302=25 Cr. L. J. 366=A.I.R. 1925 Oudh 49.

——S. 110—Considerations as to vigilance of police.

Though the Magistrate should take all precautions possible before ordering security to be furnished, if the evidence actually taken is sufficient to prove that the accused is a fit person to be placed on security, that is all that the law requires. The Magistrate should not consider whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties. 85 Ind. Cas. 368=26 Cr.L.J. 528=4 Bur. L.J. 6=2 Rang. 686=A.I.R. 1925 Rang. 174.

The powers conferred by S. 110 ought not to be exercised unless the information is precise and the subsequent

inquiry supports the information by evidence which is satisfactory. 83 Ind. Cas. 337=19 S.L.R. 96=25 Cr. L. J. 1377=A.I.R. 1925 Sind 204.

——**S. 110—Substantive charge failing.**

Every High Court always looks with grave suspicion in cases in which proceedings are started against an accused, because the police have failed to procure evidence against him on a charge of substantive offence. The *Badmashi* sections were not intended for furnishing the police with the means of detaining persons against whom a definite charge has been made but has broken down. 65 Ind. Cas. 551=9 O.L.J. 57=23 Cr. L. J. 119=24 O.C. 317=A.I.R. 1922 Oudh 26.

——**S. 110—Method of receiving information.**

The law in no way limits the method in which the Magistrate, who is empowered by the Local Government, is to receive the information and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is then received by the Magistrate, there is nothing in the section which would preclude him from acting on the information so received. 71 Ind. Cas. 79=1 Pat. 621=24 Cr. L. J. 31=4 P.L.T. 44=A.I.R. 1922 Pat. 586.

——**S. 110**—Where there are two parties equally dangerous in a village, it is not proper to bind one party without binding the other. L.R. 2 A. (Cr.) 112=3 U.P.L.R. (A.) 185=22 Cr. L. J. 701=63 Ind. Cas. 829.

——**S. 110—Sending to jail.**

Proceedings under S. 110 do not enable the police to send a person to jail where sufficient evidence is not produced to prosecute him for any specific offence. 60 Ind. Cas. 669=22 Cr. L. J. 269 (Lah.).

——**S. 110—Consent to give security when a plea of guilty.**

Whether the statement of the accused "I am prepared to give security for good behaviour" is in effect equivalent to a plea of guilty, can be decided upon an examination of the particular facts. In one case an expression of readiness on the part of the accused to give security may fairly be construed as a plea of guilty ; in other cases it could not possibly fairly be so construed. Where the man has already flatly denied his guilt on every point, then his statement : "I am prepared to give security for good behaviour" cannot be equivalent to a plea of guilty. 26 A.L.J. 519=9 L.R.A. Cr. 75=9 A.I. Cr. R. 467=30 Cr. L. J. 122=113 Ind. Cas. 232=A.I.R. 1928 All. 357.

——**S. 110**—Persons forming into a party claiming common rights and privileges can be said to become members of a community within Cl. (*f*). 6 Pat. 1=28 Cr. L.J. 359=100 Ind. Cas. 967=8 P.L.T. 335=A.I.R. 1927 Pat. 126.

——**S. 110 (a), (c)—Security for good behaviour from habitual offender—Finding to support action under the section—Specific instances need not be proved.**

The finding that an accused person is by general repute a habitual offender committing mischief and that he protects thieves is sufficient to warrant action under S. 110 of the Cr. P. C. It is not necessary for the purpose of the section that specific instances should be given. (1907) 9 Bom. L. R. 164.

——**S. 110 (f)—"Desperate and dangerous character"—Person in the habit of giving a beating to any one not respecting his wishes.**

Where the evidence establishes the fact that certain persons were in the habit of resorting to violence and giving a beating to any one residing in the village who has the audacity not to respect therewishes and that they were extremely rash and acted without any regard to the consequences of their action, they are certainly desperate and dangerous characters and a Magistrate would be certainly justified on such evidence to take action under S. 110, Cr. P. Code. 1948 A.W.R. (H.C.) 233=1948 A.L.J. 332=A.I.R. 1949 A.12=50 Cr. L.J. 22.

——**S. 110. Cl. (d), (f)—Desperate and dangerous character, meaning —Joinder of charges.**

In S. 110, Cl. (*f*), Cr. P.C., a man of a desperate and dangerous character, means a man who has a reckless disregard of the safety of the person or the property of his neighbours. Under that clause evidence of general repute is not admissible in evidence of acts of extortion committed by a person unless those acts were accompanied by acts causing danger to the person and properties of other persons, and is not sufficient to bring his case within Cl. (*f*) of S. 110, Cr. P. C. The law as to joinder of charges against an accused of definite offences has no application to an inquiry under S. 110. 25 M. 61 ref. to and dist. On an inquiry whether the defendant is a habitual offender, evidence of acts of misconduct committed by him years ago is admissible in evidence as indicating the formation of habit, but such evidence, unless supplemented by evidence of misconduct committed by the defendant within a year or so before the institution of the proceeding under S. 110 Cr. P. C., cannot justify the making of the order under S. 118, Cr. P. C. When the person against whom proceedings under S. 110, Cr. P.C., are instituted for being a habitual offender, is a well known resident of the city, his fellow-citizens, though not living in his immediate neighbourhood, are competent witnesses to prove his general repute. 11 C.W.N. 789.

——**S. 110, Cl. (e)—Acts of oppression by Zemindar—Abetment of offences involving a breach of the peace—Residence—Jurisdiction.**

Where a Zemindar has been habitually abetting other people to commit offences involving a breach of the peace, in order to compel the raiyats to pay him enhanced rents:

Held, that such abetment brings the zemindar within the scope of Cl. (*e*) of S. 110. Where a person has a residential house within the jurisdiction of the Magistrate and he occasionally, if not often, goes there for the purpose of his business the Magistrate has jurisdiction over him for the purposes of S.110, provided the acts which call for the proceedings under the section are committed by him while he so resides. (1904) 31 C. 419.

12. Fresh Proceedings.

——**S. 110—Fresh Proceedings—Fresh evidence.**

Where the accused was run in under S. 110 and was discharged on a finding that the prosecution had entirely broken down and proceedings were again started against him only seven months afterwards, under the same section:

Held, that under these circumstances it was obviously the duty of the Courts to be very careful to see that there was sufficient evidence of accused's conduct after the conclusion of the previous proceedings to justify fresh proceedings being started against him after so short an interval. 26 O.C. 242=73 Ind. Cas. 261=24 Cr. L.J. 565=A.I.R. 1924 Oudh 84.

——**S. 110—Further enquiry.**

Merely because the District Magistrate takes a view of the evidence on record in any proceedings different from that taken by the trying Magistrate that is no reason for ordering further enquiry under S. 437 especially when there is no suggestion that further evidence is available or should be taken. 71 Ind. Cas. 528=44 All. 691=24 Cr. L. J. 176=A.I.R. 1922 All. 429.

——**S. 110**—An order of discharge in the proceeding under S. 110 of the Act is no bar to subsequent proceedings under the section, if in future it becomes necessary to take them. 71 Ind. Cas. 528=44 All. 691=24 Cr. L. J. 176=A.I.R. 1922 All. 429.

——**S. 110—Fresh proceedings—Grounds for.**

When after the expiration of the period of a bond for good behaviour taken under S. 110, Cr. P. Code, fresh proceedings are taken against the accused, such proceedings must be confined to facts and circumstances alleged

against him after release from his last security. 19 C.W.N. 223=16 Cr. L. J. 312=28 Ind. Cas. 648.

——Ss. 110 et seq.—Fresh proceedings after discharge—Security for good behaviour—Discharge by First-Class Magistrate—Fresh proceedings by District Magistrate on the same record.

Even though a person has once been called upon to show cause why he should not give security for good behaviour and discharged by a First-class Magistrate, it is competent to a Magistrate upon the same record and without fresh information to institute proceedings again and require security for good behaviour. (1901) A.W.N. 206=24 A. 148.

——Ss. 110, 437—Re-opening of proceedings—Release of a person in a proceeding under S. 111—Applicability of S. 437 to such proceedings—S. 437, Scope of.

S. 437 of the Code of Criminal Procedure is the only law which authorizes a Magistrate to re-open proceedings in which a person has been released. The further enquiry which can be ordered under S. 437, Cr. P. C., is into a complaint which has been dismissed or into the case of any accused person who has been discharged. Proceedings under S. 110 of the Code of Criminal Procedure can neither be regarded as on a complaint nor can they be regarded as a case in which any accused person had been discharged. The terms 'accused person' and 'discharged' in S. 437 refer to a person accused of an offence who has been discharged of a charge of that offence within the terms of Ch. XIX of the Code. (1900) 6 C W.N. 163.

13. Habitual offender.

——S. 110—Habitual offender—Previous order under S. 110, Cr. P. Code.

The fact that a person has been bound over previously under S. 110, may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. The value to be attached to the proof of a previous order under S. 110, is of course, a question for the Court to consider. 51 All. 275=1929 Cr. C. 346=125 Ind. Cas. 19=31 Cr. L. J. 755=A.I.R. 1929 All. 650.

——S. 110—Habitual offender—Who is.

Habit has to be proved by an aggregate of facts and it would be straining the provisions of S. 110, if it were to be held that a man being suspected mainly by the police in four thefts after he had been acquitted on a charge of theft amounted to sufficient evidence of habit. 109 Ind. Cas. 510=10 A.I. Cr. R. 355=10 L.L.J. 317=29 Cr. L. J. 574.

——S. 110—Guilty of substantive offence.

S. 110 does not provide for any person being called upon to furnish security on the ground that he was by habit a dacoit and belonged to a gang of dacoits. Being a member of a gang of dacoits is a definite offence defined and punishable under the Penal Code and it cannot be permitted that instead of the specific charge being tried in a proper Court on a proper evidence, the person should be indirectly punished by proceedings under the preventive sections. 23 A. L. J. 18=26 Cr. L. J. 746=6 L.R.A. Cr. 45=86 Ind. Cas. 282=A.I.R. 1925 All. 250.

——S. 110—Proof of.

Evidence of general repute is only admissible under S. 117 Cr. P. Code, to prove that a person is a habitual offender under S. 110, but not to prove a charge under S. 110 (*f*) of being of desperate and dangerous character. 13 Bur. L.T. 157=62 Ind. Cas. 188=22 Cr. L. J. 492.

——S. 110—Habitual offender—Evidence.

The mere circumstances that a person is found under a bush for the whole night and has property which he does not account for is not sufficient to make him a habitual offender and to justify an order under S. 110 of the Cr. P. Code. (1911) 1 M.W.N. 355=12 Cr. L. J. 359=10 Ind. Cas. 959.

——S. 110 (c)—Harbouring thieves—Non-liability of manager of a shrine freely open to public, where thieves resort—Previous convictions of gambling and of offences not relating to property.

The manager of a public shrine, which is not under his exclusive control and which is freely open to the public, cannot be asked to furnish security for good behaviour under S. 110 (*c*) though some thieves have been arrested there, on several occasions and it is generally used as a gambling resort, and among the people who come up there, are a number of thieves and bad characters and though the manager himself has nine convictions against him, none of which has anything to do with property and six of which are for gambling, The shrine is not his house and he cannot be said to harbour thieves, such like convictions cannot fairly be raked up against a person involved in the proceedings under the said S. 110 (c). 37 P.W.R. (Cr.) 1910=11 Cr. L. J. 603=8 Ind. Cas. 249.

——S. 110 (c)—Harbouring an offender.

The acts which amount to harbouring must be done with the intention of screening the offender from legal punishment or of preventing him from being apprehended. If a man from mere motives of humanity, and without any intention of enabling the fugitive to escape from justice, were to give food to a man who was starving, or surgical assistance to one who was wounded even with full knowledge of his character, he commits no criminal act. The 'protecting or harbouring' in S. 110 (*c*) Cr. P. C., seems to contemplate assistance of the former kind, and not of the latter. The clause is designed to meet the case of the professional receiver of stolen property who assists the thief after the theft by relieving him and encouraging him, protecting him from discovery and arrest and helping him to dispose of his stolen property. It does not apply to a mere associate of suspected thieves, or of persons who have at some previous date been convicted of theft and have served their sentences. (1910) 1 U.B.R. 4=11 Cr. L. J. 490=7 Ind. Cas. 462.

——S. 110—Reputation—Good behaviour—Habitual thief—Desperate character—Specific acts.

A charge under S. 110, Cr. P. C., should be proved by definite and clear evidence of the character of the accused, and not by general evidence of reputation. The accused should be proved to be a desperate and dangerous character by evidence of persons, who of their own personal knowledge can speak to specific acts by him, showing him to be of such character. The evidence of persons, however respectable, who have no personal knowledge of the accused ought not to be admitted to prove his character. (1901) 29 C. 779.

14. Joint Trial.

——S. 110—Joint trial—Legality—Proceedings under against several persons—Joint inquiry or trial—Propriety and legality—Proper procedure—Rule.

It is very hard—almost oppressive—to any set of persons to charge them together unless the whole of the evidence against all of them is precisely the same, and a joint trial is not generally permissible unless there is evidence of something in the nature of a conspiracy. Under S. 110, Cr. P. Code, where proceedings are instituted, every person must ordinarily be tried separately for the offences or charges enumerated against him and a joint inquiry is entirely out of the question, when at least one of some of the charges are that two of the persons are so desperate and dangerous as to render their being at large without security hazardous to the

community. The characteristic of being a desparate and dangerous character is a personal attribute and should be proved separately against every individual charged with that attribute. There certainly can be no such intimate connection between two or more individuals in regard to their individual characteristics as to render them liable to a joint inquisition. A.I.R. 1923 All. 35; A.I.R. 1938 Mad. 35; A.I.R. 1923 Pat. 104, foll. I.L.R. (1949) Cut. 751.

——**Ss. 110, 117—Penal Code (1860), S. 401—Joint trial of habitual offenders—Legality of—Difference between Ss. 110, 117, Criminal P. C., and S. 401, I.P.C.**

Reading cl. (*a*) of S. 110 with sub-s. (5) of S. 117, Cr. P.C., it is clear that, one or more persons, believed to be habitually committing one or more offences, mentioned either jointly or severally, can be proceeded against under S. 110, jointly or severally, notwithstanding that their activity may fall within the purview of S. 401, I.P.C. The difference between the two sections is that, under S. 401, it is necessary to prove that several persons have associated together, forming a gang for the purpose of habitually committing theft or robbery ; and their activities, in fact, materialised into active robberies and thefts or attempts at such offences ; whereas S. 110, Cr. P. C., being only a preventive section, evidence of strong suspicion and evil repute that such person or persons engage in criminal activities is enough to render them liable to be bound down to be of good behaviour. Section 401 is punitive ; while S. 110 is preventive. 227 Ind. Cas. 204=47 Cr. L. J. 1919=1946 O.A. (C.C.) 227=1946 O.W.N. (C.C.) 316=A.I.R. 1947 Oudh 86.

——**S. 110**—When it is alleged that a person is in the habit of committing theft in association with other persons as members of a gang of thieves, the Magistrate is at liberty in his discretion, to deal with the case of all such persons in the same inquiry. A.I.R. 1934 Rang. 121=12 Rang. 169=35 Cr. L. J. 1257=151 Ind. Cas. 205.

——**Ss. 110, 122, 123, 406-A—Order under S. 110—Interference in revision—Powers of High Court—Evidence in the nature of conspiracy or acting in concert—Joint trial.**

Where there is evidence in the nature of a conspiracy or acting in concert, the legality of a joint trial depends on what is alleged for the prosecution. A man of "desperate and dangerous character" in cl. (*f*) of S. 110, means a man who has reckless disregard of the safety of persons and the property of his neighbours.

A joint trial is the proper procedure, in the case of persons acting in concert—persons who are associates and confederates, so as to call into operation the provision contained in S. 117 (5) of the Cr. P. C. In cases where proceedings are taken jointly against more persons than one under S. 110, the Magistrate is required to come to separate findings as regards each of the persons charged individually.

Where the subject-matter of the charge against the petitioners was that they were so desperate and dangerous as to render their being at large without security hazardous to the community, as mentioned in S. 110 (*f*) of the Cr. P. C., a joint enquiry is the proper procedure to be followed. A Joint trial is not only permissible but a joint trial is the only procedure that could be followed in the case. A.I.R. 1934 Cal. 482=35 Cr. L. J. 952=61 Cal. 588=149 Ind. Cas. 460.

——**Ss. 110, 112—Two persons alleged to be members of gang of habitual thieves—One order under S. 112—Joint trial.**

Where two persons were alleged to be members of a gang of habitual thieves and robbers and were always associated jointly in the commission of thefts, burglaries and robberies, a Magistrate acts properly in issuing one order against both of them under S. 112, Cr. P. C., calling upon them to show cause why they should not be bound over to be of good behaviour under S. 110 and the joint trial of the two is perfectly legal. A.I.R. 1933 Oudh 251=10 O.W.N. 325=34 Cr. L. J. 852=144 Ind. Cas. 944.

——**S.110 (a), (d) and (f)**—A joint trial of several persons charged under S. 110, is not illegal if the evidence disloses that they belong to the same gang. 12 Pat. L.T. 880.

——**S. 110—Joint trial.**

Joint inquiries under S. 117 are not illegal even where part of the inquiry is under Cl (*f*) S. 110. The evidence of reputation admitted against the several persons should of course not be against each accused separately but against them all together. A.I.R. 1925 Mad. 189 and 27 Cal. 781, Not foll.; A.I.R. 1923 Cal. 35 Rel. on. 1930 M.W.N. 1045=1930 Cr. C. 1149=32 M.L.W. 743= A.I.R. 1930 Mad. 873. 128 Ind. Cas. 449=53 Mad. 870=59 M.L.J. 853.

——**S. 110—Where action is also taken under Cl. (f).**

Joint trial must be condemned as prejudicial to the accused, where proceedings are taken against the accused not only for conduct coming within S. 110, Cls. (*d*) and (*e*) but also under Cl. (*f*) for the reason that they are so desperate and dangerous as to make their being at large without security hazardous to the community, and where the accused are tried jointly and evidence pertaining exclusively to the nefarious acts of each of the accused is let in addition to the evidence as to the events in which it is alleged that they are associatad together and the Magistrate passes an order against them on a consideration of the entire evidence thus introduced into the record against all the accused. 86 Ind. Cas. 49=26 Cr. L. J. 673=47 M.L.J. 689=1925 M.W.N. 57=A.I.R. 1925 Mad. 189.

——**S. 110—Committing violence jointly.**

Where there is evidence of joint acts committed by the two accused and some of the evidence applies to one and some to the other, the joint trial of the two accused under S. 110 is not illegal. 88 Ind. Cas. 282=26 Cr. L. J. 1114=A.I.R. 1925 Nag. 381.

——**S. 110—When can be allowed.**

It is very hard, to any set of defendants to charge them together, unless the whole of the evidence against all of them is precisely the same and they are to be dealt with on the same facts, and compel them to fight each his own individual battle during a prolonged enquiry, a great deal of which concerns for the moment only one out of the general body. 71 Ind. Cas. 865=20 A.L.J. 881=45 All. 109=24 Cr. L. J. 257=A.I.R. 1923 All. 35.

——**S. 110—Association of accused.**

Where there is an association of several persons belonging to different villages at several places for committing offences their joint trial in a proceeding under S. 110, Cr. P. Code, is not bad. 64 Ind. Cas. 842=23 Cr. L. J. 58 (Cal.).

——**Ss. 110 and 234—Joint trial—Misjoinder—Test of—Misconduct of member of family.**

Whenever in security proceedings a plea of misjoinder is raised, the test to be applied is whether there has been habitual association between the persons charged in respect of the conduct alleged in the complaint. The mere fact that the persons charged are members of undivided family would not by itself render each member liable for the misconduct of any other member and where they are living separately there is not even the presumption that one member knew and assented to the misdeeds of the other. 8 L.W. 461=(1918) M.W.N. 751=19 Cr. L. J. 905=47 Ind. Cas. 277.

——Ss. 110 and 122—Joint trial—Magistrate's duty.

In a joint trial of several persons under S. 110, it is incumbent on the Magistrate to exercise care and caution and to insist that definite evidence be given against each person charged. 15 O.C. 263=13 Cr. L. J. 760=17 Ind. Cas. 72.

——S. 110—Joint trial.

In cases under S. 110, Cr. P. Code, each accused can claim an entirely independent examination of his own case: to set up facts against an accused of dates older than the previous security bond is illegal. 4 P.R. Cr. 1910=10 Cr. L. J. 591=25 P.W.R. Cr. 1909=149 P.L.R. 1909=168 P.L.R. 1910=4 Ind. Cas. 432.

——Ss. 110 and 117 (5) and Penal Code XIV of 1860, S. 401.—Legality of joint trial of persons believed to be habitually committing offences.

It is clear from a reading of Cl. (*s*) of S. 110 with sub-S. (5) of S. 117, Cr. P. Code, that one or more persons believed to be habitually committing one or more of the offences mentioned either jointly or severally can be proceeded against under S. 110, Cr. P. Code, jointly or severally notwithstanding that their activity may fall within the purview of S. 401, I. P. Code. 227 Ind. Cas. 204=1946 A. Cr. C. 126=1946 A.W.R. (C.C.) 227=1946 O.W.N. 316=1946 O.A. (C.C.) 227=A.I.R. 1947 Oudh 86=47 Cr. L. J. 1019.

15. Jurisdiction.

——S. 110—Residence within local limits, if necessary.

Section 110, Cr. P. C., does not say that the person must be residing within the local limits of the jurisdiction of the Magistrate concerned. There is no justification for interpreting the words "within the local limits" as meaning "residing within the local limits".

Where the alleged acts of person proceeded against (threats to and intimidation of witnesses) which have led to the proceedings against him under S. 110, Cr. P. C., were acts committed within the jurisdiction of the Sub-Divisional Magistrate of Rohri, and the apprehension of the repetition of such acts also related to persons within the jurisdiction of that Sub-Divisional Magistrate :

Held, that the Sub-Divisional Magistrate of Rohri could proceed against the person under S. 110. A.I.R. 1944 Sind 106=45 Cr. L. J. 532=I.L.R. (1943) Kar. 514=212 Ind. Cas. 114.

——S. 110, refers merely to place where person proceeded against was, when information was received.

A Magistrate, in order to have jurisdiction, must receive information that the person to be dealt with is within the limits of his jurisdiction. Section 110, Cr. P. C., cannot grammatically be read as referring to the place where the acts on which an order is to be based were committed. The words of the section do not refer to the place where the person proceeded against became a robber or a receiver of stolen property and so forth ; it refers merely to the place where he was when the information was received. When it comes to proving the truth of the information no doubt the words of the section must be construed in a common sense manner, and a person can be said to be within the jurisdiction of a Magistrate if he was ordinarily within the jurisdiction of the Magistrate. The mere fact that on the particular date on which the information was received he had gone temporarily out of the jurisdiction would not prevent the section from applying. A.I.R. 1940 Bom. 204=42 Bom. L. R. 353=41 Cr. L. J. 686=I.L.R. (1940) Bom. 397=188 Ind. Cas. 830.

——Ss. 110 and 123 (6)—Imprisonment—Default of furnishing security.

S. 110, Cr. P. Code, being essentially a preventive rather than a punitive provision, the imprisonment awarded in default of furnishing security should in ordinary cases be simple unless the accused is habitual thief, house-breaker or the like, in which case the imprisonment may be rigorous. 42 All. 563=18 A.L.J. 640=2 U.P. L.R. (A) 159=21 Cr. L. J. 580=57 Ind. Cas. 100.

——Ss. 110, 112—Ch. VIII—Information, kind of, on which Magistrate can act.

Magistrates are left a very wide discretion as to the kind of information upon which they may act in instituting proceedings under Ch. VIII of the Code, and they are not bound to disclose its source. In. S. 110 of the Code, the Legislature has advisedly adopted the expression "any person within the local limits" to exclude the necessity of proving anything approaching permanent residence and to leave it in the power of the Magistracy to deal with what are perhaps the most dangerous habitual criminals who wander from place to place and have no well-known residence where the police or the Magistracy could be sure at any time of finding them. (1907) 9 Bom. L. R. 244.

——S. 110—Inquiry held outside the local limits of the Magistrate's jurisdiction—Proceedings taken when the person is outside such jurisdiction.

An inquiry under S. 110, Cr. P. C., should not be conducted by a Magistrate at a place which is outside the local limits of his jurisdiction and where he has no power to conduct any proceedings. The person against whom proceedings are taken, under S. 110, Cr. P. C., must be, at the time when such proceedings are taken, within the local limits of the jurisdiction of the Magistrate taking such proceedings. Non-compliance with these provisions vitiate the proceedings as made without jurisdiction and the order passed must be set aside. (1905) 3 C.L.J. 195.

——S. 110—Proceedings under—Magistrate's jurisdiction to initiate—Power of Superior Court to examine materials upon which it is based.

Magistrates have complete jurisdiction to initiate proceedings under S. 110, Cr. P. C., provided that they are satisfied that there are sufficient materials for doing so, but in each case, the Superior Court will examine, if necessary, the materials upon which the proceedings are based. A.I.R. 1938 Pat. 533=19 P.L.T. 542=4 B.R. 767=39 Cr. L. J. 811=176 Ind. Cas. 849.

——S. 110—Residence within jurisdiction of person bound down under—Whether necessary to give jurisdiction to Magistrate.

The words of S. 110, Cr. P. C., do not mention residence within the jurisdiction of the Magistrate but are "any person within the local limits of the Magistrate's jurisdiction". Consequently, where a person who is bound down under S. 110, is within the jurisdiction of the Magistrate, this is sufficient to give the Magistrate jurisdiction over him. The residence of the person is immaterial. 165 Ind. Cas. 648=17 Lah. 453=38 P.L.R. 905=38 Cr. L. J. 144.

——S. 110—To start proceedings under S. 110, on receipt of information or on a petition received through post is a non-judicial act and not a delegation of powers. 1934 M.W.N. 695.

——S. 110—Jurisdiction—Date of Report.

Person proceeded against under S. 110 at Barisal was in a jail in Calcutta on the date of the making of report against him by the police, on which report the inquiry was founded :

Held, that the persons proceeded against being outside the local limits of the jurisdiction of the Magistrate of Barisal he had no jurisdiction to hold the proceedings. 111 Ind. Cas. 394=48 C.L.J. 143=29 Cr. L. J. 842=11 A.I.Cr.R. 202.

——S. 110—Permanent residence.

There is nothing in S. 110 to support the plea that the person complained against should be a permanent resident within the jurisdiction of the Magistrate in whose court proceedings are taken. (36 Mad. 96, Foll.) 98 Ind. Cas. 109=20 S.L.R. 310=27 Cr. L. J. 1261=A.I.R. 1927 Sind 59.

——S. 110—Convenience.

The fact that it would be inconvenient for the person against whom proceedings have been started under S. 110 to summon witnesses from the place of his residence is no ground for transferring the case to the Court within whose jurisdiction such a person resides. 98 Ind. Cas. 109=20 S.L.R. 310=27 Cr. L. J. 1261=A.I.R. 1927 Sind 59.

——S. 110—Where crime is practised.

Where proceedings under S. 110, Criminal Procedure Code, were instituted against a person in the Cantonment Magistrate's Court in the local limits of whose jurisdiction he lived and carried on a career of crime:

Held, that S. 110 has left the question of permanent residence open and it is not the question of permanent residence but of where the man practises his career of crime that will decide jurisdiction. 65 Ind. Cas. 438=20 A.L.J. 49=23 Cr. L. J. 86=A.I.R. 1922 All. 86.

——S. 110, 112, and 115—Jurisdiction—Persons outside local jurisdiction—Police report—Order under S. 112 not accompanying warrant—Irregularity—General repute.

It is legal for a Magistrate in charge of a Sub-division of a district to take proceedings under S. 110 of the Cr. P. Code, upon a police report in respect of persons residing outside his local jurisdiction, irrespective of how the police report came before him. Where a copy of the order made under S. 112 of the Cr. P. Code, does not accompany the warrant as required by S. 115 but the order is read over to the person affected thereby and there is nothing to show that there was any prejudice, the omission to attach a copy of the order to the warrant is a mere irregularity not fatal to the trial. To establish a general repute for the purposes of S. 110 of the Cr. P. Code, the evidence of the investigating Police Officer is inadmissible and irrelevant. 1 Pat. L. T. 632=21 Cr. L. J. 321=55 Ind. Cas. 593.

——S. 110—Jurisdiction—Person not residing but found within the jurisdiction—Initiation of proceedings.

It is enough if a person proceeded against under S. 110 is found within the local limits of the Magistrate taking action under the section. He need not reside or be arrested within such limits. 3 Cal. L. J. 195; 43 Cal. 153; 26 Mad. 96; 39 All. 139, Foll. 20 Cr. L. J. 133=23 C.W.N. 100=30 C.L.J. 173=49 Ind. Cas. 165.

——S. 110—Jurisdiction—Arrest—Magistrate.

A person residing within the local limits of a Magistrate's jurisdiction can be proceeded against by such Magistrate though he was arrested in another jurisdiction in connection with another proceeding. 9 Bom. L. R. 244; 35 M. 96, Foll.; 37 C. 993; 6 C.L.J. 195, Diss. 10 Bur. L. T. 44=8 L.B.R. 378=17 Cr. L. J. 319=35 Ind. Cas. 495.

——S. 110—Jursidiction—Foundation of.

An order under S. 110 by a Magistrate who when the investigation commenced was a Sub-Divisional Magistrate but had ceased to be so on the date of passing the order is invalid. 17 Cr. L. J. 141=33 Ind. Cas. 317.

——S. 110—Jurisdiction—Person in local jail.

A person in jail is also a person under the jurisdiction of the Magistrate if the jail is in his jurisdiction. 17 Cr. L. J. 88=9 Bur. L. T. 39=8 L.B.R. 353=32 Ind. Cas. 680.

——S. 110—Jurisdiction—Foundation of.

A Magistrate has no jurisdiction to act under S. 110 unless he has sufficient information to make an order in compliance with S. 112. 12 A.L.J. 336=15 Cr. L. J. 696=26 Ind. Cas. 144.

——Ss. 110 and 121—Jurisdiction—Conviction in Native State.

The conviction of an accused in a Native State does not, in Br. India, establish the commission of the offence. The phrase "offence punishable with imprisonment, wherever it may be committed" in S. 121 includes the dishonest receipt of stolen property in a Native State by a Br. subject. Commission of an offence in a Native State against a Br. subject is a breach of the security bond furnished under S. 110. 28 P.R. 1910 Cr.=199 P.L.R. 1910=45 P.W.R. 1910, Cr.=11 Cr. L. J. 635=8 Ind. Cas. 383.

——S. 110—Jurisdiction of District Magistrate to order further inquiry.

A District Magistrate has no power in setting aside on appeal an order for furnishing security for good behaviour to order further inquiry. (1905) 33 C. 8.

——S. 110—Jurisdiction—Good behaviour—Security—Residence outside jurisdiction.

A Magistrate has no jurisdiction to require security for good behaviour under S. 110, Code of Criminal Procedure, from persons who do not reside within his local jurisdiction, but who, it was alleged, habitually committed theft, robbery and house-breaking within such limits. It is only when a person residing within such limits is of such bad repute that a Magistrate is competent to take action under that section. (1900) 5 C.W.N. 29.

——S. 110—Landlord—Tenants of bad character—Lending money and settling disputes—Association.

The facts that a landlord has tenants of bad character, that he lends money or paddy when the latter are in difficulty and because they are his tenants, and that he settles disputes between two men, one of whom is a thief and the other is not, do not subject him to a proceeding under S. 110 of Cr. P. C. The mere association with men of bad character is not sufficient unless the association is to commit theft or dacoity, to bring him under S. 110 of the Cr. P. C. (1907) 6 C.L.J. 711.

——S. 110—Object and scope of—Person changing his place of residence at the time when complaint is made against him—Jurisdiction.

The object of S. 110, Cr. P. Code, is preventive and if an accused person has gone outside the jurisdiction of a Magistrate though temporarily at the time when the complaint was made, there is no ground left for any proceedings under that section to be taken against him by such Magistrate. I.L.R. (1948) All. 139=1947 A.L.J. 624=1948 A.W.R. (H.C.) 9=1948 O.A. (H.C.) 9=A.I.R. 1948 All. 185=49 Cr. L. J. 194.

——S. 110—Order under—Passing of—Test.

The problem which faces a Court in passing orders under S. 110, Cr. P. Code, is to see whether upon the evidence in a particular case against a particular person it can be said that he is so desperate and dangerous as to render his remaining at large without security hazardous to the community. 1948 A.L.J. 332=1948 A.W.R. (H.C.) 233=A.I.R. 1949 All. 12=50 Cr. L. J. 22.

16. Notice.

——S. 110—Notice of—Specific offence—If within the section.

When charge in the notice under S. 110 amounts to definite and specific offence, preventive sections could

not be used. A.I.R. 1925 All. 250, Foll. ; 119 Ind. Cas. 571=10 L.R.A.Cr. 127=1929 A.L.J. 981=30 Cr. L. J. 1086=12 A.I.Cr.R. 208=1929 Cr. C. 449=A.I.R. 1929 All. 813.

——S. 110—Notice—Form of.

That "you possess a bad reputation in the vicinity of your village" is not a proper notice under S. 110 and cannot be said to be the basis of an order under this preventive section. 119 Ind. Cas. 571=10 L.R.A.Cr. 127=1929 A.L.J. 981=30 Cr. L. J. 1086=12 A.I.Cr.R. 208=1929 Cr.C. 449=A.I.R. 1929 All. 813.

——S. 110—Notice—Form of.

That you "have only a nominal means of livelihood except the proceeds of theft and burglary" is not a proper notice under S. 110. 119 Ind. Cas. 571=10 L.R.A. Cr. 127=1929 A.L.J. 981=30 Cr. L. J. 1086=12 A.I. Cr. R. 208=1929 Cr.C. 449=A.I.R. 1929 All. 813.

——S. 110—That you "have been strongly suspected to have committed the following burglaries" cannot be the ground of proceedings under S. 110. A.I.R. 1928 All. 351, Foll. 119 Ind. Cas. 571=10 L.R.A.Cr. 127=1929 A.L.J. 981=30 Cr. L. J. 1086=12 A.I.Cr.R. 208=1929 Cr. C. 449=A.I.R. 1929 All. 813.

——S. 110—A joint notice to show cause to more than one person is undesirable. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L.R.A. Cr. 66=11 A.I.Cr.R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—Essentials of.

Merely informing an accused person that he was suspected to be a habitual thief is not sufficient notice under S. 112 of the Code. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. Accused were arrested as suspected habitual thieves. The Magistrate fixed a date for the production of evidence with the object of issuing a notice under S. 112. On the date fixed, after hearing prosecution evidence, he at once called upon the accused to enter upon their defence to a charge under S. 110, *held*, the procedure was bad and the proceedings must be set aside. It is only after the Magistrate has made the order required by S. 112 which is really a notice in writing, that the actual hearing under S. 110 can by law take place at all. 60 Ind. Cas. 420=42 All. 646=18 A.L.J. 673=22 Cr. L. J. 228=L.R.I.A. 182 (Cr.).

——Ss. 110 and 112—Notice—Contents of—Condition precedent to proceedings.

Merely informing an accused person that he was suspected to be a habitual thief is not sufficient notice under S. 112 of the Code. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. Accused were arrested as suspected habitual thieves. The Magistrate fixed a date for the production of evidence with the object of issuing a notice under S. 112. On the date fixed, after hearing prosecution evidence he at once called upon the accused to enter upon their defence to a charge under S. 110 ; *held*, the procedure was bad and the proceedings must be set aside. It is only after the Magistrate has made the order required by S. 112 which is really a notice in writing, that the actual hearing under S. 110 can by law take place at all. A Magistrate should not detain a person under S. 110 unless he has the information upon which he can make the order required by S. 112. 42 All. 646=18 A. L.J. 673=60 Ind. Cas. 420=22 Cr. L. J. 228.

——Ss. 110 and 439—Notice—Omission of detail—No surprise—No irregularity.

If in a notice to an accused person under S. 110, Cr. P. C. it is not possible to give the detailed information as to the nature of the evidence for the prosecution, the omission to do so is not an irregularity sufficient to validate the proceedings, especially if the accused had cross-examined at great length the witnesses of the prosecution and had not been taken by surprise. 20 Cr. L. J. 436=51 Ind. Cas. 260.

——S. 110—Notice—Form and Contents.

Notice issued under S. 110 should sufficiently indicate the time and place of the facts charged and give sufficient details which would enable the accused to know what he is to meet though a list of the witnesses need not be given. They should not merely reproduce the clauses of the section. But if the defect has not prejudiced the accused, the High Court will not quash the proceedings in revision. 8 L.W. 461=(1918) M.W.N. 751=19 Cr. L. J. 905=47 Ind. Cas. 277.

——Ss. 110 and 439—Notice—Defective proceedings—Revision.

The Chief Court can revise the interiocutory order passed by a Magistrate under S. 112, Cr. P. C., if sufficient grounds are made out for interference in revision. 22 C. 131 ; 20 B. 543 ; 17 P.W.R.Cr. 1910, Foll. A notice is bad in law and cannot form the basis of proceedings under S. 110, if it does not give the substance of the information received as required by S. 112 of the Code, or purports to issue under the Old Code or requires more security than what is entered in the original order and is not personally served upon the person to whom it is given. 18 P.W.R. (Cr.) 1910=11 Cr. L. J. 388=6 Ind. Cas. 626.

——Ss. 110 and 439—Notice—Defective notice—Chief Court's power to revise and quash defective proceedings in a pending case.

The Chief Court is competent, at any stage of a criminal case, to interfere and exercise revisional powers generally and particularly when the proceedings are defective on any of the following grounds that (1) The accused has been twice acquitted on similar facts and evidence, and nothing new is urged against him. (2) The original order is only initialled and not signed by the Magistrate and (3) neither the amount nor the period of the security nor the full particulars of bad livelihood are mentioned therein. 17 P.W.R. 1910 (Cr.)=11 Cr. L. J. 387=6 Ind. Cas. 624.

——S. 110—What the notice should contain—Meagre information.

It is not necessary to state more than will show the person against whom proceedings are taken the particular sub-section on which the Court proposes to proceed against him. The order need not show the nature of the case against him. If, for example, a Magistrate receives information from a police-officer, that a certain person is a habitual thief, the Magistrate has a right to proceed to the next stage and issue a notice to him. He may be unwise in taking such action without carefully checking that information ; but he has a legal right to take such an action ; and if his information is meagre, the substance of his information would be meagre. Nevertheless, it is sufficient for him to state it to make an order under S. 112 legal. If he has taken action on insufficient information, the proceedings may on the evidence, be found to have been without justification; no ill results will follow from the adoption of this view, and irregularity if any, is curable under S. 537. 103 Ind. Cas. 792=2 Luck. 157 =28 Cr. L. J. 744=8 A.I.Cr.R. 394=6 O.W.N. 1202=A.I.R. 1927 Oudh 306.

17. Power and Duty of Court.

——S. 110—Person proceeded against, if should be ex-convict—Finding that person is habitual criminal, if can be based on criminal case against him in which he was exonerated.

A person against whom proceedings under S. 110, Cr. P. C., are taken, need not be ex-convict.

In proceedings under S. 110, the Court is not warranted in basing its finding that the person proceeded agains

is a habitual criminal on the evidence gathered from the proceedings in those cases, when he was exonerated in respect of the charges laid against him in those proceedings. A.I.R. 1938 Mad. 591=1938 M.W.N. 313 =47 M.L.W. 428=I.L.R. (1938) Mad. 720=39 Cr. L. J. 898=177 Ind. Cas. 589.

——S. 110—Duty of Court—Previous conviction, whether necessary for passing order of security—Evidence produced by prosecution must be considered and weighed.

A previous conviction is not necessary for proceedings under S. 110, Cr. P. C. There is no such provision in the law itself which on the other hand lays down in S. 117 (4) that the fact that the man is an habitual offender can be proved by evidence of general repute or otherwise. Before passing any order under S. 110, therefore, the Magistrate must consider and weigh the evidence produced by the prosecution to prove that the person against whom the proceedings are instituted was a habitual thief even if there is no evidence that such person had any previous conviction. A.I.R. 1938 Lah. 428=40 P.L.R. 222=39 Cr. L. J. 599=175 Ind. Cas. 522.

——S. 110—Security proceedings—Court's duty—Magistrate limiting the number of defence witnesses—Magistrate should not act as prosecutor.

In cases arising out of security proceedings, the Courts ought to approach the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused. A Magistrate has no sanction in law and no right to arbitrarily limit the number of witnesses whom the accused wants to examine in his defence. A person who is called upon to furnish security under S. 110, Cr. P. C., is entitled like other accused persons to have his full say in the matter and there is no warrant in law for calling upon such a person to play the role of a Judge and to decide for himself who are his "best witnesses" and examine only such witnesses in his defence. When trying a case under S. 110, the Magistrate is required by law to function as a judicial officer, and public policy dictates that nothing should be done in the trial of such cases which may lay the proceedings open to the comment that the Magistrate was both in the position of a prosecutor and a Judge. In the trial of such cases, like other cases, the procedure prescribed by law must be faithfully followed, the evidence must be judicially considered and findings based on judicial principles must be recorded. A.I.R. 1934 All. 735=36 Cr. L. J. 33=3 A.W.R. 655= 152 Ind. Cas. 120.

——Ss. 110, 123 (2), 362—Presidency Magistrate—Record of evidence—Detention in custody on failure to furnish security—Association with bad characters proved and reputed previous conviction.

S. 362 of the Criminal Procedure Code does not apply to cases under S. 110 where the accused has failed to furnish security and has been detained in prison pending reference to the High Court under S. 123 (2). The Presidency Magistrate must in such a case record the evidence though not as fully as a mofussil Magistrate should do. Evidence of reputation of associating with bad characters, must be of association with proved bad characters, not merely reputed ones. Previous convictions are not substantive evidence in a case under S. 110 of the Criminal Procedure Code though they may have an effect in deciding for what length of time the accused is to be bound down. (1908) 9 C.L.J. 439=13 C.W.N. 318=2 Ind. Cas. 651=10 Cr. L. J. 122.

——S. 110—Previous acquittal for dacoity—Proceeding to bind down on failure of prosecution, if legal.

Where a person has been tried for dacoity and acquitted, he ought not to be proceeded against under S. 110, Cr. P. C., on matters deposed to and disbelieved at the trial for dacoity. A person acquitted of dacoity cannot be bound over under S. 110, Cr. P. C., on the evidence merely of persons stating that they began to suspect him since the dacoity case. (1906) 11 C.W.N. 129.

——S. 110—Duty of High Court in revision.

In cases under S. 110, Cr. P. C., it is not the duty of the High Court sitting in revision to weigh the evidence of one side or the other but only to see whether the Court below considered the case in a fair way having regard to the interest not only of the prosecution but also of the accused. A.I.R. 1934 Oudh 49=35 Cr. L. J. 403= 11 O.W.N. 84=147 Ind. Cas. 388.

——Ss. 110 and 406—Evidence—Not properly dealt with—Judgment of Lower Court—Very sketchy—Revision.

The High Court will interfere in revision with an order of the Dt. Magistrate in an appeal under S. 110 of the Code, if it finds that the judgment is very sketchy and that the evidence was not properly weighed. 13 Cr. L. J. 9=13 Ind. Cas. 102.

——S. 110—Proceeding under—Duty of Magistrate to consider defence case and record findings based on evidence.

Where the Magistrate in the lower appellate Court bound down the accused under S. 110, remarking that he agreed with the trial Court in its analysis of evidence produced in defence and that it was insufficient to rebut the strong and reliable prosecution evidence, in which some of the witnesses stated specific instances where the accused was suspected, *held*, that the Magistrate's way of dealing with the defence evidence, in the case was very unsatisfactory. The accused in such cases is entitled to have his defence thoroughly considered and proper findings recorded on the evidence. 1930 Cr. C. 1227= A.I.R. 1930 Lah. 1051=32 P.L.R. 92=129 Ind. Cas. 276.

——S. 110—Proceeding under—Means of punishment—Evidence of character—Admissibility of.

The High Court will not interfere on the merits with proceedings under S. 110 of Cr. P. C., provided that the court hearing the appeal under S. 406 shows in its judgment that it has really and not merely nominally considered the evidence on the record. When proceedings under S. 110 were started against a man soon after a discharge or acquittal from a charge of burglary of which he was suspected, it is always necessary to make it clear that the proceedings were not taken as a means of punishing in an indirect way a man who (the police were convinced) was guilty. The accused was continuously for a period of 10 or 11 years employed as a servant of the Tahsildar of Orai. He was suspected by his master of burglary and prosecuted. He was discharged and proceedings were taken against him under S. 110, Cr. P. C. He produced evidence to show that his character when he was in the service of his former masters was satisfactory.

Held, that such evidence was material to the case. (1909) 6 A.L.J. 487=2 Ind. Cas. 225=9 Cr. L. J. 528.

——S. 110—Reference—District Court.

S. 435 does enable a Sessions Judge to call for the record of proceedings under S. 110, Cr. P. Code, taken before an inferior Criminal Court within his jurisdiction and the other provisions of the Code enable him to refer the matter to the High Court. 73 Ind. Cas. 337= 21 A.L.J. 513=4 L.R.A. Cr. 126=24 Cr. L. J. 593= A.I.R. 1923 All. 596.

——Ss. 110 and 123—Reference to sessions—Order for security by Dt. Magistrate—Security furnished.

When a person called upon by a Dt. Magistrate to furnish security under S. 110 does furnish security as required, it is not necessary to send the record to the Sessions Judge for orders. S. 128 refers only to a case in which default is made in furnishing the security

required. 23 C. 121, Foll. 40 All. 39=15 A.L.J. 822=19 Cr. L. J. 2=42 Ind. Cas. 914.

18. Practice and Procedure.

(*See also* CRIMINAL P. C., S. 117.)

——S. 110—Plea of guilty.

An admission of guilt in a proceeding under S. 110 or in proceedings of a mere informal character cannot amount to a plea of guilty. A.I.R. 1936 Cal. 292=37 Cr. L. J. 818=163 Ind. Cas. 228 (2).

——S. 110—Prosecution or defence should not be hampered in any way—Defence should be allowed to cross-examine prosecution witnesses.

Neither the prosecution nor the defence in proceedings under S. 110, Cr. P. C., or enquiries of this kind, ought to be hampered in any way. It ought to be open to the defence to cross-examine the prosecution witnesses if they wish to do so. A.I.R. 1936 Cal. 292=37 Cr. L. J. 818=163 Ind. Cas. 228 (2).

——S.110—Notice under S. 110—Calling upon person to show cause why he should not execute bond—Notice made absolute—Sentence on default—Legality of—Proper procedure.

Where by notice under S. 110, a person is called upon to show cause why he should not execute a bond in Rs. 5,000 with two sureties to be of good behaviour for a period of three years, and the notice is made absolute, the Magistrate cannot sentence him to imprisonment on default. The case should be submitted to the Sessions Judge if the security is not furnished and if it becomes necessary to send the man to jail. A.I.R. 1935 Pesh. 80 =36 Cr. L. J. 1127=156 Ind. Cas. 659.

——S. 110—Section 30, Evi. Act, applies to a case where there is a proceeding under S. 110, Cr. P. C., against a number of persons, one of whom has made a confession implicating other persons whose conduct is also the subject of an enquiry. Further, as procedure to be followed under S. 110 is, by virtue of S. 117, Cr. P. C., that for a warrant case, the procedure under S. 30, Evi. Act applies. A.I.R. 1934 All. 927=4 A.W.R. 42=1934 A.L.J. 1170=36 Cr. L. J. 198=57 All. 312=152 Ind. Cas. 881.

——S. 110—Right of accused to cross-examine witnesses.

In security cases, the order passed by the Magistrate under S. 112, is equivalent to a charge in a warrant case and the Magistrate has no power to go beyond the terms of his order. Therefore, the person against whom the order is made is fully aware of what is alleged against him, and as the evidence of the prosecution witnesses is recorded in his presence he has every opportunity of cross-examining them. There is consequently no conceivable reason why he should be allowed the right of a second cross-examination and protract the proceedings unnecessarily. A.I.R. 1933 Rang. 29=34 Cr. L. J. 468 =142 Ind. Cas. 752.

——S. 110—Procedure—S. 256 applies to cases under S. 110.

S. 256 is applicable to inquiry into cases under S. 110, so far as practicable. (A.I.R. 1927 All. 660, Foll.) 1930 A.L.J. 389=31 Cr. L. J. 627=124 Ind. Cas. 40=1930 Cr. C. 442=52 A. 448=A.I.R. 1930 All. 274.

——S. 254 and S. 256, Cr. P. Code.

There is no reason why Ss. 254 and 255 should not be applied to an enquiry under S. 117, except in so far as the framing of a charge and the reading of it to the accused is concerned : in other words, at any stage of the prosecution the Magistrate, if he is *prima facie* satisfied that there is a case against the accused, may interrupt the proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to make. When the stage is reached of asking the accused whether he wishes to plead guilty or to defend, the accused must be allowed an opportunity of cross-examining any witnesses whom he desires to cross-examine. 104 Ind. Cas. 232=25 A.L.J. 749=8 A.I.Cr.R. 183=8 L.R.A. Cr. 122=28 Cr. L. J. 792=A.I.R. 1927 All. 660.

——S. 110—Further cross-examination.

A person proceeded against under S. 110 has no right to further cross-examine the prosecution witnesses under S. 256. (1 P.R. 1916 Cr. ; 35 Cal. 243, Foll.) 99 Ind. Cas. 1039=8 Lah. 265=28 P.L.R. 438=28 Cr. L. J. 239=A.I.R. 1927 Lah. 470.

——S. 110—The provisions of S. 190 do not apply to proceedings taken under S. 110 by a Magistrate upon information received from any person other than a police-officer ; (27 All. 172, Foll.) 98 Ind. Cas. 128=27 Cr. L. J. 1280=20 S.L.R. 291=A.I.R. 1927 Sind 77

——S. 110—Enquiry.

In principle there is no distinction between trials under S. 107 and trials under S. 110. In either case it is the duty of the Magistrate to hold an enquiry of the offence and not to bind an accused person merely because he agrees to furnish security : (37 All. 30 ; 54 I.C. 411 ; and 54 I. C. 784, Foll.) 92 Ind. Cas. 882=24 A.L.J. 317=7 L.R.A.Cr. 54=27 Cr. L. J. 370=A.I.R. 1926 All. 614.

——S. 110—Issue of warrant.

A Magistrate holding an inquiry under S. 110 derives jurisdiction to issue a warrant against a suspect only after he has passed an order under S. 112, and after he has satisfied himself that there is reason to fear the commission of a breach of the peace, and such breach of peace, cannot be prevented otherwise than by the immediate arrest of the suspect. 96 Ind. Cas. 391=20 S.L.R. 122=27 Cr. L. J. 935=A.I.R. 1926 Sind 288.

——S. 110—Opportunity to defend.

A suspect is as much, if not more, entitled as a matter of right as any other person accused of a substantive offence to have a reasonable opportunity afforded to him of defending himself. 96 Ind. Cas. 391=20 S.L.R. 122=27 Cr. L. J. 935=A.I.R. 1926 Sind 288.

——S. 110—Reasons for arrest.

If it is intended that the police-officer should arrest a man with a view of taking proceedings under S. 110, it is strictly and specially necessary that he should specify one of the clauses given in S. 55, although it may be for the cause so stated that he intends to proceed under S. 110. 94 Ind. Cas. 404=20 S.L.R. 85=27 Cr. L. J. 628=A.I.R. 1926 Sind 190.

——S. 110– Local enquiry.

Though local inquiry is most appropriate where proceedings under S. 110, shall be instituted it is entirely out of place when the accused are brought before the Court. Once the accused are before the Court the case must be decided on the evidence alone. But where the Magistrate merely used his enquiries to confirm the result at which he had arrived on a consideration of the evidence :

Held, that though the course taken by the Magistrate was irregular yet it was not sufficient ground for setting aside the whole proceedings and directing a retrial. 88 Ind. Cas. 461=12 O.L.J. 341=2 O.W.N. 350=26 Cr. L. J. 1149=A.I.R. 1925 Oudh 441.

——S. 110—Amount and terms of the bond.

In so far as an order does not state the amount of the bond to be executed, or the term for which the bond is to be in force, as required under the provisions of S. 112 of the Cr. P. Code, the order is not a proper one for the purpose of S. 110, Cl. (*f*) of the Cr. P. Code. 85 Ind. Cas. 33=26 Cr. L. J. 417=2 Rang. 524=A.I.R. 1925 Rang. 69.

——**S. 110—First order and finding.**

Magistrate ought to do their best to see that the first order does actually contain the substance of the information received by them, no less and no more. The next thing is that the finding on enquiry should conform to the first order which in its turn should conform to the information received by the Magistrate. Deviation from this procedure is likely to gravely prejudice the position of the accused and the order passed against him calling on him to furnish security will be set aside if such prejudice has occurred. 86 Ind. Cas. 351=19 S.L.R. 332=26 Cr. L. J. 767=A.I.R. 1925 Sind 236.

——**Ss. 110, 107 and 537—Procedure—Summons under S. 107—Proceedings under S. 110—Irregularity.**

Where after issuing summons under S. 107, Cr. P. C., the Magistrate took proceedings under S. 110, but evidence was recorded at length and the parties were. not prejudiced, *held*, the irregularity in procedure was cured by S. 537. 14 Cr. L. J. 65=18 Ind. Cas. 401.

——**S. 110**—Where it was found that the omission to formally examine, after close of prosecution and before defence, the person called upon to furnish security had not prejudiced him, *held*, that the omission is only an irregularity curable under S. 537. 50 Cal. 223, Not foll. 81 Ind. Cas. 909=50 Cal. 985=25 Cr. L. J. 1085=A.I.R. 1924 Cal. 392.

——**S. 110—Opportunity to defend.**

Two persons were arrested under S. 156, on the ground that they were habitual thieves and house-breakers. On the date fixed the Magistrate recorded the evidence given by the police and without giving the accused any opportunity to obtain legal assistance called upon them to conduct their case. *Held*, the procedure was irregular. Merely informing the accused that he is a suspected thief is not sufficient as it does not give him the slightest intimation as to the grounds of the allegation. 60 Ind. Cas. 420=42 A. 646=22 Cr. L. J. 228=L.R.I.A. (Cr.) 182=18 A.L.J. 673.

——**S. 110—Procedure—Magistrate declining to examine witnesses—Confession of co-accused.**

Where a Magistrate in a proceeding under S. 110 of the Code refused to examine more witnesses for the defence than the number of prosecution witnesses, his action is arbitrary and open to revision. A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under S. 110. 22 C.W.N. 408=20 Cr. L. J. 201=49 Ind. Cas. 649.

——**S. 110—Procedure—Charge to be communicated to accused—Evidence of—Reputation, nature of—Sureties, qualification of.**

An order under S. 110, should not be made unless the charge which the accused has to meet is communicated to him. When it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial and who should ordinarily not be officials. An order under S. 114, framed without reasonable grounds or with the express intention of preventing the accused from furnishing security is *ultra vires*. 16 Cr. L. J. 553=8 Bur. L. T. 53=29 Ind. Cas. 825.

——**Ss. 110 and 190 (c)—Procedure—Cognizance by Magistrate.**

The conviction based on preliminary local investigation was bad as the Magistrate should not have tried the case himself. Although S. 190 (*c*) applies only to offences, the principle must apply to cases of a miscellaneous character. 19 Cr. L. J. 899=4 Pat. L. J. 7=47 Ind. Cas. 95.

——**Ss. 110, 112, 113, 117—Procedure—Irregularity—Accused must have time to bring witness.**

In a proceeding under S. 110 of the Code unless the accused is allowed time to bring his witnesses and their evidence is recorded, the order against him must be set aside. 41 Cal. 806=15 Cr. L. J. 353=23 Ind. Cas. 721.

——**S. 110—Procedure—Prosecution witnesses examined after close of defence.**

Examination of some prosecution witnesses after the close of the defence in a case under S. 110 is erroneous and irregular. 10 A.L.J. 383=13 Cr. L. J. 772=17 Ind. Cas. 404.

——**S. 110—Proceedings after acquittal.**

Where the charge of dacoity against some persons failed for want of evidence, it is competent to the Magistrate to bind them over for good behaviour, relying on Police information and on the evidence on record. 32 All. 55=6 A.L.J. 961=11 Cr. L. J. 36=4 Ind. Cas. 709.

——**S. 110—Proceeding to bind down for good behaviour upon failure of prosecution for offences under Ss. 380, 412 and 457, Penal Code—Evidence of repute.**

Proceedings under S. 110, Cr. P. C., ought not to be instituted with a view to bind down persons on an indefinite charge, after the prosecutions against them and definite charges under the Penal Code, have failed. Persons ought not to be bound down under S. 110, Cr. P. C., upon the mere statements of witnesses that they suspect or are under the impression that the persons proceeded against are thieves or dacoits when no fact is mentioned to indicate that there was sufficient reason for their suspicion or impression. (1906) 11 C.W.N. 413.

——**Ss. 110 and 109—Proceedings under both sections.**

A person cannot be bound over for good behaviour under both the sections. 38 Mad. 555=16 Cr. L. J. 631=30 Ind. Cas. 455.

——**Ss. 110 and 195—Proceedings under—Judicial.**

A petition was presented to a Dt. Magistrate praying that he would proceed under S. 110, Cr. P. C., against a certain person about whom certain information was given. The Dt. Magistrate believed the information to be false, and granted sanction against the petitioner for an offence under S. 182, I.P.C. *Held*, that the sanction was valid. 3 S.L.R. 132=11 Cr. L. J. 3=4 Ind. Cas. 477.

——**S. 110—Proceeding under—Evidence not clear—Procedure.**

Where the evidence for defence is at least as good as that for the prosecution, then the order under S. 110 should not be passed; more specially the order should not be passed when the evidence for defence coupled with evidence of several of the prosecution witnesses is decidedly superior to the rest of the evidence for prosecution. 1930 Cr. C. 1227=A.I.R. 1930 Lah. 1951=32 P.L.R. 92=129 Ind. Cas. 276.

19. Revision.

——**S. 110—Trial Court's opinion as to sufficiency or insufficiency of evidence cannot be questioned.**

In a case under S. 110, Cr. P. C., the opinion of the Court of first instance in respect of sufficiency or insufficiency of evidence will not be questioned in revision. A.I.R. 1942 Oudh 356=43 Cr. L. J. 398=1942 O.W.N. 39=1942 A.W.R. (C.C.) 51=198 Ind. Cas. 547.

——**Ss. 110, 119, 109, 112, 438—Notice to show cause under Ss. 109-112—Cancelling of—Magistrate disbelieving prosecution—Accused ignorant of legal procedure—No cross-examination of prosecution evidence—Presumption—Interference under S. 438.**

Where in a case under S. 110, Cr. P. C., evidence was produced before the Magistrate which he disbelieved and in a reference to High Court under S. 438, Cr. P. C., against his order cancelling under S. 119 notice to show

cause made under Ss. 109-112, the District Magistrate stated some reasons why this evidence ought to be believed but these reasons could be explained away :

Held, that the case was not one in which the High Court should interfere and set aside the order of the Magistrate cancelling, under S. 119, Cr. P. C., the notice to show cause made under Ss. 109-112.

Where the accused is an ignorant Pasi and could not be expected to know the legal presumption that uncross-examined evidence is probably reliable, the fact that the accused, in S. 110 proceedings, did not cross-examine the prosecution witnesses is of no value.

The evidence of suspicion under S. 457, is evidence of a very weak nature even in S. 110 case. 170 Ind. Cas. 482=38 Cr. L.J. 889=1937 O.W.N. 816.

——S. 110—Person of revolutionary tendencies — Security—Interference in revision—Sentence of rigorous imprisonment—Accused kept in simple imprisonment pending revision— Reduction of period of rigorous imprisonment.

A person was arrested in connection with the Lahore Conspiracy Case, but he was acquitted in that case in the following year. It was, however, proved by the evidence that he was associating with a number of persons who were known to be members of the revolutionary party. Several of these associates were suspected of taking part in dacoities committed in pursuance of revolutionary objects. There were indications in the evidence of his sympathy with other persons who wished to upset the social order by violent revolution. The status of his family was also such that there should have been no difficulty in the applicant finding the security required. He was ordered to give security to the extent of Rs. 2,000 or to undergo rigorous imprisonment for one year :

Held, on revision, that there was no reason to interfere with the order.

[In view of the fact that when the application for revision was admitted, the order that the applicant should undergo rigorous imprisonment was suspended and he was detained in the jail under conditions of simple imprisonment, his Lordship reduced the term of rigorous imprisonment.] A.I.R. 1933 All. 674=35 Cr. L. J. 234 (2)=146 Ind. Cas. 1070.

——S. 110—Bad livelihood proceedings—Pendency for a long time due to fault of accused—Murder of witnesses in bad livelihood case—Proceedings, if can be stayed.

Where bad livelihood proceedings had been pending for a long time mainly due to the fault of the accused themselves as against many of them, warrants and proclamation and attachment orders had to issue in order to secure their attendance, and according to the prosecution murders had taken place as the murdered pesons were witnesses in the bad livelihood case :

Held, that the High Court could not interfere in revision to stay proceedings in the case and to order that the two cases—the bad livelihood case, and the murder case, should not go on together. A.I.R. 1933 Pat. 116= 34 Cr. L.J. 1145=146 Ind. Cas. 37.

——S. 110—Order under—Revision—Interference.

Though in cases unde S. 110, Cr. P. C., the Court of the Judicial Commissioner, Sind, does not sit as a Court of Appeal, nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the lower Court, that Court will look into the record to satisfy itself that an order under S. 110 has been properly passed. A.I.R. 1932 Sind 100=33 Cr. L. J. 324=136 Ind. Cas. 753.

——S. 110—Revision—Considerations by High Court.

The High Court is not a Court of appeal in cases under S. 110, and if it is satisfied that the Courts below have approached the consideration of the evidence in a fair way having regard to the interests not only of the prosecution but also of the accused, it is not called upon in revisions against orders passed under S. 110, to weigh the evidence given on behalf of one side or the other. A.I.R. 1922 Oudh 26, Foll. But at the same time before affirming an order demanding security, High Court is to be satisfied that the evidence in the case was of a character which made it imperative in the interests of public security to pass an order under S. 118. (6 A.L.J. 487, Foll.) 8 L.R.A.Cr. 70=7 A.I.Cr.R. 482=28 Cr. L. J. 515=102 Ind. Cas. 211=A.I.R. 1927 All. 473.

——S. 110—Administration of.

Section ought to be administered with scrupulous care—High Court will look into the record only when there is something unusual. 101 Ind. Cas. 886=25 A.L.J. 393=8 L.R.A.Cr. 53=7 A.I.Cr.R. 353=28 Cr. L. J. 502=A.I.R. 1927 All. 394.

——S. 110—Proceedings under—Ss. 112 and 115 not complied with—Revision.

An order passed against an accused in the proceedings under S. 110 cannot be set aside by High Court on the ground that the provisions of Ss. 112 and 115 were not strictly complied with, where it appears that the accused is sufficiently informed as to the allegation against him. 27 Cr. L. J. 575=94 Ind. Cas. 143=A.I.R. 1926 Lah. 366.

——S. 110—Fair consideration of the case.

The High Court is not a Court of appeal in cases under S. 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other, but only to see whether the Court below had approached the consideration of the case in a fair way, having regard to the interest not only of the prosecution but also of the accused. 89 Ind. Cas. 147=12 O.L.J. 413=26 Cr. L. J. 1283=29 O.C. 44=A.I.R. 1925 Oudh 473.

——S. 110—What prosecution evidence should be.

Although it is very difficult in revision to interfere in cases under S. 110 still the Court must be satisfied that the prosecution evidence is of such a character that it will reasonably support the inference that it is necessary in the interest of public security to send the person to prison or bind him down. 82 Ind. Cas. 36=22 A.L.J. 678=5 L.R.A.Cr. 97=25 Cr. L. J. 1172=A.I.R. 1924 All. 569.

——S. 110—Considerations which will induce the High Court to quash the order.

The High Court is not in criminal cases a Court of appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant, *Secondly*, if the evidence for the defence is equally good as that for the prosecution, the High Court may quash the order in revision. *Thirdly*, witnesses, who voluntarily come forward whether as friends or associates of the accused to give them a good character, must not be brushed aside; unless they are discredited as regards their good faith and honesty, just as witnesses in any other proceeding must be discredited before they are rejected by the tribunal.

Fourthly, evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances, is not suffic ientto justify an order and lastly vague repetition unaccompanied by direct evidence personally affecting each accused person or accompanied by direct evidence which breaks down, is not sufficient in itself to justify an order. 71 Ind. Cas. 865=20 A.L.J. 881=45 All. 109 =24 Cr. L.J. 257=A.I.R. 1923 All. 35.

——S. 110—Miscarriage of justice.

Where the lower Courts are satisfied by evidence that the occasion has arisen to bind down certain people to be of good behaviour, the High Court will always be loath to interfere with such orders unless it is obvious that a miscarriage of justice has taken place. 69 Ind. Cas. 629=23 Cr. L. J. 741=A.I.R. 1923 Nag. 53.

——S. 110—Unsatisfactory evidence.

Where the evidence of the police and of their principal witnesses was extremely vague, general in character and consisted almost entirely of repetition, and wherein the only case in which they attempted to bring home to the accused complicity with a definite piece of *badmashi*, namely assisting in the attempt of a thief to avoid arrest, they had come hopelessly to grief:

Held, that order for security must be quashed. 19 A.L.J. 668=63 Ind. Cas. 452=22 Cr. L. J. 660.

——Ss. 110, 107—Revision—Interference by High Court on merits—Appeal—Judgment—Court, duty of.

In questions arising under Ss. 110 and 107 when the Courts below have done something either in excess of their powers or by misapplying the rules of evidence for the defence, revision should be admitted but the High Court should not interfere on the merits except in very exceptional cases. In an appeal in such a case the Lower Appellate Court should set out over again in detail all the points in the evidence and the reasons, provided they are clear and the Court has shown by its judgment that it has taken the trouble, to rehear the case. 17 Cr. L. J. 461=36 Ind. Cas. 141 (A).

——S. 110—Revision—Power of High Court.

A High Court is not a Court of appeal under S. 110, the provisions of which Magistrates ought to administer with the most scrupulous care. The High Court will see if the Lower Court has exercised its jurisdiction fairly and properly. Hence if a Magistrate has disbelieved all witnesses for defence on the ground of probability of accused's influence being brought to bear on them. High Court ought not to interfere in revision. 13 A.L.J. 1046=16 Cr. L. J. 805=31 Ind. Cas. 821.

——Ss. 110 and 439—Revision—High Court.

The High Court can revise under S. 439, Cr. P. C., an order for security passed under S. 110. 154 P.L.R. 1914=5 P.R. (Cr.) 1914=15 Cr. L. J. 563=24 Ind. Cas. 971.

——S. 110—Satyagraha volunteers—Participation in disorderly scenes—Order for security—Propriety.

The accused who were members of a Satyagraha volunteer band were shown to have engaged themselves in Hindu-Moslem fight and had participated in disorderly activities though they perofessed non-violence as their creed. *Held*, that an order for security was rightly made. 52 C.L.J. 405=1931 Cr. C. 50=A.I.R. 1931 Cal. 18=130 Ind. Cas. 889=32 Cr. L. J. 593.

20. Reputation—What is.

——S. 110—Reputation—Nature and character of.

A witness should not be allowed to state merely that an accused person is a " bad character " if he does not explain more precisely what he means by that expression. But when a witness starts by saying that a person is a " bad character " and immediately follows this up by saying that the person habitually commits theft, then there is no ambiguity about his meaning and his deposition is then relevant and admissible as evidence of general repute. 125 Ind. Cas. 19=31 Cr. L. J. 755=51 All. 275=1929 Cr. C. 346=A.I.R. 1929 All. 650.

——Ss. 110, 117—General repute—Evidence of—Police witness, value of—Stranger to place, if can give such evidence.

The question what is a person's reputation is a question of fact. It can be spoken to by any one who knows what his general reputation is. The Police Officer who goes to the place where a particular person lives and who makes enquiries to find out what his reputation is, is perfectly competent to speak in the witness-box about the result of his enquiries. It is not necessary that the witness who speaks to the general reputation of a person must be resident in the same place. A stranger can find out what the general repute of a person is and he is competent to testify to that fact. Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly conversant or the circle in which he moves ; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the 'place' or 'community' with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but having regard to modern conditions, it is impossible to define " neighbourhood " or " community " with any degree of accuracy. A.I.R. 1938 Mad. 591=1938 M.W.N. 313=47 M.L.W. 428=I.L.R. (1938) Mad. 720=39 Cr. L.J. 898=177 Ind. Cas. 586.

——S. 110—Rumour, whether can be taken into consideration.

There is no legal justification for taking rumours into consideration against persons charged under S. 110. Cr. P. C. A.I.R. 1935 Pesh. 158 (159)=159 Ind. Cas, 97.

——S. 110—Security—Imprisonment on failure to give security—Release—Fresh notice—Proceedings—Witnesses—Evidence of general repute—Period subsequent to release.

In cases where there has been a previous order under S. 110, Cr. P. C., witnesses ought to make it clear in their evidence that their evidence relates to the reputation of the persons proceeded against, subsequent to their release from imprisonment. A.I.R. 1933 All. 369= 1933 A.L.J. 263=55 All. 404=35 Cr. L. J. 417 (1) =147 Ind. Cas. 227 (1).

——Ss. 110, 367—Proceeding under S. 110—Evidence of general repute—Consideration of.

In proceedings under S. 110, Cr. P. C., the Magistrate should consider evidence regarding the general repute of the persons accused. He must also consider whether this evidence is to be regarded as in any way rebutted by the evidence of repute adduced on behalf of the accused, and must discuss in the judgment how this

evidence affects each individual among the accused. A.I.R. 1933 Pat. 112=34 Cr. L. J. 476=146 Ind. Cas. 934.

——S. 110—General reputation—Tangible facts.

The object of S. 110 is to offer protection to the members of the public and is not intended to be an engine of oppression. Nothing is more easy than to put forward a general charge against a certain person that he is a burglar and thief. The said statement has got to be tested in the light of tangible facts and particulars if there are any such facts to support the story. If there are no such facts, the evidence loses its value. 121 Ind. Cas. 559=1930 Cr. C. 53=31 Cr. L. J. 301=A.I.R. 1930 All. 37.

——S. 110—In a case under S. 110, Cr. P. Code, the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person and if their opinion is based wholly or partly on the belief that the accused person committed a crime which had not been brought home the court cannot rule out as inadmissible all evidence on which the belief of the witness is based. Meaning of general reputation indicated. 126 Ind. Cas. 501=31 Cr. L. J. 1020=7 O.W.N. 493=A.I.R. 1930 Oudh 357.

——S. 110—Testing of evidence.

The mere production of a string of witnesses who say that an accused person's general repute is so and so can carry very little weight unless some attempt has been made to show that he is a person in a position to know the general repute, and there has been some reasonable attempt by the counsel for the accused or by the Court to check the value of the evidence. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L.R.A.Cr. 66=11 A.I.Cr.R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—Evidence as to.

A witness can come into Court and say "This man is by general repute an habitual thief." Whether this evidence is worth anything will depend upon his position, his partiality or impartiality and whether the defence have by cross examination been able to show that the witness has no real grounds for saying that he has knowledge of the general reputation of the man in the dock. Such evidence of general repute does not offend against the rule against hearsay evidence. This is not hearsay. It is direct evidence given on the basis of the witness' own knowledge of a fact, the fact that people are talking about this man in a certain way, the fact that he has such a general reputation. 8 L.R.A.Cr. 163=8 A.I.Cr.R. 557=26 A.L.J. 99=29 Cr. L. J. 92=106 Ind. Cas. 684=A.I.R. 1928 All. 1.

——S. 110—Nature of evidence.

In absence of strong evidence of repute which is of universal kind, order under Section 110 should not be passed. Evidence of an avowed enemy cannot be worth very much. 25 Cr. L. J. 808=81 Ind. Cas. 344=A.I.R. 1925 Lah. 166.

——S. 110—"Evidence of general repute" means, with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood in which he lives. Such evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally nor that such general opinion has been publicly expressed by the neighbours. 89 Ind. Cas. 147=12 O.L.J. 413=26 Cr. L. J. 1283=29 O.C. 44=A.I.R. 1925 Oudh 473.

——S. 110—A man's general reputation is the reputation which he bears in the place in which he lives among the inhabitants of that place. Though this definition may be accepted as correct in the great majority of cases it can hardly be recognised as conclusive. 85 Ind. Cas. 368=26 Cr. L. J. 528=4 Bur. L. J. 6=2 Rang. 686=A.I.R. 1925 Rang. 174.

——S. 110—Nature of the evidence of.

The rule, that in order to satisfy himself that an accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities, is not a rule of law and a Magistrate must, in each case, weigh the evidence and decide as to its sufficiency. 76 Ind. Cas. 709=2 Bur. L. J. 153=1 Rang. 447=25 Cr. L. J. 245=A.I.R. 1924 Rang. 22.

——S. 110—Rumour and Reputation.

A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is that the body of his fellow-townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character. It may not always be easy to say where rumour ends and reputation begins, in the case of a man whom one does not personally know, and probably the roots of a bad reputation are often planted in rumour. 25 C.W.N. 334=22 Cr. L. J. 377=61 Ind. Cas. 233=A.I.R. 1921 Cal. 625.

——S. 110—Good behaviour—Proceedings to bind down persons—Indefinite charge, after failure of definite charges.

Where a charge of dacoity against certain persons failed for want of evidence but the District Magistrate, upon Police information, took proceedings against some of them under S. 110, Criminal Procedure Code, and upon the whole evidence before him, bound them over to be of good behaviour :

Held, that the order under the circumstances was a proper one. 11 Cr. L. J. 36=6 A.L.J. 961=32 A. 55=4 Ind. Cas. 709.

——S. 110 (c), (f)—Security proceedings—Evidence of repute—'Reputation', meaning of—'Rumour' and 'reputation', distinguished—Evidence of similar acts, value of—Evidence of accused's enemies, value of—Evidence of habit—Section 110 (c), scope of.

To bring a person within S. 110 cl. (*c*), it is not enough to prove that he helped the accused persons in whom he was interested in one or two cases, but it must be proved that he is in the habit of protecting thieves as such.

Isolated cases are not sufficient to prove habit and character. One or two cases may not be sufficient but a number of similar incidents cease to be isolated facts and become evidence of habit and character. How many facts must be proved to enable the Court to draw a reasonable inference depends upon the circumstances of each case.

Evidence of general repute and character, which is not admissible when an accused is being tried for the commission of a specific offence, is admissible in a case of this kind and specific instances where reasonable suspicion fell upon the accused are good evidence to show the basis of bad reputation to be decided on the facts of the particular case.

Reputation is the sum total of the rumours and talks about a man accepted and believed by those who know him well. The evidence of reputation is made up partly of the belief of the deponent and partly of what he heard from others of their beliefs. Distinction between reputation and rumour is well marked, though it may be difficult to say generally where a rumour ends and reputation begins.

The distinction between admissible evidence of reputation and inadmissible hearsay evidence can be stated thus. The evidence of those who know the man and his reputation is admissible. Evidence of those who do not know the man, but have heard of the reputation is not admissible.

It is the duty of the Court to judge whether a man deserves a particular reputation and, in order to judge this, enumeration of specific cases will serve as a valuable guide.

A man who is proceeded against under the preventive sections of the Cr. P. C. must have some enemies whom he has hurt and these persons are bound to help the prosecution in getting the man bound down. Evidence of witnesses cannot be discarded on this ground. The only thing required is that the Court should be cautious in accepting the evidence of witnesses who come from such quarters. A.I.R. 1933 Pat. 189=14 P.L.T. 482=34 Cr. L. J. 643=143 Ind. Cas. 687.

——S. 110—General reputation.

Evidence of general repute alone, given by witnesses having no personal knowledge about the accused person, and entirely ignorant about his business and circumstances, does not justify an order to furnish security. 60 Ind. Cas. 1002=19 A.L.J. 39=22 Cr. L. J. 314=A.I.R. 1921 All. 88.

——S. 110—General reputation.

Where the prosecution merely gives evidence about the reputation of the accused but none beyond reputation, and the witness knows nothing about the business carried by or the circumstances of the accused, an order under S. 110 is not justified. 19 A.L.J. 39=60 Ind. Cas. 1002=A.I.R. 1921 All. 88=22 Cr. L. J. 314.

——S. 110—General repute.

The powers under S. 110 are to be exercised very sparingly and in only those cases where the evidence is very clear and precise. The fact, that an action had been taken against a person on three previous occasions, the last one being many years ago, or that his general repute is of being of bad character is not sufficient for ordering security under S. 110. 68 Ind. Cas. 43=95 P.L.R. 1922=A.I.R. 1921 Lah. 179.

21. Security.

——Ss. 110, 118—Order under S. 118, whether can be based on act committed before compromise—Mere membership of association with illegal activities, whether ground for demanding security—Amount of security, fixing of.

Where a person, being aware that violence is the inevitable outcome of the doctrines he preaches, conducts a propaganda against the forces of law and order and instigates breaches of the peace, he must be treated as an abettor of such breaches of the peace and may be ordered to give security under S. 118, Cr. P. C.

Where an association has not been declared unlawful, security cannot be demanded from all the members of the association merely because some of the activities of the association have been shown to involve breach of the peace.

The security demanded under S. 118, Cr. P. C., should not be more than the accused may reasonably be expected to furnish.

Certain persons formed themselves into an association and started a *satyagraha* movement in connection with a dispute between Hindus and Muslims. The members of the movement defied the law and many of them were convicted. The matter was afterwards compromised between the *satyagraha* leaders and the Muhammadans. Proceeding under S. 118, Cr. P. C., were subsequently started against the members of the association :

Held, that it would not be right to base an order under S. 110, Cr. P. C. only on events which took place prior to the compromise and security could not, therefore, be demanded from members who were not shown to have taken an active part in any undesirable conduct since the compromise. A.I.R. 1931 Cal. 18=52 C.L.J. 405=32 Cr. L. J. 593=130 Ind. Cas. 880.

——Ss. 110, 514—Forfeiture of security bond—Effect.

A bond under S. 17 of the Gambling Act read with S. 110 of the Cr. P. C. is a bond with a single penalty and once it is forfeited or the penalty under it exacted, it ceases to remain in force. A remission under S. 514 (5) of the Cr. P. C. is an extinction of the liability of the parties to the bond for the amount remitted. U.B.R. (1913) I. 159=14 Cr. L. J. 430=20 Ind. Cas. 414.

——S. 110—Period of security—Largest period—Exceptional cases.

Security for good behaviour should be taken at the most for one year, except in very exceptional cases but in such cases proper course would be a sentence of imprisonment. 16 Cr. L. J. 614=30 Ind. Cas. 438.

——Ss. 110, 125—Security for good behaviour—Acceptance of security bond—Subsequent Police report that security was bad—Cancellation of security-bond by District Magistrate—Jurisdiction.

When on receiving a Police report that the surety bond (which had been furnished by a person bound over to be of good behaviour and accepted by the Magistrate) was unsatisfactory, the District Magistrate cancelled such security under S. 125 and made an order requiring fresh security and directing imprisonment in default for the remainder of the term. *Held*, that the Magistrate had no jurisdiction to make such an order. (1901) 6 C.W.N. 291=29 Cal. 455.

——Ss. 110, 118—Security for good behaviour—Fresh proceedings taken immediately after the period of a previous security bond has expired—Locus penitentiae.

R was bound over to be of good behaviour for a period of three years, which term expired on the 13th of June 1905. On the 20th of June 1905 fresh proceedings were started against him under S. 110 of the Code of Criminal Procedure. *Held*, that the interval was not long enough to give *R* an opportunity of showing that he was willing to adopt an honest livelihood, and that evidence relating to events prior to the 13th June 1905 was inadmissible in support of a fresh order under S. 110. A.W.N.

1905, p. 34, Foll. 1906 A.W.N. 30=3 A.L.J. 29=28 A. 306.

——Ss. 110, 117 (3)—Security for good behaviour—Evidence—"General repute".

"General repute" within the meaning of Cl. 2 of S. 117, Cr. P. C., means the reputation which a man bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is that the body of his fellow-townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character, but to say that because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, those rumours are not in themselves evidence under this section. 23 C. 621, Foll. (1903) A.W.N. 181.

——Ss. 110, 117—Security for good behaviour—Inquiry, mode of—Evidence of general repute.

In cases of calling upon persons to furnish security to keep the peace, the inquiry must be made in the same way as in a trial in a summons case and the findings should be based on legal evidence. Evidence of general repute is not admissible in such cases and can be allowed only in cases where security for good behaviour is demanded from habitual offenders. 1903 A.W.N. 36=25 A. 273.

——S. 110—Security for good behaviour—Magistrate instituting proceedings on his own knowledge—Jurisdiction—*See* 6 C.W.N. 595=29 Cal. 392.

——Ss. 110, 117—Security for good behaviour—Nature of evidence required to sustain an order for security.

Though it is not very clear what the precise meaning of the words "by evidence of general repute or otherwise" as used in S. 117, Cr. P. C., it may be, it was the intention of the Legislature that the Magistrate should use a very large discretion as to the evidence which he may admit in proceedings under S. 110 and the following sections of the Code. (1904) A.W.N. 140.

——Ss. 110, 118—Security for good behaviour—Nature of evidence requisite to support an order for security.

Where the evidence against certain persons who were called upon to furnish security for good behaviour consisted mainly of the fact that they were Mewatis of a particular place, and that the Mewatis of that place were looked upon generally and collectively by the other inhabitants of the neighbourhood as bad characters and dangerous persons:

Held, that such evidence was not enough to support an order under S. 118, Cr. P. C., in the absence of specific evidence against each of the accused individually. (1905) A.W.N. 41=2 A.L.J. 174.

——Ss. 110, 123—Security for good behaviour—Order for imprisonment in default passed by Magistrate—Order confirmed by Sessions Judge.

A Magistrate having passed an order requiring security for good behaviour for a term of 3 years, went on to direct, that in default of finding security, the person against whom the order was made, should be rigorously imprisoned for 3 years. The Sessions Judge acting under S. 123 of the Code of Criminal Procedure confirmed the order of the Magistrate. *Held*, that although the order directing imprisonment on failure to find security was not an order which the Magistrate could pass, yet it might under the circumstances, be the order of the Sessions Judge who was the proper court to pass such an order. (1903) A.W.N. 28.

——Ss. 110, 118—Security for good behaviour—Second security after imprisonment for one year—Locus penitentiae.

Where a person who was imprisoned for one year under S. 110, Cr. P. C., was required again to furnish security for good behaviour after an expirty of fifteen months, from his release from jail:

Held, that the order was bad, the petitioner not having had a sufficient *locus penitentiae*. (1904) 8 C.W.N. 909=31 C. 783.

——S. 110—Security for good behaviour—Subsequent conviction—Forfeiture of bond—Imprisonment for unexpired portion of period for which security had been given.

Held, that where a person has given security for good behaviour and is subsequently convicted (of criminal trespass) the amount of his forfeited bond may be exacted, but he cannot be forthwith committed to prison for the unexpired portion of the term for which security had been taken. *Semble*: The Magistrate's remedy is to take fresh proceedings under Ch. VIII. 28 A. 629=(1906) A.W.N. 142.

——S. 110—Security for good behaviour—Taking of sureties without personal bonds or recognizance illegal.

Held, that there is no provision of law by which a person required to find security to be of good behaviour can be called upon to provide sureties for his good behaviour without at the same time entering into his own bond for that purpose. (1904) A.W.N. 230=1 A.L.J. 593=27 A. 262.

——Ss. 110, 123—Security for good behaviour—Term for which imprisonment in default of finding security should be ordered.

Although it is within the competence of a Sessions Judge acting under S. 123 (3) of the Code of Criminal Procedure to direct that a person who has been ordered to give security shall on failure to give security be imprisoned for any term not exceeding three years, yet it is advisable that the term of imprisonment in default ordered under that section should always be the same as the period for which the security is directed to be given. (1901) A.W.N. 114=23 A. 422.

——Ss. 110, 112, 118—Security for good behaviour—Ultimate order for security differing from terms of notice to show cause.

Where a Magistrate orders any person to furnish security for good behaviour, his final order under S. 118 of the Code of Criminal Procedure must correspond with the notice to show cause issued under S. 112. He cannot in the final order impose conditions as to the nature of the security required which were not in the notice. (1906) A.W.N. 276.

——Ss. 110, 117, Cl. 3—Good behaviour, security for, when demanded.

Where the imputations were that the petitioners had from some time past made themselves very objectionable

in the neighbourhood and that they had been annoying the villagers in various ways by kicking at their doors at night or throwing brickbats on the roof and annoying respectable women :

Held, that these imputations, even if proved, do not constitute conduct so as to render the petitioners liable to give security for good behaviour by reason of their being at large without security hazardous to the community. 5 C.W.N. 249.

——S. 110—Sureties—Acceptance of.

Where the accused are landed proprietors, their personal security should be deemed as sufficient. L.R. 2 A. (Cr.) 112 (All.)=3 U.P.L.R. (A.) 185=22 Cr. L. J. 701=63 Ind. Cas. 829.

——S. 110—Acceptance of.

Unnecessary difficulties should not be placed in the way of people required to furnish security for good behaviour and sureties ought not to be rejected merely because they reside at a distance from that of the accused. 61 Ind. Cas. 523=22 Cr. L. J. 395 (All.).

22. Surety.

——S. 110—Fitness of surety—Surety for good behaviour—Condition as to residence of surety.

Where a Magistrate, while acting under S. 110, ordered that security must be furnished of a respectable gentleman residing in the same or a neighbouring village in which the accused was living :

Held, it was quite unnecessary to demand that the surety should be a resident of any particular place when the Magistrate was satisfied that the surety could exercise proper influence over the person bound over. 8 A. L. J. 785=12 Cr. L. J. 472=11 Ind. Cas. 1008.

——Ss. 110 and 118—Fitness of surety—Test of.

The first matter to be enquired into in considering whether a surety in a bad livelihood case is to be accepted or not, is the ability of the surety to pay the sum of which he became bound in case of default of the person bound down. 6 C.W.N. 593 ; 35 C. 400, Foll. Though a person is pecuniarily fit there may also be other objections for his becoming a surety but these it is not possible to specify, and such an objection must be dealt with in each case as it arises. But if the surety is competent from the pecuniary point of view and no other cause of unfitness is shown, he should be accepted. 37 Cal. 446=14 C.W.N. 666=11 Cr. L. J. 392=6 Ind. Cas. 668.

——S. 110—Friends of accused not unfit.

Unnecessary difficulties should not be thrown in the way of people required to give security. Where a man is called upon to produce persons who would be sureties for him and he produces them :

Held, that they should not be rejected merely on the ground that they lived ten miles away from him and were on friendly terms with him. 7 A.L.J. 293=32 A. 314=5 Ind. Cas. 384.

——S. 110—Liability of sureties—Bond for good behaviour—Liability on conviction of accused.

When a *Badmash's* friend saves him from jail by standing surety for him and then his conduct shows that he has not turned over a new leaf and that the surety is exercising no real supervision over his movements, no leniency should be shown to the surety. 3 P.R.Cr. 1917=18 Cr. L. J. 508=39 Ind. Cas. 476.

——Ss. 110 and 514—Liability of surety.

The liability of a surety for appearance of a man called upon to furnish security under S. 110 of the Cr. P. C. does not cease until the culprit if so ordered, appears with the sureties and executes the bond. 32 P.R.Cr. 1914=16 Cr. L. J. 74=134 P.L.R. 1915=26 Ind. Cas. 666.

——Ss. 110, 514—Liability of surety—Forfeiture.

Persons who stand surety under S. 110, Cr. P. C., undertake liability only for such good conduct as is indicated by the cicumstances under which the security was demanded.

Where the subsequent conviction is for another offence than that for which the surety originally stood, the surety should not be held liable and the security given, not confiscated. 15 P.R.Cr. (1913)=39 P.W.R.Cr. (1913) =14 Cr. L. J. 575=334 P.L.R. 1913=21 Ind. Cas. 175.

——S. 110—Liability of sureties—If one surety can be made liable for whole amount.

It is a serious mistake to make each of the sureties liable for the full amount of the bond. 4 Bur. L. T. 270 =13 Cr. L. J. 62=13 Ind. Cas. 398.

——S. 110—Rejection of sureties—Non-residence in district—Effect of.

The mere fact that a person ordered to produce sureties under S. 110 of the Cr. P. Code gives as security two persons who are residents of a different police district and who helped him in his defence will not make them improper as sureties. The Magistrate should not refuse to accept them. 16 A.L.J. 263=19 Cr. L. J. 441=44 Ind. Cas. 969

——S. 110—Rejection of sureties—Residing at distant places—No judicial inquiry—Order illegal.

The rejection by the Magistrate of sureties on the mere ground that they live at a distance from the village of the persons required to furnish security for good behaviour without any judicial enquiry and without finding that they could not exercise control over the accused is not a proper order and should be set aside. 15 A.L.J. 848=18 Cr. L. J. 1039=42 Ind. Cas. 783.

——Ss. 110 and 123—Rejection of surety—Security for good behaviour—Delegation of inquiry—Reduction of period.

As the order did not specify whether the sureties were each to be liable for Rs. 1,000 or in all Rs. 1,000 it was bad in law. Relationship is no ground for rejecting a surety ; it is a recommendation for being accepted. 25 A. 131, Foll. The Magistrate should himself enquire into the sufficiency of the sureties and not act on a police report without giving an opportunity to the parties concerned. The policy of the law is not to fill the jails with bad persons but to make them respect the law. The demanding of four sureties is unreasonable and hard on the accused. The Magistrate had no jurisdiction to cut short the period during which the accused was to be of good behaviour, and send him to jail but he should report for orders to the Sessions Court. 16 Cr. L. J. 337=142 P.L.R. 1914 =6 P.R. (Cr) 1914=28 Ind. Cas. 721.

——S. 110—Rejection of surety—Sufficient cause.

The fact that the sureties lived nine miles off the residence of the accused is not sufficient for refusing to accept sureties. 14 Cr. L. J. 214=19 Ind. Cas. 310.

——Ss. 110, 122—Refusal to accept surety—Reasonable grounds—Relationship—Criminal Procedure Code, S. 122, ratio and scope of.

The grounds on which a Magistrate has power to refuse to accept any surety must be valid and reasonable grounds which must be stated by the Magistrate under S. 122 of the Criminal Procedure Code. Mere conjectures and surmises are not sufficient. Relationship of the surety to the accused is not a disqualification. 22 W.R. 37 Cr. (1874), Followed. Scope of S. 122, Criminal Procedure Code, and procedure thereunder, explained. (1906) 10 C.W.N. 1027.

——S. 110—Surety.

Order under S. 112, Cr. P. C.—Particulars required not given—Order of execution of a surety bond under S. 110 is illegal. 1941 M.W.N. 512=54 M.L.W. 63.

——Ss. 110, 122—Sureties by accused, whether can be rejected without inquiry merely on Police report.

In a case under S. 110, Cr. P. C., the Magistrate cannot reject the sureties merely on the Police report unless he inquires himself or orders an inquiry by another Magistrate. A.I.R. 1935 Pat. 421=16 P.L.T. 478=2 B.R. 32=36 Cr. L. J. 1473=158 Ind. Cas. 948.

——S. 110—Surety—Two bonds executed.

A bond to be of good behaviour can be forfeited on a conviction of the person bound down, under S. 323 or 325, Penal Code. [6 P.R. 1915 (Cr.) and 10 P.R. (Cr.) 1915, foll.] But where two bonds have been executed one by the accused and the other by his surety, only one of the two can be forfeited and not both. [26 P.R. (Cr.) 1894, Foll]. 81 Ind. Cas. 955=4 Lah. 462=25 Cr. L. J. 1131=A.I.R. 1924 Lah. 262.

——S. 110—Surety—Acceptance of.

Where a surety for good behaviour was not accepted on the ground that he had already stood surety for some other man:

Held, that that ground is clearly insufficient. 73 Ind. Cas. 53=24 Cr. L. J. 517=A.I.R. 1924 Oudh 132.

——S. 110—Sureties—Acceptance of.

An order directing an accused person to produce sureties residing within certain limits is illegal. A Magistrate has no authority to lay down any limits within which sureties must reside. 67 Ind. Cas. 352=20 A.L.J. 520=23 Cr. L. J. 400=A.I.R. 1922 All. 489.

——S. 110—Under S. 110 hearsay evidence of general repute is clearly not admissible as against sureties. 68 Ind. Cas. 959=9 O.L.J. 353=22 Cr. L. J. 639=A.I.R. 1922 Oudh 227.

——S. 110—Relatives.

The mere fact that the surety offered under S. 110 of the Code is a relation of the person from whom the security is demanded, is his intimate friend and is named by him as a witness is no valid reason in law for refusing to accept the surety. 59 Ind. Cas. 134=22 Cr. L. J. 22 (All.).

——S. 110—Young man.

The mere fact that the surety looks young or resides 4 miles away from the accused is not sufficient to reject him. 67 Ind. Cas. 585=24 O. C. 292=A.I.R. 1921 Oudh 229=23 Cr. L. J. 425.

——Ss. 110, 122—Sureties—Qualifications of.

Where a Magistrate refused to accept sureties tendered by a person bound to be of good behaviour on such grounds as that they were unfit to control the defendant, that they were not residents of the village, and in one case that two persons were members of the same firm:

Held, that these were not valid grounds for refusing to accept a surety under S. 122, Cr. P. C. ; that the question is not whether a surety can supervise a person for whom he stands surety, but whether he is a person of sufficient substance to warrant his being accepted. (1902) 6 C. W. N. 593.

——S. 110 et. seq—Surety's qualification—Security for good behaviour—Power of court to assign geographical limits within which the sureties required must reside.

Held, that a court in ordering security for good behaviour to be given with sureties is competent to assign some geographical limits within which the sureties required must reside. (1902) A.W.N. 122=24 A. 471.

23. Suspicion—If ground for action.

——S. 110—Suspicion—General repute.

There are only two kinds of evidence which are properly admissible. Ordinarily speaking the case will be governed by exactly the same rules of evidence as govern any other cases. (1) A witness cannot say what he suspects. If the prosecution knows that the witness does suspect the accused of having taken part in a theft, the prosecution can question that witness before he is put into the witness box and ask him what are his reasons for suspecting the accused. They can themselves ascertain from the witness that facts are within his knowledge, and then put him into the witness-box to give evidence as to those facts, and it will be for the Magistrate to determine whether those facts alone as supported by other evidence create such a conviction in his mind as to justify calling for security. But a witness's 'suspicions' and his 'allegations' that the accused is a thief, etc., are worth nothing should not be admitted. (2) In addition to this, the wtiness may be asked about his special means of knowledge as to the reputation of the accused. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L.R.A. Cr. 66=11 A.I. Cr. R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—Suspicion.

The evidence that a person was suspected of having committed murders is not a class of evidence which is admissible for the purpose of binding over that person under S. 110. 99 Ind. Cas. 46=28 Cr. L. J. 8=A.I.R. 1927 All. 146.

——S. 110—Instances of suspicion.

Evidence of instances in which the accused has been suspected is certainly not evidence of general repute. But when independent evidence of the accused's reputation has been given, evidence that he has been suspected in a number of instances may be admissible as corroboration. (23 O.C. 371, Foll.) 73 Ind. Cas. 352=24 Cr. L. J. 608=A.I.R. 1924 Oudh 112.

——S. 110—Evidence—Suspicion.

A mere suspicion of having been concerned in some thefts soon after his release, is not enough for binding over the accused a second time under S. 110, Cr. P. C. 4 O.L.J. 319=18 Cr. L. J. 710=40 Ind. Cas. 710.

——S. 110—Evidence—Suspicion of Sub-Inspector, whether legal evidence.

The mere suspicion of the Sub-Inspector is no legal evidence. No weight should be attached to the view of

the Sub-Inspector that the accused are murderers and of bad characters when that view is not based on solid facts A.I.R. 1935 Pesh. 158=159 Ind. Cas. 97.

——S. 110—Reason to suppose accused guilty—Whether sufficient for accused to be proceeded against under S. 110—Solitary confinement on failure to provide security—Legality of—Possession of revolutionary literature.

The mere fact that there may be some reason to suppose that the accused have committed some substantive offence under the I. P. C., is no obstacle, for the institution of proceedings under S. 110, Cr. P. C.

Persons who have been called on to provide security and have failed to do so and have been confined in jail in consequence, are not to be kept in solitary confinement unless they have become liable to it for some infringement of the jail rules.

The mere possession of books dealing with revolution or with a political party may not be an offence in any sense, but the fact that these books were sent to the possessor in continuation of very inflammatory conversation with the accused shows that the latter was trying to corrupt the former and turn him into a revolutionary. The mere fact that some suspicious books and pictures and four leaden bullets were found in a person's house and a box with some air pistol slugs, is not sufficient to show that he entertained revolutionary ideas and was preparing himself for revolutionary crimes. A.I.R. 1933 All. 676=1933 A.L.J. 777=35 Cr. L. J. 218=146 Ind. Cas. 900.

——S. 110—Suspicion—When sufficient.

Evidence as to mere suspicion on particular isolated occasions is not sufficient evidence at all for the purposes of a case under S. 110, C.P. Code. What is necessary is evidence to prove that the man is by habit a thief. Evidence can no doubt be led of his general reputation about the matter and that he was suspected in a particular case by a particular person or the police, of having committed a theft, But there must be a large number of cases before it can be held to be proved on this evidence alone that he is by habit a thief. 127 Ind. Cas. 861=1930 Cr. C. 393=A.I.R. 1930 Lah. 345.

——S. 110—"Suspicion" is worthless and inadmissible to support an order under S. 110 unless supported by good reasons and then it is the reasons and the facts on which the suspicion is based, and not the suspicion, to which only weight can be given. 116 Ind. Cas. 801 =10 L.R.A. Cr. 106=1929 Cr. C. 174=30 Cr. L. J. 693=1929 A.L.J. 938=12 A. I. Cr.R. 114=A.I.R. 1929 All. 599.

——S. 110—The suspicions of a witness that a particular man committed, either singly or with others, a theft in his house is wholly inadmissible in a proceeding under S. 110. In this respect a police officer stands in no stronger position than any other witness. 116 Ind. Cas. 25=51 All. 663=1929 A.L.J. 361=10 L.R.A. Cr. 66=11 A.I. Cr. R. 486=30 Cr. L. J. 562=A.I.R. 1929 All. 273.

——S. 110—Mere suspicion of complicity in any offence is no evidence of general reputation. A.I.R. 1928 Lah. 49, Foll. 9 Lah. 586=10 A.I. Cr. R. 214=109 Ind. Cas. 127=29 P.L.R. 443=29 Cr. L. J. 479=A.I.R. 1929 Lah. 41.

——S. 110—Suspicion is not a legitimate basis for findings under S. 110. A witness may have suspicion against a person in respect of whom he is giving evidence, but if he has, he ought to be able to give the grounds for that suspicion, and the value of the facts stated can then be weighed by the Magistrate. The evidence which he can give of general repute is of a totally different matter. 8 L.R.A. Cr. 163=8 A.I. Cr. R. 557=26 A.L.J. 99=29 Cr. L. J. 92=106 Ind. Cas. 684=A.I.R. 1928 All. 1.

——S. 110—Mere suspicion is no evidence in a case. 25 A.L.J. 393=8 L.R.A. Cr. 53=7 A.I. Cr. R. 353=28 Cr. L. J. 502=101 Ind. Cas. 886=A.I.R. 1927 All. 394.

——S. 110—Mere suspicion, and mere allegations that a person is a man of ill repute, is not sufficient to base an order under S. 110. 97 Ind. Cas. 43=7 A.I. Cr. R. 159= 27 Cr. L. J. 1067.

——S. 110—Corroborative value.

Evidence as to the accused having been suspected in particular cases is clearly not evidence on the basis of which any person could be bound over, yet when evidence of general repute has been given, the fact that the accused have been suspected in a large number of cases may be admissible as corroboration. Conversely the fact that the accused had never been suspected in any case might tend to weaken the evidence of general repute. 77 Ind. Cas. 886=25 Cr. L. J. 486=A.I.R. 1923 All. 595.

——S. 110—Reputation.

Where a substantive charge is made but not proved, the Court is not right in binding the accused under S. 110. Mere suspicion does not justify such an order; but evidence that a person had been suspected and named in a large number of years extending over a long interval, may serve as evidence of general bad reputation and conversely the fact that a person has never been suspected of any offence may weaken the evidence of bad reputation given against him. 22 Cr. L. J. 273=60 Ind. Cas. 673 =23 O.C. 371.

——S. 110—Suspicion.

The general reputation of a man is that which he bears among his fellow-townsmen and mere suspicion of complicity in this or that offence is not evidence of general reputation. A.I.R. 1928 Lah. 49, Foll. 113 Ind. Cas. 909= 30 Cr. L. J. 220=12 A.I. Cr. R. 112.

——S. 110—Mere suspicion of complicity in this or that isolated offence of general reputation. A man's general reputation is that which he bears amongst the fellow townsmen or in the neighbourhood in which he lives. 9 Lah. 133=28 Cr. L. J. 813=104 Ind. Cas. 253=29 P.L.R. 368=A.I.R. 1928 Lah. 49.

24. Specific offences.

——S. 110—Offence—False claim in Civil Court.

A man habitually bringing false claims in civil suits though punishable under S. 209, I.P.C., does not commit extortion or an attempt to commit extortion and does not fall within S. 110. Evidence of general repute though admissible in such a case, cannot override the Civil Court's findings after trial. 19 Cr. L. J. 885=47 Ind. Cas. 81.

——S. 110—Offence—Promoting litigation.

The mere fact that a man promotes litigation does not make him a dangerous or desperate character within S. 110. 19 Cr. L.J. 781=16 A.L.J. 776=46 Ind. Cas. 701.

——S. 110 (d)—Offence—Habitually bringing false claims in Civil Courts.

S. 110 (*d*) of the Cr. P. C., does not apply to cases of persons having the reputation of habitually bringing false claims in Civil Courts. Such a person is punishable under S. 209, I.P.C., and not for extortion. 4 O.L.J. 143= 20 O.C. 129=18 Cr. L. J. 651=40 Ind. Cas. 299.

——S. 110—Offence—"Not opposing dacoits"—Whether it comes under S. 110.

A person could not be bound over under S. 110, Cr. P. C., simply because he did not actively oppose the dacoits in the neighbourhood. 13 A.L.J. 1046=16 Cr. L. J. 805=31 Ind. Cas. 821.

——S. 110—Offences—Forgery.

The obtaining of decree by forged documents being neither cheating nor extortion, such habitual offender is not liable under the section. Without proof of association in the same offence there should be no joint trial. 21 P.R. Cr. 1914=16 Cr. L. J. 136=206 P.L.R. 1915=27 Ind. Cas. 200.

25. Terms explained.

——S. 110—'Desperate and dangerous,' meaning of—Mere quarrelsome nature and petty assaults, whether ground for binding over.

The fact that a man is quarrelsome and ill-tempered and has managed to fall foul of persons in high places, and throws bricks into other people's houses and has been guilty of petty assaults does not make him a desperate or dangerous character within the meaning of S. 110 (*f*), Cr. P. C., and is therefore, not a ground for binding him over under S. 110. A.I.R. 1931 All. 437=32 Cr. L. J. 1070=133 Ind. Cas. 535.

——S. 110—Security proceedings—Jurisdiction—'Within the limits of his jurisdiction,' meaning of—Accused not within local limits of jurisdiction on initiation of proceedings, legality of—Onus of proof.

The expression 'within the local limits of his jurisdiction' in S. 110, Cr. P. C., is not used in the sense of 'residing' within the jurisdiction but in the literal and physical sense of being within the territorial limits.

A Magistrate acts illegally in instituting proceedings under S. 110, Cr. P. C., against a person when he is outside the local limits of his jurisdiction. But the burden is on the person bound over to show that he was not within the jurisdiction of the Magistrate when the proceeding was drawn up. A.I.R. 1931 Cal. 65=52 C.L.J. 415=32 Cr. L. J. 425=35 C.W.N. 255=129 Ind. Cas. 688.

——S. 110 (c)—Breach of the peace—"Offences involving."

Offences involving breach of the peace mean offences of which a breach of the peace is an ingredient. 38 Cal. 156=15 C.W.N. 366=12 Cr. L. J. 164=9 Ind. Cas. 916.

——S. 110—Words " within the local limits of jurisdiction"—Meaning—Burden of proving want of jurisdiction.

The words "within the local jurisdiction" in S. 110, mean that the accused should be physically present within the limits and not they should reside there. Where the accused say that they are not within such jurisdiction it is for them to make out that they were outside the jurisdiction of the Magistrate. 52 C.L.J. 415=1931 Cr. C. 64=32 Cr. L. J. 425=129 Ind. Cas. 688=35 C.W.N. 255=A.I.R. 1931 Cal. 65.

——S. 110—"Stolen property" does not mean property transferred by dacoity. 51 All. 459=11 A.I.Cr. 250=10 L.R.A.Cr. 34=30 Cr. L. J. 694=116 Ind. Cas. 804=1929 A.L.J. 93=A.I.R. 1928 All. 682.

——S. 110—Habitual offender—Meaning of.

The word "habit" implies a tendency or capacity resulting from the frequent repetition of the same acts. The words "by habit" and "habitually" imply frequent practice or use. The words have been used in S. 110 in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section. 6 Pat. 1=28 Cr. L. J. 359=100 Ind. Cas. 967=8 P.L.T. 335=A.I.R. 1927 Pat. 126.

——S. 110—Dangerous to society.

Where certain persons have executed an agreement between themselves and rightly or wrongly they believe that the agreement is a valid agreement and if in enforcing the same in an improper way they commit offences, they cannot be said to have acquired the habit of committing those offences or that they were habitually offenders so as to bring them within the purview of Cls. (*a*) to (*e*) of S. 110. But where the course of their conduct shows that they have become desperate and dangerous and therefore it is not safe to let them wander about at large, they can be bound down to be of good behaviour under Cl. (*f*). 6 Pat. 1=28 Cr. L. J. 359=100 Ind. Cas. 967=8 P.L.T. 335=A.I.R. 1927 Pat. 126.

——S. 110—Meaning of.

The word "habit" means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. "Habitually" must be taken to mean repeatedly or persistently. 75 Ind. Cas. 764=25 Cr. L. J. 60=A.I.R. 1924 Nag. 19.

——S. 110—"Offences involving breach of the peace," meaning of.

The words "offences involving a breach of the peace" in S. 110 (*e*), Cr. P. C., mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. A.I.R. 1940 Rang. 95=41 Cr. L. J. 495=187 Ind. Cas. 609.

——S. 110 (e)—"Habitually," meaning of.

The word "habitually" in S. 110 (*e*), Cr. P. C., implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts. A.I.R. 1940 Rang. 95=41 Cr. L. J. 495=187 Ind. Cas. 609.

——S. 110—Jurisdiction—"Within the local limits"—Meaning of.

The words "within the local limits of his jurisdiction" are not equivalent to "residing within the local limits". It is sufficient to give the Magistrate jurisdiction, if the evil habits of the accused were practised and evil reputation acquired within the local limits of his jurisdiction. 43 Cal. 153=19 C.W.N. 1022=16 Cr. L. J. 618=30 Ind. Cas. 442.

——S. 110—Jurisdiction—"Person within local limits."

The expression "any person within local limits" means any person who is within the local limits at the time the Magistrate takes action. If a narrow meaning is applied and the scope of the section restricted to persons residing within the local limits of the jurisdiction, the object of the section which is to prevent crime would be defeated. 36 Mad. 96=23 M.L.J. 535=13 Cr. L. J. 781=17 Ind. Cas. 413.

26. Transfer of cases—Grounds for.

——Ss. 110 and 526—Transfer of case—Grounds—Apprehension of having no impartial trial.

A petition for transfer of a proceeding under S. 110

from one district to another on several grounds which does not in any way show bias or prejudice in the mind of the Magistrate will not lie, but other grounds taken with the fact of several like proceedings prior to the proceedings under S. 110 having been instituted which give rise to an apprehension that he may not get justice especially when those proceedings were pending and it was a fit case for transfer. 12 A.L.J. 736=16 Cr. L. J. 56=26 Ind. Cas. 648.

——Ss. 110 and 526—Transfer of case—Jurisdiction of High Court—Inquiry or trial into an offence—"Accused person"—"Criminal Case."

The High Court under S. 526, Cr. P. Code, cannot transfer proceedings taken under S. 110 of the Code, as they are not an inquiry or trial of an offence; the person against whom such proceedings are taken is not "an accused person" and the case against such a person is in no sense "a criminal case." 154 P.L.R. 1914=5 P.R. (Cr.) 1914 =15 Cr. L. J. 563=24 Ind. Cas. 971.

——Ss. 110 and 526—Transfer of case—Proceedings prolonged.

Where owing to the weakness of a Magistrate, it was apprehended that proceedings under S. 110 of the Code would be much prolonged, the High Court ordered a transfer. 12 A.L.J. 262=15 Cr. L. J. 363=23 Ind. Cas. 731.

——Ss. 110, 192, 529 (f), 112, 256, 550—Security for good behaviour—Transfer of case—Any case—Criminal case—Irregularity—Proceeding to show cause—Cross-examination after charge—Procedure in warrant cases—Witness called by court—Cross-examination—By parties—Restriction to cross-examination—Bad livelihood.

The District Magistrate has jurisdiction to transfer a case under S. 110, Cr. P. C., of which he has taken cognizance to any Subordinate Magistrate under S. 192, of the Criminal Procedure Code. The words 'any case' in S. 192 include a case under S. 110, Cr. P. C., and are not limited to 'criminal cases' only. A transfer by a District Magistrate of such a case, even though held to be without jurisdiction would amount to a mere irregularity and be cured by S. 539 (*f*). Even though by S. 117, Cr. P.C., the procedure prescribed for warrant cases is as nearly as possible to be followed in cases of security for good behaviour, it does not follow that that gives a right to the accused person to further cross-examine the prosecution witnesses on entering into his defence when he has once cross-examined them. The reason of the rules in S. 256 is that in warrant cases it is only when the charge is framed that the accused comes to know the definite charge which he is to meet. In cases of security for good behaviour he knows what he has to meet as soon as the proceedings are drawn up. When witnesses are called by the appellate court under S. 540, Cr. P. C., each party has the right to cross-examine them and the court has no power to put any restrictions upon such cross-examination. (1907) 7 C.L.J. 177=12 C.W.N. 299=35 C. 243.

——Ss. 110, 526—Security for good behaviour—Transfer.

Proceedings under S. 110, Cr. P. C., cannot be transferred to any court outside the district within which such proceedings are lawfully instituted. 16 A. 9; 19 A. 291, Foll. (1907) A.W.N. 268=30 A. 47.

27. Miscellaneous.

——S. 110—Binding over—Evidence of respectable persons on side of accused.

An accused person should not be bound over on evidence of bad repute where there are respectable persons on his side to clear him of the charge. A.I.R. 1935 Pesh. 158=159 Ind. Cas. 97.

——S. 110—Previous conviction 12 years before, if a justification for binding over.

In the absence of cogent and convincing evidence in proof of the fact that the applicant is by habit a thief or a house-breaker, his previous conviction 12 years before cannot by itself be a justification for binding him over under S. 110. A.I.R. 1934 All. 735=36 Cr. L. J. 33=3 A.W.R. 655=152 Ind. Cas. 120.

——S. 110—Evidence regarded insufficient to convict on dacoity charge—Whether can be used to show accused is a dangerous and desperate character.

Although evidence which was regarded as unreliable and insufficient to convict a person on the charge of dacoity, should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour, where the petitioners were discharged before the trial of the dacoity case by a Special Tribunal, and there was no question of any evidence against them so far as their participation or association with others in the dacoity who were actually tried before the Special Tribunal, it cannot be said that the proceedings under S. 110 (*f*), Cr. P. C., were not justified. A.I.R. 1934 Cal. 482= 35 Cr. L. J. 952=61 Cal. 588=149 Ind. Cas. 460.

——S. 110—Bail.

Refusal of bail is contrary to the spirit of the provisions of Ch. 8. The object of this Chapter is to prevent a suspect from committing offences and to allay public apprehensions, and that object is sufficiently attained by requiring him to find sureties. 96 Ind. Cas. 391=20 S.L.R. 122=27 Cr. L. J. 935=A.I.R. 1926 Sind 288.

——S. 110—Effect of order—Offence under S. 401, I.P.C.

Orders passed from time to time against the accused under the section demanding from them security for good behaviour are relevant evidence against accused charged under S. 401, I.P.C., for proving association and intention to habitually commit theft. 3 P.R. Cr. 1915=16 Cr. L. J. 300=191 P.L.R. 1915=28 Ind. Cas. 524.

——Ss. 110, 118—Delegation of inquiry into sufficiency of security—Practice.

A Magistrate who passes an order for security for good behaviour under S. 118 is not competent to delegate the inquiry into the sufficiency of the security to another officer. A.W.N. 1898, p. 154, Foll. 1903 A.W.N. 36 =25 A. 272.

——S. 110—Defence—Discrediting witnesses—Grounds for.

The fact that witnesses called for the defence in proceeding under S. 110 were caste fellows of the accused and had come forward from distant villages to give evidence voluntarily without being summoned, is no adequate ground for discrediting their evidence. 18 A.L.J. 1114=59 Ind. Cas. 547=43 All. 186=22 Cr. L. J. 115.

——S. 110—Successive orders—Binding a person with security under S. 110.

No order under S. 110 can be made against an accused who has been imprisoned for failure to furnish security until he has had time to retrieve his character. (1915) 11 U.B.R. 86=17 Cr. L. J. 85=32 Ind. Cas. 677.

——S. 112—See also CR. P. CODE.

——S. 112. Synopsis.

1. Amendment of order under.
2. Applicability
3. Bond—Forfeiture.
4. Compliance.
5. Conditional bail.
6. Contents of order.
7. Essentials.
8. Interpretation.
9. Joint trial.
10. Magistrate acting under is a court.
11. Object.
12 Order under—Nature of.
13 Order under S. 117 (3).
14. Powers of Magistrate to issue summons warrants and orders of detention.
15. Procedure.
16. Public peace.
17. Requiring security.
18. Right of accused to copy of report.
19. Sureties.

1. Amendment of order under.

——S. 112—Amendment of order under—Accused continuing to flout law and to commit illegal acts—Subsequent conduct—Supplementary order under S.. 112, if can be issued.

If the subsequent conduct of a person against whom a preliminary order is issued calling upon him to show cause why he should not be bound over to keep peace, indicates that despite the existence of these proceedings and his having been called upon to show cause why he should not be bound over to keep the peace and be of good behaviour, he continues of flout the law and to commit illegal acts, it is most desirable that the Court should take notice of this and be influenced by it in framing its final order. There is nothing in the Cr. P. Code, which prohibits the issuing of a supplementary order under S. 112 and it is open to no objection. The person affected by the second notice should, of course, have sufficient time to consider it. A.I.R. 1942 Mad. 242 (1)=43 Cr. L.J. 409=(1941) 2 M. L.J. 1036=1942 M.W.N. 426 (1)=55 M.L.W. 757 (1)=198 Ind. Cas. 528.

——Ss. 112, 257, 162, 123 (3), 548, 350; 342—Amendment of order under S. 112, before proceedings started—Whether irregularity.

An order under S. 112, Cr. P. Code, made in Chapter VIII proceedings is analogous to a charge framed in the case of a regular trial of an accused person for an offence, and as under the provisions of the Cr. P. Code, contained in S. 227, a charge may be altered or added to or amended at any time before judgment is pronounced subject to conditions contained in certain sections that follow, so also can an order under S. 112, Cr.P. Code. Hence where an order which is clearly an amendment of the previous orders under S. 112, on which no proceedings had actually been started is passed, there is no irregularity in the procedure adopted. A.I.R. 1942 Sind 122=I.L.R. (1942) Kar. 252=44 Cr. L.J. 367=205 Ind. Cas. 309.

——S. 112—Amendment of order.

The Court can amend a notice under S. 112 of Cr. P. C. which in many respects is analogous to a charge. 1933 M.W.N. 551.

——S. 112—Amendment of order—Altering period.

The Court has no power, after the order under S. 112, is drawn up and communicated to the accused, to alter the period during which the accused is to be of good behaviour. A.I.R. 1933 Sind 8=27 S.L.R. 19=34 Cr.L.J. 9=140 Ind. Cas. 170.

2. Applicability.

——S. 112—Applicability.

Where the substance of information received under S. 110, Cr.P. Code, as set out under S. 112, relates to disputes concerning land special provisions of S. 145 apply excluding the general provisions of S. 110. A.I.R. 1939 Sind 261=40 Cr.L. J. 887 (2)=184 Ind. Cas. 189 (2).

——S. 112—Applicability of S. 114.

S. 114, Cr. P. Code, is applicable only to the stage prior to the service of preliminary order under S. 112. A.I.R. 1944 Mad. 575 (2)=1944 M. W.N. 557=(1944) 2 M.L.J. 120=216 Ind. Cas. 308.

3. Bond—Forfeiture.

——S. 112—Bond—Forfeiture.

The bond that Ss. 112 and 118 have in contemplation is one bond for one amount and on forfeiture is discharged by the payment of the amount either by the principal or the surety. (26 P.R. Cr. 1894 and 12 Cr.L.J. 404, Foll.) 36 Cal. 562, Not Foll. 5 Lah. 448=26 Cr.L.J. 322=84 Ind. Cas. 546=A.I.R. 1925 Lah. 228.

4. Compliance.

——S. 112—Compliance.

Order under—Particulars required not given—Order of execution of a surety bond under S. 110 is illegal. 1941 M.W.N. 512=54 M.L.W. 63.

——S. 112—Compliance

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of S. 112, but before doing so it must be satisfied that there has been a failure to comply. A.I.R. 1940 Mad. 23=50 M.L.W. 802=1939 M.W.N. 1209=41 Cr.L.J. 238=(1940) 1 M.L.J. 11=I.L.R. (1940) Mad. 335=185 Ind. Cas. 824 (F.B.).

·——S. 112—Compliance.

An order under S. 112 is illegal in so far as it travels beyond the terms of S. 110. 88 Ind. Cas. 362=47 All. 733=23 A.L.J. 507=26 Cr. L. J. 1130=6 L.R.A. Cr. 129=A.I.R. 1925 All. 694.

——S. 112—Compliance.

Proceedings started on a *rubkar* based on a police report not on file and in absence of the substance of the information and the other particulars required by the section are irreguar and must be set aside. The provisions of S. 112 must be strictly complied with. 85 Ind. Cas. 46=5 L.R.A. Cr. 24=26 Cr. L.J. 430=A.I.R. 1924 All. 695.

——Ss. 112, 115 and 118—Compliance—Failure to draw up or serve proceedings as required by Ss. 112 and 115—Effect.

An order under S. 118 of the Cr.P. Code is not liable to be set aside merely because no proceedings drawn up according to S. 112 was served on the accused as laid down in S. 115 provided that an order under S. 112 is drawn up and read out and explained to the accused when they are brought into court in pursuance of summonses issued under Chap. VII of the Code. 26 M.L.T. 385=(1919) M.W. N. 639=10 L.W. 267=20 Cr.L.J. 763=53 Ind. Cas. 491.

——S. 112—Compliance—Notice not in strict compliance with—Effect.

A notice to show cause under S. 112, stating that the opposite party was "by general habit" instead of ('by habit' as required by S. 110) is not bad if the opposite party is not prejudiced by the terms of the order. 17 C.W.N. 331=13 Cr. L.J. 784=17 Ind. Cas. 416.

——S. 112—Compliance—Essentials.

A notice was issued under S. 110 (*e*), Cr.P. Code, preliminary to the taking of proceedings under S. 110. The Magistrate who eventually tried the case considered the section inapplicable and informed the petitioner that proceeding will be taken under the first part of S. 107, Cr. P. Code. He did not issue any fresh notice under S. 112, Cr.P. Code, as required by law before proceeding with the inquiry. *Held*, that the procedure was illegal and that notice should have been issued under S. 112, as the same was necessary preliminary to proceedings under S. 107, Cr.P.Code. 30 M. 282=2 M.L.T. 183.

5. Conditional bail.

——S. 112—Conditional bail.

The Magistrate having allowed bail to the petitioners on condition of their undertaking that no attempt would be made by them or their agents to realize rent by force and nothing would be done to induce a breach of the peace. *Held*, that the condition could not be imposed under S. 112, Cr.P.C., and should be struck out of the bail bond. (1906) 11 C.W.N. 121.

6. Contents of order.

——S. 112—Contents of order—Failure to annex police report and give substance of information—Effect on proceedings.

An order under S. 112, Cr.P. Code, is not a formal order, but is intended to give sufficient notice to the individual concerned of the accusation made against him. The substance of the information must be set out in the order and it should not be all too brief, vague and indefinite without giving any clue to the person proceeded against as to the acts charged against him. The failure to annex to the order a copy of the Police Report is itself a grave irregularity, which, under certain circumstances, would vitiate the proceedings. The notice or order must in law contain something more than the reproduction of the clauses of S. 110. An order which does not comply with the requirements of the Code is bad in law. 47 M.L.J. 689; 8 L.W. 461, rel. I.L. R. (1949) Cut. 751.

——S. 112—Contents of order—Order under must give definite information to persons proceeded against as to what they are called upon to answer.

An order under S. 112, Criminal P. Code, is in the nature of a charge and the person to whom the order is issued is entitled to definite information as to the case he is called upon to answer. But the question whether the omission of such particulars in an order under S. 112 has in any particular case any material effect, is a question of fact. Where the accused had full knowledge before they opened their cross-examination as to what the case of the prosecution against them was and what they were called upon to meet, an irregularity in the matter of the contents of the order under S. 112, Cr. P. Code, is purely techincal and may well be ignored. A.I.R. 1942 Sind 122=I.L.R. (1942) Kar. 252 =44 Cr.L.J. 367=205 Ind. Cas. 309.

——Ss. 112, 108—Contents of order.

S. 112, Cr. P. Code, does not contemplate that the allegations of fact constituting the information should be embodied in the preliminary order. That section provides for a preliminary order to be passed in proceedings started under Ss. 107, 108, 109 and 110 and contemplates that the order should contain as much of the information as would be sufficient to enable the party to know under which of the several sections or which part of any one of them he is proceeded against. The preliminary order under S. 112, Cr. P. Code, need not contain more than an indication of the particular offence which is sought to be prevented. A.I.R. 1940 Nag. 134=1940 N. L.J. 31=41 Cr.L.J. 713=I. L. R. (1942) Nag. 62=189 Ind. Cas. 74.

——Ss. 112, 107—Contents of order—Order, how far can exceed information given under S. 107.

Quaere.—It is doubtful how far an order under S. 112, Cr. P. Code, can properly exceed the information given under S. 107. A. I. R. 1939 Sind 167=40 Cr.L.J. 703=I.L.R. (1939) Kar. 662=182 Ind. Cas. 698.

——S. 112—Contents of order.

The information given in an order under S. 112, Cr. P. Code, should be sufficiently detailed to satisfy the requirements of law. Where neither time nor place nor the identity of the persons threatened is given, the order is illegal. 1937 M.W.N. 885.

——S. 112—Contents of order.

In a preliminary order under S. 112, Cr. P. Code mere reference to Police report is not proper. The Magistrate should state the facts which, if est-

ablished, necessitate the taking of security. 1933 M.W.N. 875.

——S. 112—Contents of order.

Ordinarily it is sufficient under S. 112 if that portion of the clause of S. 110 which is applicable to the particular case is specified in the notice that is given. But where the particular clause refers to two or more offences, the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to Cl. (*d*). A. I. R. 1927 Oudh 306, Appr. 1930 A.L.J. 389=31 Cr.L.J. 627=124 Ind. Cas. 40=1930 Cr. C. 442=52 A. 448=A.I.R. 1930 All. 274.

——S. 112—Contents of order.

In passing an order under S. 112 the Magistrate should give in substance an abstract of the facts upon which the Magistrate charges the persons proceeded against with being likely to commit a breach of the peace so as to give them notice of what they have to meet and be prepared to meet it. Non-compliance with these requirement is not a mere irregularity but an illegality vitiating the conviction. 1930 M.W.N. 698=32 M.L.W. 320=1930 Cr. C. 1035=127 Ind. Cas. 652=A.I.R. 1930 Mad. 859=59 M.L.J. 887.

——S. 112—Contents of order—'Detailed information.

Repetition of the words of the section should as far as possible be avoided and although there may be cases where it is possible to convey the substance of the information briefly, ordinarily details cannot be insisted upon, and omission to give more information where possible does not vitiate the entire proceedings without proof of prejudice to the accused. (35 Cal. 243; 17 C.W.N. 238, Foll.; 43 Mad. 450 and A.I.R. 1926 All. 759, Diss. from.) 33 C.W.N. 852=1929 Cr. C. 387=A.I.R. 1929 Cal. 739.

——S. 112—Contents of order.

An order not setting forth the substance of the information received about the petitioner is illegal. 117 Ind. Cas. 807=10 Lah. 155=30 Cr.L.J. 839=30 P.L.R. 694=1929 Cr. C. 61=A. I. R. 1929 Lah. 504.

——S. 112—Contents of order—Mere statement that accused is a habitual thief.

Even when the accused is represented by a mukhatar, it is undesirable that, where persons are arrested under S. 55, they should not be told the substance of the information against them. The procedure clearly requires somethings in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. Merely setting out in a notice under S. 112 that a man is an habitual thief or robber is not sufficient.

49 All. 5=24 A.L.J. 908=7 L.R.A.Cr. 165=28 Cr.L.J. 9=99 Ind. Cas. 41=A.I.R. 1926 All. 759.

——S. 112—Contents of order.

The action of a Magistrate in not recording the substance of the information he had received does not amount to a mere irregularity which would be covered by S. 537. 49 All. 5=24 A.L.J. 908=7 L.R.A.Cr. 165=28 Cr.L.J. 9=99 Ind. Cas. 41 =A.I.R. 1926 All. 759.

——S. 112—Contents of order.

Failure to incorporate substance of information does not vitiate proceedings unless accused is prejudiced—Reproducing S. 110 is not compliance with the section. 19 S.L.R. 176=26 Cr.L.J. 1398=89 Ind. Cas. 710=A.I.R. 1926 Sind 69.

——S. 112—Contents of order—Full details to enable accused to prepare for defence—Issue of notice judicial act.

A notice served under S. 112, which is very meagre and does not contain sufficient details regarding the charges brought against the persons must be held not to comply with the provisions of the Code. Any explanation given by the Prosecuting Inspector at the commencement of the trial cannot have the effect of remedying the defect in the notice because the object of S. 112 is to enable the accused person to prepare for his defence and to summon witnesses on his side before actual commencement of trial. The issue of a preliminary notice under S. 112 of the Cr. P. Code, is not a formal matter; but it is a judicial act which must be exercised by the Magistrate after due consideration of the materials before him. 86 Ind. Cas. 49=26 Cr.L.J. 673=1925 M.W.N. 57=A.I.R. 1925 Mad. 189=47 M.L.J. 689.

——S. 112—Contents of order.

Substance of information and amount of bond as laid down in S. 112 should be recorded. 92 Ind. Cas. 702=27 Cr.L.J. 318=4 Bur.L.J. 172=A.I.R. 1925 Rang. 353.

——S. 112—Contents of order under.

Where the allegations against the petitioners are too vague and do not give the necessary details which are required to inform the petitioners of the accusation that they have to meet the Magistrate should not call upon the petitioners to show cause why they should not be bound down to keep peace. 77 Ind. Cas. 417=5 P.L.T. 353=2 Pat.L.R. Cr. 159=23 Cr.L.J. 369=A.I.R. 1922 Pat. 209.

——S. 112—Contents of order under—Defect.

Where a preliminary order under S. 112, Cr. P. Code merely reproduces the contents of S. 110 without setting forth substance of the information

against the accused the proceedings under S. 110 cannot, be regarded as legal. Where, however, the defect in the preliminary order did not prejudice the accused in the trial and he let in all his evidence, the proceedings will not be quashed on the ground of defect in the order. 43 Mad. 450=38 M. L.J. 97=11 L.W. 331=21 Cr.L.J. 354=(1920) M.W.N. 398=55 Ind. Cas. 722.

7. Essentials.

——Ss. 112, 243, 87—Essentials—Admission of person required to furnish security—Recording of —Proclamation — Absconding person — 30 days time.

Where a notice issued under S. 112, Cr. P. Code, is not accompanied by the order mentioned, the proceedings are liable to be set aside. A statement made by persons against whom proceedings are taken under Ch. VIII of the Criminal Procedure Code expressing willingness to give security should be recorded as nearly as possible in the words used by him, and where a Magistrate fails to do so, the proceedings are liable to be quashed. A proclamation issued under S. 87 against an absconding persons should allow at least 30 days time to the absconding person for his appearance and if he fixes a less period the proclamation is bad in law. 6 Cr. L.J. 332=17 M.L.J. 438.

8. Interpretation.

——S. 112—Interpretation—Order is equivalent to a charge.

The words "no charge need be framed" in S. 117 (2) can only mean that no occasion can arise for framing a charge because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it, it resembles a charge in that it must contain a statement in abstract of the prosecution case. 124 Ind. Cas. 1=31 M.L.J. 243=3 M. Cr. C. 34=1930 M.W.N. 178=53 Mad. 173=31 Cr. L.J. 618=A. I.R. 1930 Mad. 331=58 M.L.J. 229 (F.B.).

——S. 112—Interpretation — 'Substance of the information'.

The words "substance of information" mean such or so much of information as would enable the party to know under what clause of S. 110 he is charged or to what particular class of offenders he belongs. 124 Ind. Cas. 71=31 Cr. L.J. 44=33 C.W.N. 852 =57 Cal. 503=1929 Cr. C. 387=A.I.R. 1929 Cal. 739.

9. Joint trial.

——S. 112—Joint trial.

Where two persons were alleged to be members of a gang of habitual thieves and robbers and were always associated jointly in the commission of thefts, burglaries and robberies, a Magistrate acts properly in issuing one order against both of them under S. 112, Cr. P. Code, calling upon them to show cause why they should not be bound over to be of good behaviour under S. 110, and the joint trial of the two is perfectly legal. A.I.R. 1933 Oudh 251=34 Cr. L.J. 852=10 O.W.N. 325=144 Ind. Cas. 944.

——S. 112—Joint trial—Legality of.

When two persons are both reported by the Police to be members of the same gang of bad characters, the Magistrate can proceed under S. 112, Cr. P. Code, against both and try their cases jointly. A.I. R. 1933 Oudh 195=10 O.W.N. 233=34 Cr. L.J. 793 =144 Ind. Cas. 577.

——S. 112—Joint trial.

Where a number of persons are jointly concerned in a matter under inquiry under the preventive sections of the Code, a joint enquiry with respect to all of them is legal. 26 M.L.T. 385=(1919) M.W.N. 639=10 M.L.W. 267=20 Cr. L.J. 763=53 Ind. Cas. 491.

10. Magistrate acting under is a Court.

——S. 112—Magistrate acting under is a Court. 39 Cal. 953, Foll. 1930 M.W.N. 1100=32 M.L. W. 784=1930 Cr.C. 1191=A.I.R. 1930 Mad. 975 =59 M.L.J. 914=129 Ind. Cas. 70.

11. Object.

——S. 112—Object.

The object is to prevent future offences and not punishing past ones—Order as to sureties cannot be varied at the time of being made absolute—Sureties want of influence on suspect is no disqualification. 82 Ind. Cas. 154=18 S.L.R. 298=25 Cr. L.J. 1226 =A.I.R. 1925 Sind 57 (2).

12. Order under—Nature of.

——Ss. 112, 439, 107, 144—Order under—Nature of—Magistrate applying powers under S. 112 equally to wrong-doer as well as wronged—Interference in revision.

The Judicial Commissioner's Court is always very unwilling to interfere in the case of orders passed under the preventive sections of the Cr. P. Code. These orders are largely of an administrative nature; they are concerned with the maintenance of the public peace and the prevention of breaches of the public peace for the maintenance of which the District Magistrate is responsible, and the needs of which he, as the responsible officer on the spot, is presumably in the best position to know; but these orders though largely of an administrative nature have a legal basis and if it is clear that an order under S. 112, Cr. P. Code, has no legal basis and that the District Magistrate has proceeded upon a wrong legal principle applying equally to the wrong-doers as well

as to the wronged the wide powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, the Judicial Commissioner's Court is bound to interfere. A.I.R. 1939 Sind 167=40 Cr. L.J. 703=I.L.R. (1939) Kar. 662=182 Ind. Cas. 698.

——S. 112—Order under—Nature of.

In security cases, the order passed by the Magistrate under S. 112 is equivalent to a charge in a warrant case and the Magistrate has no power to go beyond the terms of his order. A.I.R. 1933 Rang. 29=34 Cr. L.J. 468=142 Ind. Cas. 752.

13. Order under S. 117 (3).

——S. 112—Order under S. 117 (3).

An order under S. 117 (3), Cr. P. Code must have reference to the information under S. 110 and the order under S. 112 which follows it. The failure of the Magistrate to read out the order under S. 112, Cr. P. Code to the accused or to explain its substance to them is an illegality and vitiates the order under S. 117 (3). Cr. P. Code. A.I.R. 1943 Sind 173=I.L.R. (1943) Kar. 275=45 Cr. L.J. 147=209 Ind. Cas. 477.

——S. 112—Order under S. 117 (3).

When the Magistrate, while passing an order under S. 117 (3), Cr. P. Code, has clearly considered the question of emergency as a separate question but has related it to his order under S. 112 of the Code and has acted on the same information which justified his order under S. 112, there is nothing wrong in this. A.I.R. 1943 Sind 122=44 Cr. L.J. 779=I.L.R. (1943) Kar. 279=208 Ind. Cas. 338.

——S. 112—Order under S. 117 (3).

An order under S. 117 (3), Cr. P. Code, passed more than two months after proceedings under S. 112 are initiated is not justified. A.I.R. 1942 Sind 86=I.L.R. (1942) Kar. 189=43 Cr. L.J. 788 =202 Ind. Cas. 43.

——S. 112—Order under S. 117 (3).

The orders under S. 117 (3), Cr. P. Code, are not mere matters of routine orders appended as it were to orders passed by a Magistrate under S. 112, Cr. P. Code, on an application made under S. 110, Cr. P. Code. A.I.R. 1942 Sind 77=I.L.R. (1942) Kar. 9=43 Cr. L. J. 692=200 Ind. Cas. 334.

14. Powers of Magistrate to issue summons warrants and orders of detention.

——S. 112—Powers of Magistrate to issue summons, warrant or order of detention.

The Code does not authorise a Magistrate to issue summons, warrant or order of detention, until something is recorded by him in writing showing the ground for his action. A Magistrate acting under Chap. VIII cannot act until after he has recorded an order under S. 112 based on some information which the Magistrate has reasons to believe. 36 All. 262 =12 A.L.J. 365=15 Cr. L.J. 288=23 Ind. Cas. 496.

15. Procedure.

——Ss. 112, 123, 438—Procedure—Case submitted to Sessions Judge under S. 123—Powers of Sessions Court—Re-trial.

Where a Sub-Divisional Magistrate submits a case to the Sessions Judge under S. 123, Cr. P. Code, and a suspect is liable to imprisonment for a longer period than one year, the Court should deal with the case as a Court of first instance and not as an Appellate Court. The Court is also vested with all such subsidiary powers as may be necessary to enable it to finally dispose of the case. No appeal being provided in a case of this nature, the Sessions Judge has no jurisdiction to deal with it as an appeal or to order a re-trial. In certain fit cases, the Sessions Judge may refer the case to the High Court under S. 438 with a recommendation to quash the proceedings and order a re-trial. In a submission under S. 123, the Sessions Judge has no jurisdiction to direct the Magistrate to pass a fresh order under S. 112 and to try the case *de novo* after complying with the provisions of S. 112. A.I.R. 1932 Sind 88=26 Sind L.R. 200=33 Cr. L.J. 898=139 Ind. Cas. 783.

——S. 112—Procedure—Transfer.

Where a Magistrate having jurisdiction according to S. 107 has made an order under S. 112, District Magistrate has power to transfer the case as initiated to another Magistrate competent to try the case though not qualified under S. 107 as regards territorial jurisdiction. 1930 M.W.N. 698=32 M.L.W. 320=1930 Cr. C. 1035=127 Ind. Cas. 652=59 M.L.J. 887=A.I.R. 1930 Mad. 859.

——S. 112—Procedure—Irregularity.

Where the Magistrate wrote the order under S. 107 on the back of a Police report and instead of sending a copy of his order with the summons he gave the substance of the information in the summons itself:

Held, that irregularity is covered by the provisions of S. 537. (11 Bom.L.R. 740, Appl.) 49 All. 228=25 A.L.J. 44=27 Cr. L.J. 1132=7 L.R. Cr. 174=97 Ind. Cas. 652=A.I.R. 1926 All. 767.

——S. 112—Procedure.

If in a case a preliminary order is not served on an absent accused and then that accused appears and the order is read out to him the requirements of the law are substantially complied with. 76 Ind. Cas. 228=25 Cr. L.J. 132=A.I.R. 1924 Nag. 166.

16. Public peace.

——Ss. 112 and 107—Public peace.

A First Class Magistrate getting information from a reliable source that a person is likely to disturb the public peace, may proceed under S. 112 without mentioning any definite acts intended to be committed. S. 107 must be read with S. 112. 16 A. L.J. 567=19 Cr.L.J. 876=47 Ind. Cas. 72.

17. Requiring security.

——S. 112—Requiring security—Requiring more security after notice.

Certain persons appeared before a Magistrate in pursuance of an order to show cause why they should not be required to furnish security in the sum of Rs. 2,000. On that day the Magistrate passed an entirely fresh order under S. 112 in which the amount of security demanded was Rs. 5,000. It was this latter order that was read out to them as required by S. 113:

Held, that in the circumstances the proceedings were not vitiated in any way by the procedure adopted by the Magistrate. 28 Cr. L.J. 815=104 Ind. Cas. 255=A.I.R. 1927 Lah. 689.

——S. 112—Requiring security—Accused's sureties rejected—Application to Sessions Judge referring the matter to the High Court as validly irregular—High Court's power to question though no appeal to it by accused.

When an accused under S. 112 whose offer of sureties were rejected by the Magistrate applied to the Sessions Judge to invoke the aid of the High Court to set aside the Magistrate's order rejecting the sureties. The Sessions Judge finding the whole proceeding irregular and unsustainable, referred the matter to the High Court. It was held by the High Court that though the accused had not appealed to it against the order requiring him to furnish security under S. 112, yet the High Court had on the reference made to it by the Sessions Judge, jurisdiction to deal with the entire question and to set aside the proceeding of the Magistrate as illegal. 14 A. L.J. 215=17 Cr. L.J. 157=33 Ind. Cas. 637.

——Ss. 112 and 118—Requiring security—Order to give security for a longer period than the one specified in the notice.

An order requiring a person to give security for a period longer than that specified in the notice issued under S. 112 is illegal. (1902) 26 M. 471=2 Weir 56.

——Ss. 112, 114, 402 and 537—Requiring security—Appeal—Practice and procedure.

The omission of a Magistrate to send a copy of the order under S. 112 with the summons issued under S. 114 of the Code does not invalidate the trial. It is an irregularity cured by S. 537 of the Code. Where the Legislature has directed certain procedure to be followed and certain forms to be adopted in a criminal case the Magistrate ought to adhere to the law and see that no prejudice is created so far as he accused is concerned. The Code of Criminal Procedure, 1898, makes a careful distinction between an order directing security to be given for keeping peace and an order directing security to be given for good behaviour. It allows an appeal in the latter case only. 11 Bom. L.R. 740=3 Ind. Cas. 774=10 Cr. L.J. 375.

18. Rights of accused to copy of report.

——S. 112—Rights of accused to copy of written information.

The accused who is ordered to show cause under S. 112 is not entitled to a copy of the written information given by the Police on which the order is based. It is not a report under S. 173 nor part of the record under S. 548. 1930 M.W.N. 1100=32 M.L.W. 784=1930 Cr. C. 1191=A.I.R. 1930 Mad. 975=129 Ind. Cas. 70=59 M.L.J. 914.

19. Sureties.

——Ss. 112 and 118—Sureties—Respectable sureties.

Where an accused is ordered to execute a bond with "respectable or suitable sureties" the Magistrate may fairly demand a reasonable decree of social importance and influence in the sureties. The degree of respectability required in the discretion of the Magistrate. 3 S.L.R. 168=11 Cr. L.J. 198=4 Ind. Cas. 1153.

——S. 112—Sureties.

Under S. 112, the order of Sub-Divisional Magistrate requiring securities from the class of Zamindars, holding twenty acres of land in a certain locality, is legal. 3 S.L.R. 239=11 Cr. L.J. 417=6 Ind. Cas. 887.

——Ss. 112, 118 and 439 (5)—Surety—Power of Magistrate to define class of surety.

An order requiring that the sureties should own 100 acres or paying income-tax and able to control the accused is a perfectly valid order. So also an order requiring the accused to find sureties who shall be neighbouring Zemindar paying a certain assessment is valid. An order under S. 118 as to the class of sureties to be furnished is appealable under S. 406. Where therefore, no appeal has been preferred against such an order, the High Court will not interfere in revision. 8 S.L.R. 229=16 Cr. L.J. 252=28 Ind. Cas. 108.

——S. 112—Surety—Not required to be local men—Jurisdiction.

A Magistrate has no jurisdiction to direct that the sureties under S. 112 should be local men unless at a later stage they are objected to by the Police authorities. 15 Cr. L.J. 254=23 Ind. Cas. 206.

——S. 112—Sureties — Rejection of — Grounds for.

An order under S. 112 must be such that if a suspect have a *bona fide* intention to be of good behaviour, it will not be impossible for him to find sureties. It is unfair to a suspect to call on him to produce sureties of a certain class and then reject the persons offered because they do not conform to an arbitrary standard, not set up in the order. A surety should not be rejected merely because a Police Inspector informs the Magistrate that he is of bad character when such rejection involves the committal of the accused to prison. 8 S.L.R. 173=16 Cr. L. L.J. 100=27 Ind. Cas. 148.

——S. 112—Sureties for good behaviour—Qualifications of.

Sureties for good behaviour ought not to be rejected merely on the ground that they are caste follows or relations of the accused and to require that he must be capable of controlling the accused is undesirable, but not that he should be of the land-holding class. 16 Bom. L.R. 138=15 Cr. L. J. 268=23 Ind. Cas. 476.

——S. 113—Compliance.

All that S. 113, Cr. P. Code, requires is that when the person proceeded against is present in Court, the Magistrate shall read over the order to him or to explain its substance. Hence when the order is so read over to him and he is questioned about the whole case, his attention being pointedly drawn to the circumstances appearing against him, there is sufficient compliance with S. 113. The fact that the order is read over to him not at the commencement of the hearing but after the prosecution evidence does not render the proceedings illegal. The defect, if any, is curable under S. 537. 21 Luck. 251=224 Ind. Cas. 551=1946 O.A. (C.C.) 144=1946 A.W.R. (C.C.) 144=1946 O.W.N. 225=47 Cr. L.J. 642= A.I.R. 1946 Oudh 230.

——S. 113—An order under S. 117 (3), Cr. P. Code shall be passed after the order under S. 112 has been made and read out or explained to the accused under S. 113 of the Code. A. I. R. 1943 Sind 163=44 Cr.L.J. 815=I. L. R. (1943) Kar. 513=209 Ind. Cas. 49.

——S. 113—Person brought into Court.

The Magistrate was justified in treating him as a person present in Court whether brought legally or illegally and whether under arrest or not, and must be taken to have acted under S. 113. 12 Cr. L.J. 533=12 Ind. Cas. 301.

——S. 114—Arrest.

The police can arrest a suspected criminal and then proceed against him either for substantive offence or under Chap. VIII, and it is for that reason that S. 114 contemplates the serving of notice on the suspect while in custody. 20 S.L.R. 85=27 Cr. L.J. 628=94 Ind. Cas. 404=A.I.R. 1926 Sind 190.

——S. 114—Arrest outside jurisdiction.

S. 114, Cr. P. Code is not limited to arrests within jurisdiction. 46 Cal. 215=28 C.L.J. 25=23 C. W.N. 193=19 Cr. L.J. 696=46 Ind. Cas. 152.

——S. 114—Contents of order—Substance of information.

The Magistrate must be convinced that the only way of preventing an imminent breach of the peace is to commit the persons concerned to custody and must put on record the substance of the Police or other report, by which he is influenced before taking action, otherwise the order is illegal. 74 Ind. Cas. 861=5 P.L.T. 93=2 Pat. L.R. Cr. 45=24 Cr. L.J. 829=A.I.R. 1924 Pat. 320.

——S. 114—Counter petitioners—Appearance of—Procedure.

S. 114 is applicable only to the stage prior to the service of the preliminary order under S. 112 and it can have no application as a preventive measure after the counter-petitioners have appeared in order to show cause. If speedy remedy is considered desirable after the appearance has been entered, there is S. 117 (3) under which preliminary bonds can be taken and pending their completion, the counter-petitioners can be held in custody or in default of execution, they can be kept in custody until the inquiry is completed. A.I.R. 1944 Mad. 575 (2)=(1944) 2 M.L.J. 120=1944 M.W.N. 557=216 Ind. Cas. 308=46 Cr. L.J. 172.

——S. 114 — Proviso—Re-arrest after execution of bond.

Proviso to S. 114 is a proviso to the section which relates to the circumstances set out in S. 114 and not a substantive provision standing by itself and it does not empower the Magistrate to re-arrest a person who has been discharged after executing surety bond. 1929 Cr. C. 382=117 Ind. Cas. 628=30 Cr. L.J. 809=10 P.L.T. 801=A.I.R. 1929 Pat. 654.

——S. 114, Proviso—Re-arresting person admitted to bail, if legal.

Quaere.—Whether the Proviso to S. 104, Cr. P. Code, gives a Magistrate power to re-arrest a person who has already appeared and has been admitted to bail. 8 C.W.N. 779=32 C. 80.

——S. 117.

Synopsis.

1. Admission.
2. Applicability of S. 256.
3. Bail.
4. Bond—Forfeiture.
5. Contents of order.
6. Evidence.
7. Ex parte order before enquiry.
8. Further evidence.
9. Interpretation.

10. Joint trial.
11. Order under.
12. Order under S. 117 (3) without reading or explaining order under S. 112.
13. "Or otherwise."
14. Previous conviction—If necessary.
15. Procedure.
16. Proceedings under—Nature of.
17. Re-cross examination.
18. Refusal to summon witnesses.
19. Revision.
20. Scope.
21. Security for keeping the peace.
22. Sureties.
23. Transfer.

1. Admission.

——Ss. 117 (2), 107 — Admission — Consent to give security—Whether amounts to plea of guilty.

It depends upon the facts and circumstances of each case as to whether a consent to give security amounts to a plea of guilty. When an accused called upon to give security for keeping the peace says in terms that no prosecution evidence may be recorded and is willing to give security, it is sufficient proof that this is necessary for keeping the peace that he should execute a bond. Where the applicants, in their written statement, admitted that the complainant had apprehension that the applicants would commit a breach of the peace and that they were willing to give security and the Magistrate examined each accused separately and asked him if the allegations made by the complainant against him were correct and each accused admitted his guilt and said he was willing to give security:

Held, this was itself evidence on which a Magistrate could convict and there was a full enquiry as laid down in S. 117 (2), Cr. P. Code. A.I.R. 1937 Oudh 289=38 Cr. L.J. 302=1937 O.W.N. 133=166 Ind. Cas. 850.

——Ss. 117, 107—Admission — Duty of Magistrate to enquire if information which prompted him to issue notice is correct—Statement of accused, when amounts to plea of guilty.

A plain reading of S. 117, Cr. P. Code, leaves no room for doubt that the Magistrate is bound to inquire whether the information, which prompted him to issue notice, was correct. One of the ways of obtaining the necessary material is to question the accused. It is open to the accused to say that the information conveyed to the Magistrate is correct and that he is prepared to break the peace or to do an act which is likely to lead to breach of the peace. It would be tantamount to a plea of guilty and there would be no objection to the Magistrate proceeding to make the rule absolute on the basis of it. Consequently, it cannot be said that on no account is the plea of the accused sufficient to warrant an order under S. 107 read with S. 117, Cr. P. Code. A.I.R. 1935 Pesh. 116=36 Cr. L.J. 1212=157 Ind. Cas. 755.

——S. 117—Admission—Enquiry.

Even where the accused persons do admit that they fall under the categories given in S. 112, enquiry should be made. 87 Ind. Cas. 961=19 S.L.R. 101=26 Cr. L.J. 1041=A.I.R. 1925 Sind 321.

2. Applicability of S. 256.

——S. 117—Applicability of S. 256.

The Magistrate's inquiry in case of good behaviour should conform with the procedure in warrant cases and S. 256 is applicable. 4 Bur. L.T. 24=12 Cr. L.J. 89=9 Ind. Cas. 468.

3. Bail.

——S. 117—Bail.

The provisions of Ch. 39 relating to bail do not apply to an order made under S. 117 (3). 125 Ind. Cas. 322=1930 Cr. C. 677=31 Cr. L.J. 812=A.I.R. 1930 Lah. 529.

4. Bond—Forfeiture.

——S. 117 (3) — Bond — Forfeiture—Sureties if can be ordered to pay amount each more than original.

T executed a bond for Rs. 2,000 under S. 117 (3), Cr. P. Code. *N* and *K* were her two sureties and each signed a bond for a like amount. Proceedings under S. 514, Cr. P. C. were taken against them and they were ordered to pay a sum of Rs. 1,500 each:

Held, that the two sureties were jointly and severally liable and therefore more than a total sum of Rs. 2,000 could not be recovered from them. A.I.R. 1938 Nag. 275=1938 N.L.J. 79=40 Cr. L.J. 23=178 Ind. Cas. 207.

5. Contents of order.

——S. 117—Contents of order.

Barlee, A.J.C.—It is incumbent on a Court to state reasons in writing for an order under S. 117 (3). Merely stating that it is passed "on account of emergency" is not sufficient. 21 S.L.R. 93=28 Cr. L. J. 173=99 Ind. Cas. 605=7 A.I.Cr.R. 326=A.I.R. 1927 Sind 148.

6. Evidence.

——S. 117—Evidence.

Witness can depose that the accused has a general reputation as an habitual thief or robber as the case may be, but he should not be allowed to state that the accused is a bad character or has the reputation of being a bad character. 26 A.L.J. 519=9 L.R.A.Cr. 75=9 A.I.Cr.R. 467=30 Cr. L.J. 122=113 Ind. Cas. 282=A.I.R. 1928 All. 357.

——S. 117—Evidence.

Evidence which would be inadmissible at an ordinary trial should not be admitted at a trial under S. 117. 12 A.L.J. 937=15 Cr. L.J. 705=26 Ind. Cas. 153.

——S. 117—Evidence—Direct knowledge essential to prove repute.

Prosecution must produce evidence of persons living in the neighbourhood provided they are acquainted with the accused and are aware of the accused' reputation. The basis of the knowledge of a witness cannot be a rumour heard in the village without specifying any particular person. Such evidence is inadmissible. Witness must be able to testify from specific cases coming to their knowledge. 81 Ind. Cas. 633=5 P.L.T. 166=2 Pat. L.R. (Cr.) 38=25 Cr. L.J. 985=A.I.R. 1924 Pat. 500.

——S. 117 (4)—Evidence—General repute—Duty of Magistrate.

It is true that S. 117 (4), Cr. P. Code, provides that the fact that a person is a habitual offender may be proved by evidence of general repute. This is a very extraordinary rule of evidence and because of the special nature of this provision in law, it is necessary that Judges and Magistrates should consider very carefully the evidence of general repute that is adduced to decide whether in a particular case the evidence of general repute is sufficient to establish the truth of the prosecution allegation that a person is a habitual thief or a robber. Mere enumeration of the number of persons who have given evidence does not amount to a sufficient consideration of the points that are at issue. 4 A.I.Cr.D. 103=A.I.R. 1950 Cal. 177=51 Cr. L.J. 856.

——S. 117 (4)—Evidence—General repute—Evidence of relation and casteman—Value of.

While the fact that a certain person is a relation is a circumstance which may be taken into consideration against his evidence, the fact that he belongs to the same caste and walk of life is, far from being a circumstance against the credibility of the witness in a matter of general repute, a circumstance in favour of his opinion, because it is only people who belong to the same circle as the accused who can really give evidence of any value as to what he is reputed to be. 4 A.I.Cr.D. 103=A.I.R. 1950 Cal. 177 =51 Cr. L.J. 856.

——S. 117—Evidence—General repute.

In one sense the evidence of a general repute is, of course, hearsay, but it is hearsay of a particular kind which is made admissible in cases under S. 110 by S. 117, Cr. P. Code. A.I.R. 1938 Mad. 591=47 M. L.W. 428=1938 M.W.N. 313=I.L.R. (1938) Mad. 720=39 Cr. L.J. 898=177 Ind. Cas. 586.

——S. 117—Evidence—General repute.

S. 117 (4), Cr. P. Code, is an exception to the general rule of evidence and like all exceptions should be sparingly used and only in exceptional circumstances. The general rule of law, of course, is that every man is presumed not to be a criminal or an offender until he has been found guilty by a competent Court. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof, and in such unusual circumstances, the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal not to say a habitual criminal. A.I.R. 1938 Mad. 35=1937 M.W.N. 1065=(1937) 2 M.L.J. 749=46 M.L.W. 858 =39 Cr. L.J. 230=172 Ind. Cas. 866.

——S. 117—Evidence—General repute.

In proceedings under S. 110, Cr. P. Code, if the witnesses have clearly deposed that the accused has the general repute of being a habitual offender, such evidence is admissible under sub-S. (4) of S. 117 of the said Code. A.I.R. 1936 Oudh 238=1936 O. W.N. 247=37 Cr. L.J. 390=12 Luck. 36=160 Ind. Cas. 1039.

——S. 117—Evidence—General repute — Police Officials, evidence of—Value of.

The Police Officials very often are in a far better position to depose about the character of a man than witnesses who may be living in different villages and who may have been examined in defence by the accused. The right way of judging the evidence of Police Officials is to consider their statements on merits and then to determine whether they have given true evidence or otherwise. There is no justification whatsoever for discarding the evidence of a Police Official simply on the ground that he belongs to the Police; it is the duty of the Police Officials to keep under surveillance suspected persons and in many cases they can give evidence as regards the character of an accused person, which may be found to be far more satisfactory than the evidence of witnesses who do not belong to the Police department. A.I.R. 1935 All. 850=36 Cr. L.J. 1362= 1935 A.W.R. 1089=158 Ind. Cas. 424.

——S. 117 (4)—Evidence—General repute—Admissibility.

The fact that a person is a habitual offender may, in view of the provisions of S. 117 (4), Cr. P. Code, be proved by evidence of general repute or otherwise; such evidence of general repute does not offend against the rule against reception of hearsay evidence or the provisions of S. 60, Evidence Act, by which it is provided that oral evidence must,

in all cases whatever, be direct. What weight is to be attached to such evidence of a particular witness must necessarily depend on the fact whether the witness is independent and impartial, whether he is in a position to disclose the source of his knowledge and whether the source of his knowledge is such as to inspire confidence. If the witness merely states that a man is reputed to be a habitual offender and is unable to disclose the source of his knowledge, his evidence is entitled to no weight whatsoever. A.I.R. 1934 All. 735=36 Cr. L.J. 33=3 A.W.R. 655=152 Ind. Cas. 120.

——S. 117—Evidence—General repute.

Evidence as to the general repute of the accused as being a habitual offender, where clearly deposed in proceedings under S. 110, Cr. P. Code, is admissible under the provisions of S. 117 (4) and is sufficient ground for requiring the accused to give security. A.I.R. 1933 Oudh 58=9 O.W.N. 1012=34 Cr. L.J. 160=141 Ind. Cas. 251.

——S. 117—Evidence — General repute—Hearsay.

The fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. That evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him." Such evidence is admissible as evidence of general repute. So far as the witness gives the opinions or the statements of other persons, his evidence must in a sense, be "hearsay." 125 Ind. Cas. 19=31 Cr. L.J. 755=51 All. 275 =1929 Cr. C. 346=A.I.R. 1929 All. 650.

——S. 117—Evidence—General repute.

Evidence as to cases in which the applicant was suspected cannot be said, to fall within the meaning of general repute under S. 117. 20 Ind. Cas. 231, Foll. 75 Ind. Cas. 723=5 P.L.T. 129=2 Pat. L.R. Cr. 79=25 Cr. L.J. 35=A.I.R. 1924 Pat. 498.

——S. 117—Evidence—General repute.

General reputation is the reputation a man bears among his fellow-townsmen in whose midst he lives. 61 Ind. Cas. 233=25 C.W.N. 334=22 Cr. L. J. 377=A.I.R. 1921 Cal. 625.

——S. 117—Evidence — General repute and character.

Evidence disclosing the collective opinions of persons in a circle about the character of a man, of which the man is conscious, is the evidence in proof of his general reputation and character. Evidence of personal opinions of accused's character is not admissible. The evidence of those persons only who bear the general repute of a person is admissible and the evidence which merely repeats what witness heard from specified individuals, is purely hearsay and inadmissible. 23 O.C. 229=2 U.P.L.R. (J.C.) 147 =7 O.L.J. 612=58 Ind. Cas. 682=21 Cr. L.J. 810.

——S. 117—Evidence—Habitual thief.

Evidence showing clearly that the person sought to be proceeded against under S. 110, Cr. P. Code, has the general reputation of being a habitual thief and burglar, is admissible under sub-S. (4) of S. 117, Cr. P. Code. A.I.R. 1934 Oudh 49=11 O. W.N. 84=35 Cr. L.J. 403=147 Ind. Cas. 388.

——Ss. 117 (4), 110 and 439—Evidence—Suspicion against accused need not be embodied in document.

No hard and fast rule can be laid down as to the quantum of evidence necessary before a Court can act thereon, nor is it necessary that the suspicion against a person charged under S. 110 must be embodied in some document. When a large body of persons have come forward to swear as to the reputation of the accused as being by habit a housebreaker and a thief and he is not able to show anything as to why the witnesses have come forward to give him a bad character, such evidence cannot be lightly brushed aside. A.I.R. 1946 Oudh 50=1945 O.W.N. 361.

——S. 117—Evidence — Suspicion — Opinion of witness.

It is open to question, whether evidence that the accused has been suspected by persons other than the witness is inadmissible for all purposes in an inquiry under S. 117. It has no doubt been held in several cases that evidence of cases in which the accused is suspected is not evidence of general repute within the meaning of S. 117, but it does not necessarily follow that such evidence is not admissible for other purposes. When a witness gives evidence of general repute he is undoubtedly entitled to give his personal opinion of the person concerned. As his opinion is undoubtedly relevant then the grounds of his opinion must also be relevant. The value to be attached to such evidence is another matter. 125 Ind. Cas. 19=31 Cr. L.J. 755=51 All. 275=1929 Cr. C. 346=A.I.R. 1929 All. 650.

——S. 117 (3)—Evidence on oath and cross-examination, if necessary for order under S. 117 (3)—Emergency existing — Testimony of Police Officer in form of affidavit is sufficient.

S. 117 (3) contemplates the taking of evidence on oath and the cross-examination of witnesses in the usual manner. The Magistrate must record his reasons; he must deal with application under S. 117 (3) with care and prudence, realising that they are mere routine orders nor orders designed to anticipate final orders that may be made, but that they are urgent orders, arising out of emergency and can only be justified in the exceptional circumstances of an emergency. If the Magistrate is satisfied that such

an emergency exists and that urgent orders are necessary, he can act upon the application of a Police Officer or upon the sworn testimony of a Police prosecutor given in the witness box or in the form of affidavits. A.I.R. 1942 Sind 86=I.L.R. (1942) Kar. 189=43 Cr. L.J. 788=202 Ind. Cas. 43.

7. Ex parte order before enquiry.

——S. 117 (3)—Ex parte order before enquiry and without hearing petitioners is bad. 1934 M. W.N. 1353.

8. Further evidence.

——S. 117—"Further evidence."

It is not necessary for the Magistate for passing an order under S. 117 (3) to take further evidence. The only condition precedent laid down is that he must record his reasons in writing. 20 S.L.R. 358 =27 Cr. L.J. 1030=96 Ind. Cas. 982=A.I.R. 1926 Sind 276.

——S. 117—"Further evidence"—Evidence Act, S. 151.

Such further evidence in S. 117 means evidence of *ejusdem generis* with the evidence already described. The accused first gave a list of 20 witnesses, and again gave an additional list of 200 witnesses. The Magistrate thinking that it would delay the proceedings refused to summon the additional witnesses. He also stopped the Counsel putting insulting questions:

Held, that the Magistrate acted rightly in both cases. 36 All. 239=12 A.L.J. 399=15 Cr. L. J. 212=22 Ind. Cas. 996.

9. Interpretation.

——Ss. 117 (3), 112, 110—Interpretation—"Any offence", in S. 117 (3), meaning of—Habitual offenders—Wave of lawlessness passing over province and martial law declared—Bail granted—Immediate measures become necessary for preventing crime.

No one is more likely to commit an offence than one who is an habitual offender and the words "any offence" in S. 117 (3) do not mean a particular offence. Where sub-S. (3) in S. 117 refers to the commission of an offence, it means an offence of the nature set out in S. 110, Cr. P. Code. An order under S. 117 (3) must have reference to the information under S. 110 and the order under S. 112 which follows it. It is not unreasonable to say that immediate measures are necessary to prevent the commission of offences by certain accused or suspected persons, when those persons have been granted bail, which measures would not be necessary if that bail has been refused, particularly when the wave of lawlessness has been passing over the District of the Magistrate at the time. The existence of a state of martial law is very strong evidence that an emergency exists, particularly when the proclamation of martial law is due to a wave of crime sweeping over large areas of the Province. A.I.R. 1943 Sind 173=I.L.R. (1943) Kar. 275=45 Cr. L.J. 147=209 Ind. Cas. 477.

——S. 117—Interpretation—"No charge need be framed."

The words "no charge need be framed" in S. 117 (2) can only mean that no occasion can arise for framing a charge because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the 'order in writing setting forth the substance of the information received' prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it, it resembles a charge in that it must contain a statement in abstract of the prosecution case. 124 Ind. Cas. 1=31 M.L.W. 243=3 M.Cr.C. 34=1930 M. W.N. 178=53 Mad. 173=31 Cr. L.J. 618=A.I. R. 1930 Mad. 331=58 M.L.J. 229.

10. Joint trial.

——S. 117 (5)—Joint trial—Legality—Test.

There can be no doubt that in view of the provisions of S. 117 (5), Cr. P. Code, a joint enquiry against a number of persons would be fully justified in law if and when these persons have jointly taken part as habitual robbers and thieves. It is settled now that it is on the basis of the accusation made and not on the facts finally proved on the evidence that the legality or the illegality of a joint trial depends. The very language used in sub-S. (5) does make it clear that the Magistrate has to decide before the enquiry commences whether certain persons should be dealt with in the same or separate enquiries. Therefore, in enquiries under S. 110, Cr. P. Code, no less than in trials for offences under the Code, it is necessary before there can be a joint trial of certain persons that there should be an accusation which would justify a joint trial. 4 A.I.Cr.D. 103=A.I. R. 1950 Cal. 177=51 Cr. L.J. 856.

——Ss. 117 (5) and 110—Joint trial—A and B charged under S. 110 for being habitual thieves and forming gang for that purpose—Case comes under S. 117 (5)—Joint inquiry is not illegal. A.I.R. 1946 Oudh 50=1945 O.W.N. 361.

——S. 117 (5)—Joint trial—Evidence identical—Finding that evidence established prosecution case against all accused is valid—Finding against each accused is not necessary. A. I. R. 1946 Oudh 50 =1945 O.W.N. 361.

——S. 117—Joint trial—Charge against two persons that they are desperate and dangerous—Joint enquiry.

A joint inquiry under S. 117 (5), Cr. P. Code, is out of the question when one charge at least is

that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connection between two individuals in regard to their characters as to render them liable to a joint inquisition. A.I.R. 1938 Mad. 35=1937 M.W.N. 1065=(1937) 2 M.L.J. 749=46 M.L.W. 858=39 Cr. L.J. 230=172 Ind. Cas. 866.

——Ss. 117 (5), 110—Joint trial—Persons alleged to be members of association committing theft—Same enquiry under S. 117 (5) in respect of all—Legality of.

When it is alleged that a person is in the habit of committing theft in the association with other persons as members of a gang of thieves, the Magistrate is at liberty in his discretion to deal with the case of all such persons in the same enquiry. Of course in deciding whether an order under S. 117 (5) should be made or not the Magistrate must consider whether, if the order is made, one or more of the persons concerned might be prejudiced in his defence. A.I.R. 1934 Rang. 121=12 Rang. 169 =35 Cr.L.J. 1257=151 Ind. Cas. 205.

——S. 117—Joint trial.

S. 117, Cl. (5) does not make it a condition of such joint trial, that the suspects shall be shown to be associated together in the order itself. It is a permissive clause which permits an enquiry being held where such persons are, as a matter of fact, associated together. 25 C.W.N. 334, Foll. 89 Ind. Cas. 710=19 S.L.R. 196=26 Cr.L.J. 1398= A.I.R. 1926 Sind 69.

——S. 117—Joint trial — Association must be proved.

Under Cl. (4), S. 117 two or more persons may be jointly tried where they have been associated together in the matter under inquiry, but there must be clear evidence to prove the association. 86 Ind. Cas. 274=6 P.L.T. 810=1925 P.H.H.C. 6=26 Cr.L.J. 738=A.I.R. 1925 Pat. 131.

——S. 117—Joint trial — Association should be proved—Prejudice to accused.

Ordinarily, under S. 110, Cr.P. Code, every person has to be tried separately for the offences enumerated therein. A joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in S. 110 clauses (*a*) to (*f*). The association of several persons in the commission of the offence mentioned in S. 110 of the Cr. P. Code must be established in order to entitle the Magistrate to try several persons jointly. In a case under S. 110, Cr.P. Code, in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form the integral parts of the offence, it is possible to conceive that the evidence led against one will not at all prejudice the case of the other accused persons assembled together in the same dock. 65 Ind. Cas. 484=3 P.L.T. 538=23 Cr.L.J. 100=1923 P.H.C.C. 8=A.I.R. 1923 Pat. 104.

——S. 117—Joint trial.

The legality of a joint trial must depend on what is alleged for the prosecution, not on the facts subsequently found to be true. 61 Ind. Cas. 233=25 C.W.N. 334=22 Cr.L.J. 377=A.I.R. 1921 Cal. 625.

——S. 117 (4)—Joint trial—Associated together.

A remark by Court in a proceeding under S. 110 that the association of the accused is established, that they are close neighbours and are found implicated together in many cases, does not satisfy the requirements of S. 117 (4). 21 Cr. L. J. 700 =57 Ind. Cas. 940 (Cal.).

——S. 117 (4)—Joint trial.

Although in cases of joint inquiries there is a danger of one accused being prejudiced through the evidence against another, which does not directly affect him, being on the record, the law nevertheless allows joint inquiries under S. 117, Cl. (4) of the Cr.P. Code. 20 Cr.L.J. 750=53 Ind. Cas. 158.

——Ss. 117 (4), 110—Joint trial.

Under S. 117 (4) a joint proceeding is competent where two or more persons have been associated together in the matter under enquiry but the section does not apply to proceedings under S. 110, where the evidence to the effect that the accused are persons of bad livelihood who associate with other *badmashes* and evidence is also given of specific act against individual accused. 3 P.W.R. Cr. 1917= 18 Cr.L.J. 617=39 Ind. Cas. 985.

——S. 117—Joint trial — "Associated together in the matter under enquiry".

Persons belonging to two contending factions, cannot be said to be associated together in the matter under enquiry within the meaning of S. 117 and they cannot be legally dealt with and bound down to keep peace in one proceeding. 5 N.L.R. 65=9 Cr.L.J. 560=2 Ind. Cas. 240.

——S. 117 (4)—Joint trial—"Associated together".

Persons in conflict with one another are not "associated together" within the meaning of Cl. (4) of S. 117 and a joinder of enquiry in respect of such parties is an illegality and not a mere irregularity. 31 M. 276=3 M.L.T. 408.

——Ss. 117, (4), 107, 233, 239—Joint trial—Prejudice—Wrongful acts committed — Breach of the peace, likelihood of—Servants acting in the interests of their master—High Court—Revision.

Per *Rampini, J.*:—When two or more persons are associated together in the matter of extortion of kabuliats at enhanced rates from the tenants of their master the zemindar, for his benefit, the terms of S. 117 (4), Cr. P. Code, fully jusstifies o joint enquiry of all those persons. When persons in whatever capacity, commit wrongful acts which may probably occasion a breach of the peace or disturb the public tranquillity, as they have done before, they are liable to be proceeded against under S. 107, Cr. P. Code, and cannot escape liability by pleading or showing that they acted in obedience to the orders of their employer.

Per *Henderson, J.*—When acts are done by two or more persons, not in their own interests but in the course and within the scope of their employment, in the interests of their master and under the orders, express or implied of him or his agents, in such a case ordinarily, their acts (*i.e.*, of the servants) would be primarily and properly attributable to the orders given and not necessarily to any association together for the purpose of committing the acts. If the servants of a zemindar acting under orders of their master or out of zeal for their master's interests or for any other reason join or associate themselves together for the purpose of committing acts of oppression upon the raiyats, they will render themselves liable to punishment for any offences which they commit, and if they are shown to have habitually committed extortion so as to bring them within the terms of S. 110, Cr. P.C., they are liable to give security for their good behaviour. The words "*associated together*" do not imply that the persons to whom they may be properly applied must have been acting in concert, but that persons associated together in the matter of an enquiry under S. 107, Cr.P. Code, must be persons shown to have been acting together in the various matters charged against them as grounds for binding them over to keep the peace. Where there is no such association together a joint enquiry is improper, if not also illegal, and such an enquiry prejudices the accused. The object of S. 107, Cr. P. Code, is the prevention and not the punishment of offences. Where wrongful acts are committed, which, if repeated, are likely to occasion a breach of the peace, the proper and appropriate procedure would be to institute regular trials for the offences which the act constitute and not to take proceedings under S. 107, Cr. P. Code, and an order for security to keep the peace would very seriously prejudice them in their trials, should, such trials be instituted. Where an inquiry is found to have been defective or improper and a question arises whether a fresh enquiry be directed it is necessary to look to the evidence. Having regard to the information upon which the inquiry was started it might very well be a joint enquiry but if at a later stage it appeared that a joint enquiry might prejudice the persons concerned, it would be the duty of the Magistrate to stop the enquiry and institute separate enquiries. Where however, in a proper case, the Magistrate had exercised the discretion vested in him, the High Court would not rightly interfere. But if it should come to the conclusion that the persons concerned had been prejudiced by the procedure adopted, it should not hesitate to interfere as a Court of revision.

Per *Geidt, J.*—The association which will give the Magistrate jurisdiction to deal in one proceeding with two or more persons must be alleged or implied in the initiatory order. It is the accusation which must be looked to ascertain whether a joint trial is legal or not. If on the information received by the Magistrate that two or more persons are associated together in the wrongful acts which they are likely to commit and which may probably occasion a breach of the peace he has jurisdiction to hold a joint enquiry in proceedings under S. 107 and to make an order requiring the execution of a bond by all those whom he has reason to think to be associated together in the acts likely to be committed by them. Nor will his proceedings be vitiated even if it should appear in the course of the enquiry that one or more persons called to show cause, are not associated with those against whom there is sufficient reason for making the order absolute. The phrase '*associated together*' applies to persons acting in concert, whether the concert is due to mutual agreement amongst themselves or in obedience to the orders of a common master. The object of proceedings under S. 107, Cr. P. Code, is not to punish persons for anything that they have done in the past but to prevent them from doing in the future something that may probably occasion a breach of the peace. Evidence as to acts committed in the past may be brought forward to show that while the conditions remain unchanged similar acts may be committed in the future. If those acts are wrongful and are likely to occasion a breach of the peace, the Magistrate's jurisdiction to take security is in no way impaired by the circumstance that those acts are offences for which the offenders may be punished when they are committed. 9 C.W.N. 898=1 C.L. J. 618.

11. Order under.

——Ss. 117 (3), 110 (a) (b) and (c) and 112 — Order under S. 117 (3), if a routine order appended to order under S. 112 passed on application under S. 110—Charges under S. 110 (a) (b) and (c), when fall under S. 117 (3)—Order under S. 117 (3)—Matters to be considered—Duty of Magistrate.

The orders under S. 117 (3), Cr. P. C., are not mere matters of routine order appended as it were to orders passed by a Magistrate under S. 112, Cr. P. Code, on an application made under S. 110, Cr. Procedure Code.

Before passing an order under S. 117 (3), the Magistrate must direct his consideration particularly to the question of emergency and the necessity of immediate measures. Charges falling under cls. (*a*), (*b*) and (*c*) of S. 110 do not, perhaps, with one exception, bring the case under S. 117, sub-S. (3). The words "commission of any offence" in sub-S. (3) cover cases falling under cls. (*a*), (*b*) and (*c*) of S. 110. but only when the Magistrate considers that immediate measures are necessary to prevent

the commission of any offence. The Magistrate must give a careful consideration to the separate case of an emergency under S. 117 (3) and the necessary immediate measure; and it cannot be said the Magistrate has done this when merely on a Police report, without even calling the Police Officer in the witness box, without making any further inquiry in the general and vague allegations such as that the persons complained against were "dangerous *badmashes* and the public was in fear of them," he passes an order under S. 117 (3), Cr. P. C. A mere report by Police Officer of this nature should not satisfy a Magistrate. He should make some further inquiry either from the Inspector himself or from some other source before he is satisfied that an emergency justifying immediate measures under S. 117 (3) exists. A.I.R. 1942 Sind 77=I.L.R. (1942) Kar. 9=43 Cr.L.J. 692=200 Ind. Cas. 334.

——S. 117 (3)—Orders under—Object of.

Orders under S. 117 (3), Cr. P. Code, are not mere routine orders to be appended to an order under S. 112 nor are orders under S. 117 (3) meant merely to anticipate final orders that may be made under S. 118. The orders contemplated by S. 117 (3) are orders designed to meet emergencies. An order under S. 117 (3) passed more than two months after proceedings under S. 112 are initiated is not justified. A.I.R. 1942 Sind. 80=I.L.R. (1942) Kar. 189=43 Cr.L.J. 788=202 Ind. Cas. 43.

——S. 117—Orders under — Object of — When High Court interferes with order for interim security.

S. 117 (3) has apparently been introduced for the purpose of preventing a breach of peace or disturbance of the public tranquillity or the commission of any offence or in the interest of public safety pending an enquiry under Ss. 108, 109 and 110. It is not therefore open to the High Court under provisions of S. 498 to reduce the security which the Magistrate orders to be furnished. But there is nothing to prevent the High Court in exercise of its inherent powers from considering whether the interim security which is ordered to be furnished is not too high. The order of the High Court reducing interim security does not, however, fetter the discretion of the Magistrate as to the amount of security which may ultimately be demanded. 125 Ind. Cas. 322=1930 Cr.C. 677=31 C.L.J. 812=A.I.R. 1930 Lah. 529.

——S. 117—Order under S. 112 not read out nor substance explained—Order under S. 117 (3) is vitiated.

The error on the part of the Magistrate in failing to read out the order under S. 112 to the accused or to explain its substance to them vitiates the order under S. 117 (3), Cr. P. Code. The failure to comply with the provisions of S. 117 (1) is not a mere irregularity but is an illegality which goes to the root of the proceedings. A.I.R. 1943 Sind. 175=45 Cr.L.J. 164=209 Ind. Cas. 614.

12. Order under S. 117 (3) without reading or explaining order under S. 112.

——S. 117—Order under S. 117 (3) without reading order under S. 112 is premature.

S. 117, Cr.P. Code, clearly contemplates that the order under S. 117 (3) shall be passed after the order under S. 112 has been made and read out or explained to the accused under S. 113. An order under S. 117 (3) passed before such reading is passed prematurely. A.I.R. 1943 Sind 163=44 Cr. L.J. 815=I.L.R. (1943) Kar. 513=209 Ind. Cas. 49.

——S. 117 (3)—Orders under Ss. 117 (3) and 112 based on same information and same statements—Question of emergency separately considered—Order under S. 117 (3), if wrong.

Where the Magistrate while passing an order under S. 117 (3), Cr.P. Code, has clearly considered the question of emergency as a separate question, but has related it to his order under S. 112 of the Code and has acted on the same information which justified his order under S. 112, there is nothing wrong in this. The Magistrate has considered first that it is necessary to pass an order under S. 112, he has then considered the case under S. 117 (3) and considered it necessary to pass an order under S. 117 (3) of the Code. The fact that the same information supports and the same statements are the basis of both orders, does not offend either against the provisions of the Cr.P. Code or against the interpretation of those provisions. A.I.R. 1943 Sind 122=I.L.R. (1943) Kar. 279=44 Cr .L .J. 779=208 Ind. Cas. 338.

13. "Or otherwise".

——S. 117—'Or otherwise'—Habitual offenders—Accused associated together—Statement by some incriminating others — Admissibility — Evidence Act, S. 30.

Persons against whom proceedings are being jointly taken under S. 117 of the Cr. P. Code in one and the same enquiry cannot be said to be on their joint trial for the same offence within S. 30 of the Evidence Act. But under S. 117 of the Cr. P. Code when once the prosecution has made out a reasonable case for dealing with two or more persons in the same enquiry, evidence which would be relevant if the accused persons were being tried on a charge of being habitual offenders, would be admissible. The use of the expression 'or otherwise' in Cl. (3) of S. 117 sufficiently indicates this. 41 All. 231=17 A.L.J. 147=20 Cr.L.J. 206=1 U.P. L.R. (H. C.) 89=49 Ind. Cas. 654.

14. Previous conviction—If necessary.

——S. 117—Previous conviction—If necessary.

A previous conviction is not necessary for proceedings under S. 110, Cr. P. Code. There is no such provision in the law itself which on the other hand lays down in S. 117 (4) that the foct that the man is a habitual offender can be proved by evidence of general repute or otherwise. A.I.R. 1938 Lah. 428=40 P.L.R. 222=39 Cr. L. J. 599=175 Ind. Cas. 522.

15. Procedure.

——S. 117—Procedure.

S. 247 is not applicable to proceedings under S. 117 (2). 101 Ind. Cas. 607=45 C.L.J. 211=31 C.W.N. 388=28 Cr.L.J. 479=A.I.R. 1927 Cal. 343.

——S. 117—Procedure.

The provisions of S. 360, Cr. P. Code, are applicable to proceedings under S. 117 when a person is called upon to show cause why he should not furnish security for good behaviour and failure to comply with the provisions of that section would vitiate the enquiry or trial which has resulted in an order under S. 118 of the Code.

Per *B. B. Ghose, J.*—There is considerable doubt whether S. 360, Cr. P. Code, applies to proceedings under Chapter VIII of that Code. 88 Ind. Cas. 856=41 C.L.J. 352=52 Cal. 632=26 Cr. L. J. 1240=A.I.R. 1925 Cal. 720.

——S. 117—Procedure—Individual finding against accused.

The Magistrate is bound to consider the case of each suspect separately and individually on its own merits and to come to a separate finding in respect of each of the suspects, notwithstanding that under S. 117 (4) it is permitted to a Magistrate to hold a joint enquiry against several suspects associated together in the matter under enquiry. 83 Ind. Cas. 337=19 S.L.R. 96=25 Cr.L.J. 1377=A. I. R. 1925 Sind. 204.

——Ss. 117 (2), 350 (1) (a)—Procedure—Expression "the manner hereinafter.....in warrant cases."

The words "the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases" in cl. (2), S. 117, Cr. P. Code, are wide enough to cover the special procedure laid down for the trials of summons or warrant cases in Chaps. XX and XXI as well as the general provisions as to inquiries and trials contained in Chap. XXIV. A.I.R. 1937 All. 438=1937 A.L.J. 373=38 Cr.L.J. 804 =1937 A.W.R. 382=169 Ind. Cas. 833.

——S. 117—Procedure in a security case.

S. 117 requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal enquiring into a security case. The right of the accused to have the witnesses recalled is not a substantive right but procedural, and the accused has that right in a security as in a summons or warrant case. 43 Mad. 511=(1920) M.W. N. 280=21 Cr. L.J. 402=38 M.L.J. 370=11 L.W. 435=56 Ind. Cas. 50.

16. Proceedings under—Nature of.

——S. 117—Proceeding under—Nature of.

A proceeding under S. 117 is an enquiry within S. 517. A.I.R. 1936 Nag. 143=I.L.R. (1936) Nag. 150=38 Cr. L.J. 175=166 Ind. Cas. 271.

17. Re-cross-examination.

——S. 117—Re-cross-examination.

Quaere.—It is doubtful whether a person whose conduct is under enquiry under S. 117, Cr. P. Code, is entitled at any stage of the proceedings to demand that witnesses who have been cross-examined should be-recalled for further cross-examination. A.I.R. 1943 All. 23=1942 A.L.J. 557=1942 A.W.R. (H. C.) 326=I.L.R. (1942) All. 945=44 Cr. L. J. 187=204 Ind. Cas. 274.

——S. 117—Re-cross-examination — Ss. 256 and 254, Cr. P. Code.

An accused person who has been called upon to give security for good behaviour, has no absolute right to recall prosecution witnesses for cross-examination under S. 256, but he has a right under S. 257. Case-law discussed. 31 M.L.W. 243=3 M. Cr. C. 34=53 Mad. 173=124 Ind. Cas. 1=31 Cr. L.J. 618=1930 M.W.N. 178=A.I.R. 1930 Mad. 331=58 M.L.J. 229.

18. Refusal to summon witnesses.

——Ss. 117 (2), 257—Refusal to summon—Principle to guide magistrate—Omission to record reasons for refusal—Reason to be given in the case of each witness.

S. 257, C. P. Code, is imperative. A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground must be recorded by him in writing. A Magistrate, therefore, must issue the summons for each witness named unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or for defeating the ends of justice. The case of each witness must be dealt with individually. 4 Bom. L.R. 38=26 B. 418.

19. Revision.

——S. 117 (3)—Revision—Emergency order under S. 117 (3).

In a case of emergency order under S. 117 (3), Cr. P. Code, although a Court in revision is not in a position, as is the Magistrate, to understand the emergency and the necessity for the order and will not substitute its own opinion for that of the Magistrate yet the order of a Magistrate must have a legal basis though proceedings under Chap. VIII are only of a quasi-judicial nature. The High Court can interfere with the order in revision where the order is without legal basis. A.I.R. 1940 Sind 175=41 Cr. L.J. 937=I.L.R. (1940) Kar. 494=190 Ind. Cas. 532.

——Ss. 117 and 242—Revision—Failure to follow the procedure laid down in S. 242.

Under S. 117, a Sub-Divisional Magistrate, should state the particulars of the matter against the accused and ask the accused if he could show cause why he should not be ordered to execute a bond, and should satisfy himself by inquiry of the truth of the information before making an order. The procedure laid down in S. 242 should be followed and it is not sufficient to ask the accused if he is willing to execute the bond required; a bond executed on the accused answering such a question in the affirmative is irregular and must be set aside. 34 M. 139=(1910) M.W.N. 228=6 Ind. Cas. 682=7 M.L.T. 304=11 Cr. L.J. 393.

——Ss. 117 and 118—Revision—Order of single Judge in—Appeal—Letters Patent, Cl. 15.

Orders passed in revision by a single Judge of a High Court dealing with proceedings under the section cannot be appealed against under the Letters Patent. 39 Mad. 539=28 M.L.J. 307=(1915) M.W.N. 224=16 Cr. L.J. 303=28 Ind. Cas. 527.

20. Scope.

——Ss. 117, 117 (3), Chap. VIII—Scope—Nature of order under S. 117—S. 117, if applies to offence of perjury.

An order under S. 117, Cr. P. Code, is in the nature of an *interim* order and must be of a kind which could be made in a permanent order in the proceedings. The temporary order under S. 117 must be capable of direct relation to the application under Ss. 107, 108, 109 and 110 on which the proceedings are based and it is not intended to apply to an offence that has no relation whatever to the object of the proceedings under the Cr. P. Code, no relation whatever to proceedings under Chap. VIII, S. 117 could not, therefore, be said to apply to an offence of perjury. A.I.R. 1940 Sind 175=41 Cr. L.J. 937=I.L.R. (1940) Kar. 494=190 Ind. Cas. 532.

——Ss. 117 and 118—Scope of inquiry.

The inquiry under Ss. 117 and 118 is not restricted by the precise terms of S. 112. 17 C.W.N. 331=13 Cr. L.J. 784=17 Ind. Cas. 416.

21. Security for keeping the peace.

——Ss. 117, 118—Security for keeping peace—Nature of surety required—'Surety in movable property.'

In making an order under S. 117, Cr. P. Code, calling upon a person to give security for keeping the peace, there should be no restriction in the order itself that the accused should produce sureties in movable property. So far as the order goes, the Magistrate should follow the words of S. 117 and the bond executed by the sureties should be in the form given in the schedule.

Obiter—If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may, by way of precaution, accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties. A.I.R. 1932 All. 122=1932 A.L.J. 157=33 Cr. L.J. 229=136 Ind. Cas. 65.

22. Sureties.

——S. 117—Surety—Interim order.

Where a Court passes an interim order of security, that order should not be more onerous than the one issued under S. 112. 96 Ind. Cas. 982=20 S.L.R. 358=27 Cr. L.J. 1030=A.I.R. 1926 Sind 276.

23. Transfer.

——S. 117—Transfer—Application under S. 526—Power of Court to act under S. 117 (3).

After an application is made to a Court under S. 526 for adjournment to enable an accused person to apply for transfer of the case, the Court does not become incompetent to make ancillary orders not affecting the merits of the case, such as requiring an accused to execute a bond under S. 117 (3). 3 S.L.R. 155 and 1 S.L.R. Cr. 35. Diss. from: 31 Cal. 715, Rel. on. 99 Ind. Cas. 605=28 Cr. L.J. 173=7 A.I.Cr.R. 326=21 S.L.R. 93=A.I.R. 1927 Sind 148.

——S. 118.

Synopsis.

1. Appeal.
2. Bail.
3. Binding over.
4. Double order.
5. Enquiry.
6. Evidence necessary to support order.
7. Procedure.
8. Security—Default—Imprisonment.
9. Security—Fixing of amount.

10. Security—Sufficiency—Duty of Magistrate to himself decide.

11. Security for good behaviour.

12. Security for keeping the peace.

13. Several accused.

14. Sureties—Fitness of.

15. Surety for good behaviour.

16. Surety offering house property.

17. Surety only in movable property if can be ordered.

18. Surety—Magistrate can accept even after accused sent to jail for default.

19. Suspect in jail.

1. Appeal.

——S. 118—Appeal—High Court can interfere on merits of orders under S. 118, if the lower Court under S. 406 has not really gone through evidence on record.

It is true that the High Court will not ordinarily interfere on the merits of orders passed under S. 118, except in very exceptional circumstances provided that the Court under S. 406, shows in its judgment that it has really, and not merely nominally, gone through the evidence on the record, which it can do by stating clearly what it believes the evidence proves giving a short summary of that evidence and making such criticisms as go to show that the evidence is reliable; but if the judgment does not satisfy these requirements and also fails to come up to the required standard of a legal judgment, and there is a clear misconception of such evidence as is considered, it is not only just but imperative on the High Court to see how far the judgment in appeal is correct even on matters which it purports to decide expressly. 6 A. L. J. 487, Rel. on. 120 Ind. Cas. 215=1929 Cr. C. 532=31 Cr.L.J. 20= A.I.R. 1929 Nag. 328.

——Ss. 118, 406—Appeal—Order of Additional District Magistrate under S. 118—Appeal, whether lies to District Magistrate or Sessions Judge.

In the case of districts in respect of which a notification has been issued by the Local Government under the proviso to S. 406, Cr. P. Code, appeals under that section from orders made by an Additonal District Magistrate under S. 118 lie to the District Magistrate and not to the Sessions Judge. A.I.R. 1932 Lah. 463 (1)=13 Lah. 254=32 P.L.R. 453 =32 Cr. L. J. 849=132 Ind. Cas. 206.

——S. 118—Appeal.

An appeal lies to the District Magistrate from an order for security for good behaviour passed by an Additional District Magistrate. 66 Ind. Cas. 69 =48 Cal. 874=25 C.W.N. 383=23 Cr. L.J. 229 =A.I.R. 1921 Cal. 347.

——Ss. 118, 406, 404—Appeal—Security for keeping the peace—No right of appeal.

S. 404 of the Code not having provided for an appeal except as under the Code there is no right of appeal from an order to furnish security for keeping the peace, S. 406 having provided for such a right only in the case of an order to furnish security for good behaviour. 2 A.L.J. 716=1905 A. W. N. 135=27 A. 623.

2. Bail.

——S. 118—Bail—Sessions Judge has power to grant bail pending reference under S. 123.

There is nothing in S. 123 (2) controlling the very wide provisions of S. 498. Bail can be allowed by the Sessions Judge in the case of a person against whom an order had been made under S. 118 as the order is liable to be revised by a Sessions Judge under the provisions of S. 123 (2). 75 Ind. Cas. 537 =50 Cal. 969=37 C.L.J. 592=24 Cr. L. J. 953 =A.I.R. 1923 Cal. 723.

3. Binding over.

——S. 118—Binding over—Grounds.

A person cannot be bound over for prospective breach of peace on hypothetical contingencies. 1931 M.W.N. 402.

——S. 118—Binding over—Grounds.

An order under S. 110, read with S. 118, Cr. P. Code, cannot be made on vague allegations that person proceeded against was suspected in several cases of having committed offences against property. A.I.R. 1939 Lah. 269=41 P.L.R. 431=I. L. R. (1939) Lah. 53=40 Cr. L.J. 753=183 Ind. Cas 269.

——S. 118—Binding over — Is not conviction — Power of Sessions Judge to enlarge such person on bail—Order under S. 426 suspending execution of order—Whether can be passed—Period during which he is released on bail—Exclusion of.

Persons against whom proceedings are taken under Chap. VIII. Cr. P. Code, are not accused persons nor can they be called convicted persons when an order is passed against them adversely. The word "convicted" has been used in the Code as meauing "convicted of an offence", and, would therefore be inapplicable to the case of persons who are bound over.

There is no reason for limiting the scope of S. 426 so as to narrow it down to cases where persons have been convicted of offences and have preferred appeals under S. 407 and the following sections. Although the Sessions Judge has power under S. 498 to admit a person bound over under S. 118 to bail

it does not empower him to pass an order under S. 426, suspending execution of that order. In cases where a person has been convicted of an offence and the Sessions Court on appeal admits him to bail the Court may not necessarily pass a separate order suspending the execution of the sentence or pass an order releasing him on bail under S. 426. It may simply pass an order under S. 498 admitting him to bail. The necessary result of the release on bail is that the person does not serve out his sentence of imprisonment during the period that he is released on bail. When, therefore, his appeal is dismissed and he surrenders to his bail, he must serve out the remaining portion of his sentence so as to complete the full period of imprisonment passed against him. The same principle should apply to cases where a person has been bound over for a particular period and is released on bail by the Sessions Judge and has to surrender after the dismissal of his appeal. The necessary result of his being allowed to be at large is that he has for that period neither furnished any security as required by the order of the Magistrate nor been detained in jail, but has been set free by the order of the Appellate Court. It cannot, therefore, be said that during this period. the order of the Magistrate has been carried out and has, therefore, partially exhausted itself. Consequently the period during which the person bound over is released on bail by an order of the Appellate Court should be excluded from the term prescribed under the order of the Magistrate who bound him over. A.I.R. 1936 All. 107=37 Cr. L.J. 155=1935 A.W.R. 1401=1935 A.L.J. 1337=58 All. 589=159 Ind. Cas. 804 (2).

——S. 118—Binding over—Is not conviction.

A proceeding under Chap. VIII. is an "inquiry" which under the definition of the term excludes a trial. No doubt S. 117 applies to such inquiry, the procedure prescribed for conducting trials, and the terms and expressions which occur in a trial come to be loosely applied in an inquiry also for the sake of convenience. But actually the person in respect of whom the inquiry is held is not an accused, but a quasi-accused and he is not deemed to be an accused, nor when an order under S. 118 is passed against him "deemed" to be convicted within the meaning of S. 426. A.I.R. 1924 Cal. 392; A.I.R. 1926 All. 403, Foll. 125 Ind. Cas. 792=31 Cr. L.J. 958=9 Pat. 131=1930 Cr. C. 455=11 P.L.T. 261 =A.I.R. 1930 Pat. 274.

——S. 118—Binding over—Is not "Conviction" or "acquittal".

The terms "conviction" and "acquittal" are nowhere applied throughout the Code to an order under S. 118 and they are, in fact, wholly inapplicable to the same. (1898) A.W.N. 127; 13 C.W.N. 420, and 9 Cal. 878, Rel. on. Therefore, no appeal lies on behalf of Government against an order of a Sessions Judge setting aside the order of a Magistrate calling upon a person to furnish security for good behaviour. 106 Ind. Cas. 684=8 L.R.A. Cr. 163=8 A.I.Cr. R. 557=26 A.L.J. 99=29 Cr. L.J. 92=A.I.R. 1928 All. 1.

4. Double order.

——S. 118—Double order.

Where a bond has been executed by an offender, with sureties, under S. 118, Cr. P. Code, it is illegal to pass an order against him under the Burma Habitual Offenders Restriction Act. 73 Ind. Cas. 975=1 Bur. L.J. 257=24 Cr. L.J. 735=A.I.R. 1923 Rang. 134.

5. Enquiry.

——S. 118—Enquiry—Magistrate's action.

In a pending proceeding some defence witnesses were called upon to show cause why they should not be prosecuted under S. 193, I. P. C., it was held that the Judge's action was injudicious and prejudiced the accused. The order could not be sustained. 16 Cr. L.J. 114=27 Ind. Cas. 178.

6. Evidence necessary to support order.

——S. 118—Evidence necessary to support order.

A report of a Police Officer and the evidence given by the same officer are not sufficient to justify an order binding down a person to keep the peace. 117 Ind. Cas. 807=10 Lah. 155=30 Cr.L.J. 839 =30 P.L.R. 694=1929 Cr. C. 61=A.I.R. 1929 Lah. 504.

——S. 118—Evidence necessary to support order.

Entries in the Thana Village Crime Note Book are not sufficient evidence to support an order under S. 118. 62 Ind. Cas. 182=22 Cr. L.J. 486 (Cal.).

7. Procedure.

——S. 118—Procedure—Legality.

L and *B* were given notice under S. 112, Cr. P. Code, to show cause as to why they were not to be bound down with bonds and securities. There was no joint trial nor was there any intention of having a joint trial. The Magistrate recorded the evidence against both in one case and then proceeded to consider it as evidence in the case against *B*:

Held, that the procedure in recording the evidence was illegal. *B's* case was never tried at all and the orders passed against him under S. 118, Cr. P. Code and S. 7, Habitual Offenders Act, should be set aside. 127 Ind. Cas. 861=1930 Cr. C. 393=A.I.R. 1930 Lah. 345.

——S. 118—Procedure—Order without enquiry is illegal.

It is the duty of the Magistrate to proceed to enquire into the truth of the information on which he takes action and it is only if upon such enquiry it is proved that it is necessary to take bond from the person in respect of whom the enquiry has been made, he can be ordered to execute a bond. Mere fact that the person was prepared to execute the bond does not make the order legal if it is made without any

enquiry. 24 P.R. 1915 (Cr.) and 27 P.R. 1917 (Cr.), Rel. on. 117 Ind. Cas. 807=10 Lah. 155= 30 Cr.L.J. 839=30 P.L.R. 694=1929 Cr. C. 61= A.I.R. 1929 Lah. 504.

8. Security—Default.

——S. 118—Security—Default—Imprisonment.

Imprisonment for default of security under S. 118 stands on quite a different footing from a sentence of imprisonment passed on a conviction in respect of an offence. 1 Pat. L.J. 212, Rel. on. 125 Ind. Cas. 792=31 Cr. L.J. 958=9 Pat. 131=1930 Cr. C. 455=11 P.L.T. 261=A.I.R. 1930 Pat. 274.

——Ss. 118, 120 and 123—Security—Default—Imprisonment to run concurrently with sentence.

Under S. 120 (1) read with S. 123 (1) of the Code a sentence of imprisonment under S. 118 cannot be made to run concurrently with some other sentence which the accused is already undergoing. 16 Cr. L.J. 272=28 Ind. Cas. 160.

9. Security—Fixing amount of.

——S. 118 (2)—Security—Fixing of amount.

The character and reputation of a suspect are not the sole consideration on which the amount of the security is to be fixed. The amount should not be excessive or prohibitive and it should be fixed after considering the status in life of the accused. 16 B. 372, Foll. 5 S.L.R. 10=12 Cr.L.J. 110=9 Ind. Cas. 651.

——S. 118—Security—Fixing of amount.

Security demanded under S. 118, Cr. P. Code, should not be excessive. 16 B. 372, Foll. 23 A. 80=1900 A.W.N. 204.

——S. 118—Security—Fixing of amount.

Where a person, being aware that violence is the inevitable outcome of the doctrine he breches, conducts a propaganda against the forces of law and order and instigates breaches of the peace, he must be treated as an abettor of such breaches of the peace and may be ordered to give security under S. 118 Cr. P. Code. The security demanded under S. 118 should not be more than the accused may reasonably be expected to furnish. A.I.R. 1931 Cal. 18=52 C.L.J. 405=32 Cr. L.J. 593=130 Ind. Cas. 880.

10. Security—Sufficiency of.

——S. 118—Security—Sufficiency of — Duty of Magistrate to decide himself.

It is not competent to a Magistrate who has passed an order under S. 118 to delegate to another, *e.g.* the Superintendent of Police, the duty of the enquiry into the sufficiency of the security tendered, but should make such inquiry himself. 76 Ind. Cas. 27=25 Cr.L.J. 91=A.I.R. 1924 Lah. 672.

11. Security for good behaviour.

——S 118—Security for good behaviour—Order under Punjab Act (V of 1918).

If person is required to furnish security for good behaviour under S. 118, Cr. P. Code it is illegal to make an order at the same time under S. 7 of the Punjab Restriction of Habitual Offenders Act restricting his movements. I Lah. 100=95 P.L.R. 1920=21 Cr. L.J. 385=55 Ind. Cas. 993.

12. Security for keeping the peace.

——Ss. 118, 125—Security for keeping peace—Power of Dt. Magistrate to cancel bond and to send accused to jail.

A District Magistrate can cancel a bond given by an accused to keep peace, but cannot cancel the bond of surety and send the accused so bound to jail. 33 All. 624=12 Cr. L.J. 480=8 A.L.J. 658 =12 Ind. Cas. 88.

13. Several accused.

——Ss. 118, 367 (6)—Several accused—Order under S. 118—Nature of.

Proceedings in which suspected persons can be sent to prison on evidence on which they would not ordinarily be convicted if charged with a substantive offence in a Criminal Court are serious proceedings and require to be dealt with quite as carefully as cases where accused persons are charged in the ordinary way with substantive offences in the Criminal Courts, and where in many cases, the consequences are not so serious to the persons charged. An order passed under S. 118 or S. 123 (3), Cr.P. Code, must be self-contained; it must show that the Court has considered the evidence against each of the suspected persons and has found that the evidence proves the case against each of the suspected persons individually. But there is nothing to exclude the application of S. 11, Evidence Act. The Appellate Court's judgment cannot be read in connection with and as supplementary to the judgment if the Court of first instance but must be quite independent and stand by itself. In proceedings against several suspected persons, where they can be dealt with in one inquiry under the law, the appellate judgment must show that the case against each has been considered separately and that the case against each of them individually is proved by evidence. A.I.R. 1937 Sind 26=38 Cr. L.J. 363 =30 Sind L.R. 382=167 Ind. Cas. 227.

14. Sureties—Fitness of.

——S. 118—Sureties—Fitness of.

In the proceedings taken after the order for securities is made and after the accused persons bring certain sureties the Magistrate cannot introduce any new qualifications while deciding on the suitability

of the sureties. 87 Ind. Cas. 961=19 S.L.R. 101 =26 Cr.L.J. 1041=A.I.R. 1925 Sind 321.

——Ss. 118 and 182—Sureties—Fitness of.

Sureties for good behaviour should not be rejected before judicial inquiry held by the Magistrate himself. He cannot delegate the function to others. The fitness of each surety should be separately determined if each of the accused offer two sureties each. A general order without investigation of the circumstances of each of the sureties should not be passed. 43 Cal. 1024=24 C.L.J. 51=20 C.W.N. 1133=18 Cr.L.J. 408=38 Ind. Cas. 968.

——S. 118—Sureties—Fitness.

The fact that the sureties reside at a distance where they cannot reasonably be expected to exercise control over the accused becomes of less importance when the sureties are themselves relations and presumably persons of some standing and they offer to keep control over the accused. 43 Cal. 1024, Rel. on. 112 Ind. Cas. 909=30 Cr.L.J. 45=10 P.L.T. 213=A.I.R. 1928 Pat. 374.

——S. 118—Sureties — Fitness—Distant residence by itself is no ground for rejection unless that indicates absence of control.

Sureties should not be rejected merely because they are not close neighbours of the persons called upon to execute the bond, but this does not mean that sureties cannot be rejected when in the particular case the Magistrate finds that they live too far away to be able to exercise any control over the conduct of the person called upon to execute the bond. Inability to control, whether owing to distance or an other reason, is a good reason, for rejection, though mere distance is not. In the case of a bond for good behaviour and a bond to keep the peace, personal security is necessary. 81 Ind. Cas. 316=26 O.C. 284=25 Cr. L.J. 796 =A.I.R. 1924 Oudh 80.

——S. 118—Surety—Fitness of.

A person, asked to furnish security for good behaviour, gave two sureties, but both were rejected on the ground that they did not live within a radius of 5 miles from the residence of the accused:

Held, that there wos no ground for rejecting the securities and the order rejecting the securities was bad. 10 A.L.J. 354=13 Cr .L. J. 831=17 Ind. Cas. 575.

——S. 118—Sureties, fitness of—Friends of accused not unfit.

Unnecessary difficulties should not be thrown in the way of people required to give security; where a man is called upon to produce persons who would be sureties for him and he produces them, they should not be rejected merely on the ground that they lived ten miles away from him and were on friendly terms with him. 7 A.L.J. 993=7 Ind. Cas. 910=11 Cr. L.J. 536.

——S. 118—Sureties—Fitness of.

It is inexpedient to question a surety as to his imprisonment that took place thirty years prior to the inquiry and Judges will show a wise discretion by disallowing the question on the ground that it related to a matter which had happened thirty years before and was so remote in time that it ought not to influence his decision as to the fitness of the surety. 26 A. 371=1904 A.W.N. 52.

——S. 118—Surety—Fitness—Test.

The test of the fitness of a surety is not whether he can supervise the person for whom he stands surety, but whether he is a person of sufficient substance to warrant his being accepted. 3 C.W.N. 797; 6 C.W.N. 593, Foll. 1895 A.W.N. 143; 20 A. 207 diss. from. (1908) 35 C. 400.

——Ss. 118, 122—Sureties—Fitness of—Test.

The Magistrate in rejecting sureties under S. 122, Cr. P. Code, has to record his reasons. He should carefully consider and test them. This could be best done by bringing them to the notice of the persons offered as sureties and allowing them an opportunity of controverting them. 11 Cr.L.J. 243 =14 C.W.N. 709=6 Ind. Cas. 124.

15. Surety for good behaviour.

——Ss. 118, 122, and 123—Surety for good behaviour — Rejection of, sufficiency of reason—Revisional power of High Court.

Pecuniary sufficiency alone of the surety offered is not the criterion. The question is one of discretion and the High Court has to see whether the order of the Magistrate in not accepting the surety offered, is reasonable and proper. Where a Magistrate rejected the surety of a pleader for the good behaviour of a certain person alleged to belong to a gang of swindlers on the ground that the pleader had no sort of control over him, the order is reasonable and proper and the High Court will not in revision interfere with the Magistrate's discretion in such a case. 44 Cal. 737=21 C.W.N. 925=18 Cr. L.J. 453=39 Ind. Cas. 293.

16. Surety offering house property.

——S. 118—Surety offering house property as security—Acceptance of.

A security of immoveable property can be accepted under S. 118, Cr. P. Code though during the life-time of the surety, only movable property could for default be attached and sold for recory of the penalty. 19 A.L.J. 503=19 Cr.L.J. 711=46 Ind. Cas. 295.

17. Surety only in movable property if can be ordered.

——S. 118—Surety only in movable properties—If can be ordered.

In making an order under S. 117, Cr. P. Code, calling upon a person to give security for keeping the peace, there should be no restriction in the order that the accused should produce sureties in movable property. A.I.R. 1932 All. 122=1932 A. L.J. 157=33 Cr.L.J. 299=136 Ind. Cas. 65.

18. Surety—Magistrate can accept even after accused sent to jail for default.

——S. 118—Surety—Magistrate can accept security even after the accused has been sent to jail.

A man was ordered by a Magistrate of the first class under S. 118 to give security for his good behaviour under S. 110 for a perod of three years. He failed to furnish security then and there and he accordingly was ordered to be detained in prison pending the orders of the Sessions Judge. A day or so later he offered security to the Magistrate who accepted it and he was released from jail.

Held, that the Magistrate can accept security. A reasonabe view of the matter should be taken as there is nothing in the Act, clearly indicating what should be done if security is offered to the Magistrate after he has referred the matter to the Sessions Judge and before the latter has heard the reference. The purpose of the security sections is not that the persons proceeded against should be sent to or kept in jail but that should only be done when they are unable to give security.

Held, further, that reference to the Sessions Judge automatically ends with the acceptance of security by the Magistrate. 107 Ind. Cas. 286=29 Cr.L.J. 236=9 A.I.Cr. R. 490=A.I.R. 1928 Lah. 64.

19. Suspect in Jail.

——S. 118—Suspect in jail.

Where the accused person is already undergoing imprisonment at the time an order under S. 118 has to be passed, the proper order is to direct that the period for which the suspect is required to give security shall commence from the date of the expiration of the sentence of imprisonment he is then undergoing. A. I. R. 1937 Sind 204=38 Cr.L.J. 1014=31 Sind L. R. 412=171 Ind. Cas. 61.

——S. 118—Suspect in jail.

Where a suspected person against whom an order under S. 118, Cr.P. Code, is passed, is undergoing imprisonment for a substantive offence under the provisions of S. 120 (1). Cr.P. Code, the period for which the security is required should commence not from the date of order but from the date of the expiration of the sentence which the suspect was undergoing for the sustantive offence of which he had been convicted. A.I.R. 1937 Sind 203=38 Cr. L.J. 961=31 Sind L.R. 409=170 Ind. Cas. 676.

——S. 118—Suspect in jail.

An order under S. 118 is not suspended during the time spent in prison if the suspect is not on bail. A.I.R. 1937 Sind 26=38 Cr.L.J. 363=30 Sind L. R. 382=167 Ind. Cas. 227.

——S. 118—Suspect in jail.

Order under S. 118 was made on 20th October and the order of imprisonment for one year in consequence of the failure of the accused to give security in pursuance of the order under S. 118 was made under S. 123 on 29th October. Between 20th October and 29th the accused was convicted and sentenced to 7 years R. I. and that sentence commenced between these two dates.

Held, that it was clear that on the expiry of the above sentence the accused was entitled to be set at liberty. 103 Ind. Cas. 108=29 Bom.L.R. 700=28 Cr.L.J. 652=A.I.R. 1927 Bom. 657.

——S. 118—Suspect in jail.

If on the date of the order passed under S. 118 the suspect is undergoing imprisonment for a substantive offence, the provisions of cl. (1) of S. 120 come into operation and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment. The proper procedure under the circumstances would be not to pass the order for detention of the suspect under S. 123 at once but postpone further proceedings under that section till the suspect has served out the period of sentence for the substantive offence. A.I.R. 1926 Bom. 545, Rel. on. If on the date of order under S. 118 the suspect is not undergoing imprisonment for a substantive offence his case does not fall within the purview of Cl. (1) of S. 120. If on that date the suspect asks for time to furnish the required security, it is open to the Magistrate to inquire whether the suspect is undergoing a trial for a substantive offence, and, if so, it is open to him to refuse to grant any time for furnishing the required security and to take immediate action under S. 23. If however, the Magistrate does not make the necessary enquiry, or on making the necessary enquiry he does not get any definite information, and in the exercise of his discretion he grants time to the suspect to furnish security, and before the expiry of that time the suspect is convicted of a substantive offence and sentenced to imprisonment, then neither Cl. (1) nor Cl. (2) of S. 120 applies. In that case, the Magistrate should proceed to pass an order under S. 123 which provides for immediate detention in prison of the suspect till he furnishes the required security. This detention would *ipso facto* run concurrently with the substantive sentences which the suspect is undergoing. A. I. R. 1926 Sind 273, Foll. 101 Ind. Cas. 463=28 Cr.L.J. 431=8 A.I. Cr.R. 31=A.I.R. 1927 Sind 166.

——S. 119—Discharge on ground of non-existence of police report—Subsequent proceedings on police report of correct date.

A previous order of discharge under S. 119 of the Cr.P. Code on the ground of the non-existence of the police report, upon which the proceedings purported to be based, is no bar to subsequent proceedings being initiated upon a police report which was not the foundation of the former proceedings. 14 Cr.L.J. 189=19 Ind. Cas. 189.

——S. 119—Inquiry under S. 119—Binding order found unnecessary—Person, if should be "discharged" or "acquitted".

Where under the provisions of S. 119, Cr.P. C., after an inquiry has been made as to whether an order binding a person over to keep the peace should be passed and it has been found that no such order is necessary, the proper course is to discharge the person concerned. The use of the term "acquitted" is quite inappropriate to a proceeding of this nature. A.I.R. 1938 All. 49=1937 A.L.J. 1281=I.L.R. (1938) All. 89=1937 A.W.R. 1113=173 Ind. Cas. 669.

——S. 119— Order cancelling notice under S. 112—Interference.

Where in a case under S. 110, Cr. P. Code, evidence was produced before a Magistrate which he disbelieved and in a reference to High Court under S. 438, Cr.P.C., against his order cancelling under S. 119 notice to show cause made under Ss. 109-112, the District Magistrate stated some reasons why this evidence ought to believed, but these reasons could be explained away:

Held, that the case was not one in which the High Court should interfere and set aside the order of the Magistrate. 170 Ind. Cas. 482=1937 O.W.N. 816 =38 Cr.L.J. 889.

——S. 119—Re-enquiry.

A further enquiry after discharge under S. 119 is improper unless the order of discharge is manifestly perverse or foolish or is based on a record of evidence which was obviously incomplete. 11 O.L.J. 334=25 Cr.L.J. 1026=81 Ind. Cas. 802=A.I.R. 1924 Oudh 368.

——Ss. 119 and 437—Re-enquiry.

Where a Sub-Divisional Magistrate after hearing the defence discharged the accused under S. 119 and the District Magistrate acting under S. 437 ordered further enquiry. *Held*, that the District Magistrate cannot make such an order. 33 Mad. 85= 6 M.L.T. 133=20 M.L.J. 137=11 Cr.L.J. 162= 4 Ind. Cas. 1057.

——S. 119—Re-enquiry.

When proceedings under S. 110 have terminated in an order of discharge, the District Magistrate has no power without taking fresh evidence or issuing notice to the accused to direct a re-enquiry but he can himself issue notice to the accused to show cause against re-trial. 64 Ind. Cas. 846=23 Cr.L.J. 62=19 A.L.J. 985=A.I.R. 1921 All. 181.

——Ss. 119, 438—Reference by District Magistrate in respect of order of discharge.

When a District Magistrate makes a reference in respect of an order of discharge passed by a Subordinate Magistrate he should not permit himself to be associated with criticism by a Police Officer of the order. He should himself consider the case with greater care before he commits himself to the reference. A.I.R. 1936 Sind 243=38 Cr.L.J. 117=30 Sind L. R. 368=165 Ind. Cas. 950.

——S. 119—Revision.

Under S. 436 as amended in 1923 a District Magistrate has no jurisdiction to revise the case of a person who has been called upon to give security and is discharged. 24 All. 148 *held no longer good law;* 33 Mad. 85, Appr.: 113 Ind. Cas. 79=9 L. R.A. Cr. 146=10 A.I.Cr.R. 488=30 Cr.L.J. 63 =51 All. 408=1929 A.L.J. 146=A.I.R. 1928 All. 755.

——S. 119—Validity.

Where in proceedings under S. 107 the Magistrate proceeds to enquire into the truth of the information under S. 117 (1) but the complainant and prosection witnesses are found absent, it is proper for the Magistrate to pass an order under S. 119 discharging the person proceeded against. 101 Ind. Cas. 607=45 C.L.J. 211=31 C.W.N. 388 =28 Cr.L.J. 479=A.I.R. 1927 Cal. 343.

——S. 120—Detention after furnishing security—Illegal.

No person committed to prison under S. 120 (1) can be detained there if he furnishes the security required of him after his commitment. Consequently, an order stating that he should suffer a period of imprisonment in default is illegal. A. I. R. 1936 Nag. 265=38 Cr.L.J. 388=I. L. R. (1937) Nag. 173=167 Ind. Cas. 403.

——S. 120—Imprisonment as well as order to execute bond—Invalid.

When the accused is sentenced to 2 years of imprisonment and at the same time he is ordered to execute a bond to keep peace for 3 years from that day, the order is against the provisions of S. 120, Cr.P. Code. 1934 M.W.N. 1362.

——S. 120—Order of imprisonment under — Release on bail by Appellate Court:

Held, that the period during which the applicant was released on bail must be excluded from the period for which he was required to undergo imprisonment failing the giving of security. A.I.R. 1934 All. 845=36 Cr. L.J. 177=4 A.W.R. 76=57 All. 264=152 Ind. Cas. 785.

——S. 120—Rejection of surety—Previous conviction.

A Magistrate acts unreasonably in rejecting a surety merely on the ground that he had once been

convicted of an offence under S. 223, I. P. Code. 25 C.W.N. 140=A.I.R. 1921 Cal. 356 (1)=62 Ind. Cas. 179=22 Cr.L.J. 483

——S. 120—Scope of.

Order of a Magistrate demanding security to be furnished within one month from the date of sentence is erroneous; the case falls under S. 120 (1) and not (2). 5 L.B.R. 34=10 Cr. L.J. 69=2 Ind. Cas. 531.

——S. 120—Starting point — When suspect is in jail, S. 120 applies.

A person was sentenced by a Magistrate to 12 months' rigorous imprisonment on proceedings initiated under S. 109 on 8th August, 1927; and while undergoing that sentence he was sentenced to three years' rigorous imprisonment from 21st December, 1927 on proceedings instituted under S. 110:

Held, that in view of S. 120 the person should have been required to give security from 8th August, 1928 and as according to S. 123 the maximum punishment for failure to give security was three years, the person should be sentenced to two years' rigorous imprisonment from 8th August, 1928. 23 S.L.R. 438=117 Ind. Cas. 777=1929 Cr. C. 335=30 Cr. L.J. 849=A.I.R. 1929 Sind 166.

——S. 120—Starting point.

The period of security is to be calculated from the date of final order and not from the date of preliminary order. 1927 M.W.N. 185=106 Ind. Cas. 589=29 Cr. L.J. 77=A.I.R. 1927 Mad. 542.

——S. 120—Starting point.

Where during the time allowed to a suspect to furnish the security as required by the order passed under S. 118 of the Code, he is sentenced to imprisonment for an offence committed by him prior to the date of such order, it is not competent to the Magistrate to fix the date of the expiry of such sentence as the date for computing the period from which such security is to be furnished. 20 S.L.R. 163=27 Cr. L.J. 865=96 Ind. Cas. 113=A.I.R. 1926 Sind 273 (F.B.).

——S. 120—Starting point—Person sentenced to imprisonment at a time of order for security — Period cannot run before the expiry of the sentence.

The accused was released on bail, pending appeal from his conviction under S. 147, I. P. Code. During this term he was awarded rigorous imprisonment for failure to give security under S. 110, Cr. P. Code and was directed to undergo his remaining sentence under S. 147, I.P. Code after the latter. *Held*, the order was illegal. 22 Cr.L.J. 95=59 Ind. Cas. 383=2 L.R.A. (Cr.) 36 (All.).

——Ss. 121, 110—Bond for good behaviour—Reasons leading up to taking of security—Whether relevant on breach of bond.

Once a bond has been taken for good behaviour, the reasons leading up thereto are no longer relevant when there is a breach of the bond, while what amounts to a breach of the bond is laid down in S. 121, Cr. P. Code, without any ambiguity. A.I.R. 1936 Pesh. 16=37 Cr. L.J. 342=160 Ind. Cas. 631.

——S. 121—Bond—Forfeiture—When permissible.

The mere fact that a person bound down under S. 109, Cr. P. Code, is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself which may justify fresh proceedings against him under S. 109, Cr. P. Code, would not result in the forfeiture of first bond because that does not amount to the commission of or attempt to commit, or abetment of an offence punishable with imprisonment. A.I.R. 1932 All. 58 (1)=1932 A.L.J. 112=33 Cr. L.J. 281=54 All. 335=136 Ind. Cas. 373.

——S. 121—Bond—Forfeiture—When proper.

Subsequent conviction need not be for the same kind of offence for which the person is bound over. S. 121 makes no such reservation but lays down that a breach of the bond is committed as soon as a person bound over commits any offence punishable with imprisonment. He need not be actually convicted. 15 P.R. 48, Diss. from. 50 All. 666=9 A.I.Cr.R. 443=26 A.L.J. 443=113 Ind. Cas. 740 =30 Cr. L. J. 203=9 L.R.A.Cr. 68=A. I. R. 1928 All. 232.

——Ss. 121 and 514—Forfeiture of security—If can be made in separate proceeding.

If a Criminal Court, knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it, makes no reference to any confiscation of security and takes no step towards its confiscation, it is not competent for that Court or any Court in a subsequent and separate proceeding to take such steps. 18 Ind. Cas. 403 (F.B.), Foll. 6 P. W. R. (Cr.) 1915=95 P.L.R. 1915=16 Cr.L.J. 194=27 Ind. Cas. 754.

——S. 121—Scope of.

The provisions of the section have not been overlooked in 13 P.R. 1913 Cr. and that decision has not laid down any hard and fast rule prohibiting the forfeiture of security under certain circumstances. The headnote of the decision is misleading. 7 P. W.R. Cr. 1914=62 P.L.R. 1914=15 Cr. L.J. 485 =24 Ind. Cas. 573.

——S. 121—Scope of.

The section is exhaustive so far as the bond for good behaviour is concerned; the bond is forfeited when there is commission of, or attempt to commit or abetment of an offence punishable with imprisonment. 5 P.R.Cr. 1910=8 P.W.R. Cr. 1910 =169 P.L.R. 1910=11 Cr.L.J. 252=5 Ind. Cas. 827.

——S. 121—Security for good behaviour—Subsequent conviction under S. 325, I. P. Code—Forfeiture of surety bonds.

Where a man was placed on security under S. 110, Cr. P. Code not merely as a receiver of stolen goods but also as being a dangerous man and was subsequently convicted under S. 325, I. P. Code:

Held, that there was nothing in law to prevent the forfeiture of the bond of sureties. 21 P.L.R. 1916=10 P.R. 1915 Cr.=16 Cal.L.J. 549=29 Ind. Cas. 821.

——S. 122.

Synopsis.

1. Acceptance of surety.
2. Fitness of surety—Onus.
3. Grounds for rejection of sureties.
4. Hearsay evidence.
5. Inquiry as to fitness.
6. Magistrate's discretion.
7. Magistrates and Sessions Judge's powers.
8. Order under Punjab Restriction of Habitual Offender's Act.
9. Pleader certifying sufficiency of surety.
10. Power to demand security.
11. Sureties—Limitation on.
12. Sureties—Rejection of.

1. Acceptance of surety.

——Ss. 122, 123—Acceptance of surety.

There is a procedure laid down which is to be followed by the Magistrate in rejecting a surety. But there is nothing to prevent him from accepting persons, with whom he is satisfied, as sureties without any sort of inquiry or examination of witnesses on oath. A.I.R. 1937 Cal. 233 =41 C.W.N. 415=38 Cr. L.J. 635=168 Ind. Cas. 716.

2. Fitness of surety—Onus.

——Ss. 122 and 123—Fitness of surety—Onus—'Magistrate' if includes "Successor in office".

A person required to furnish security is bound to prove to the satisfaction of the Magistrate, that the surety he offers is a fit person. 'Magistrate' in S.122 includes also the successor in office of a Magistrate, who is properly seised of the inquiry. 5 S.L.R. 87=12 Cr. L.J. 410= 11 Ind. Cas. 594.

3. Grounds for rejection of sureties.

——S. 122—Rejection—Question of fact.

There should be a valid and reasonable ground for the refusal by a Magistrate to accept a surety for good behaviour under S. 122, Cr. P. Code, depending upon the circumstances of each particular case. Where a Magistrate refused to accept as sureties the brothers of the person bound down to be of good behaviour, on the ground that the person bound down was a notorious dacoit, whom according to general consensus of opinion the brothers would not be able to control, the Magistrate had a valid reason for so refusing. 41 Cal. 764=15 Cr. L.J. 169= 22 Ind. Cas. 745.

——S. 122—Grounds for rejection.

Surety residing at a distance of 18 miles may be accepted if he undertakes to keep accused within his area of observation.

The mere solvency of a surety may not invariably be sufficient to ensure the good conduct of the accused any more than the mere fact of his residing at a distant place may be a sufficient ground for rejecting him as such. The sureties to be tendered should not be sureties from such a distance, as would make it unlikely that they could exercise any control over the man for whom they are willing to stand sureties. If the sureties undertake to keep the accused within the area of their observation or adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour there can be no inherent objection to their being accepted as sufficient. 6 O.C. 199, Foll. 74 Ind. Cas. 539=10 O.L.J. 299=24 Cr. L.J. 795=A.I.R. 1923 Oudh 165.

——S. 122—Grounds of rejection—Conviction.

The mere fact that the proposed surety had been convicted of such an offence as assault is not sufficient to justify the Magistrate in coming to the conclusion that he could not be a proper surety. 26 All. 189, Foll. 25 C.W.N. 140=22 Cr. L.J. 483=62 Ind. Cas. 179=A.I.R. 1921 Cal. 356.

——S. 122—Grounds for rejection—Conviction.

The fact that a proposed surety has on one occasion offended against the law and been punished for an offence under the Indian Penal Code does not in itself render such person for ever afterwards unfit to be surety for a party who is required to give security for good behaviour. (1903) A.W.N. 220=26 A. 189.

——S. 122—Grounds for rejection of.

The sureties offered though solvent and respectable were not accepted on the grounds that they lived at some distance from the persons bound over and were not in a position to exercise control over the persons bound over. *Held*, that the sureties offered having been solvent and respectable, the grounds of refusal stated were not sufficient for their non-acceptance as sureties. 22 Bom. L.R. 190=21 Cr. L.J. 377=55 Ind. Cas. 857.

——S. 122—Grounds for rejection of sureties.

When an accused person is called upon to produce a surety the surety must be accepted or, if rejected he must be rejected upon tangible evidence recorded and considered by the Magistrate who ordered him to find security. It does not follow that a person who had once been chalaned for theft was not a reliable person and it was for the surety to prove that he was of good character, but it is for the Magistrate if he doubts the reliability, to decide the matter upon evidence. 18 All. L.J. 324=21 Cr. L.J. 365=55 Ind. Cas. 733.

——S. 122—Grounds for rejection of sureties.

The failure of surety to show that he has sufficient control over the accused is not a valid ground for rejection of the surety. 43 Cal. 1024=24 C.L.J. 51=20 C.W.N. 1133=18 Cr. L.J. 408=38 Ind. Cas. 968.

——S. 122—Grounds for rejection.

The power of rejection of sureties conferred on Magistrates by S. 122, Cr. P.C., should not be used merely to prevent a "Badmash" from giving security. The section recognises only one ground of rejection of the surety and the reason given by the Magistrate must be a positive reason for believing the surety to be unfit. The burden of proving the fitness of the surety is ordinarily discharged by the evidence of the surety himself. 8 S.L.R. 322=16 Cr. L.J. 479=29 Ind. Cas. 111.

——S. 122—Grounds for rejection of sureties—Relationship to the person to be bound—How far a disqualification.

The mere fact that the sureties tendered are related to the person to be bound over is no ground for rejecting the sureties if they are otherwise fit. The relationship is, far from being an objection, a most useful qualification in the person tendered as sureties. (1902) A.W.N. 197=25 A. 131.

4. Hearsay evidence.

——S. 122—Hearsay evidence.

Under S. 110 hearsay evidence of general repute is clearly not admissible as against sureties. 68 Ind. Cas. 959=9 O.L.J. 353=23 Cr. L.J. 639=A.I.R. 1922 Oudh 227.

5. Inquiry as to fitness.

——S. 122 (3)—Inquiry as to fitness—Magistrate if can delegate.

Magistrate should not accept as security for good behaviour, such persons as he does not know himself and should not reject those persons who fail to write in presence of the Magistrate what influence they have over the accused. An enquiry under S. 122, if necessary at all, may be delegated to another Magistrate. (Per *Cox, J.*) A Magistrate should himself enquire as to the fitness of the proposed sureties. 37 Cal. 91=14 C.W.N. 49=11 Cr. L.J. 23=5 Ind. Cas. 29.

——S. 122—Inquiry into fitness of surety—Power of Magistrate in such inquiry to take evidence upon oath.

A Magistrate in inquiring under the provisions of S. 122, Cr. P.C., into the fitness of a surety tendered in obedience to an order under Ch. VIII of the Code, has power to record evidence upon oath or solemn affirmation. (1904) A.W.N. 52=26 A. 371.

——S. 122—Inquiry—Judicial inquiry.

Sureties offered should not be refused except after judicial inquiry by the Magistrate who made the order under S. 110, such inquiry is to be made under S. 122, of the Cr. P. Code. 42 Cal. 706=19 C.W.N. 220=16 Cr. L.J. 327=28 Ind. Cas. 663.

——S. 122—Inquiry—Judicial—Importation of personal knowledge by Magistrate.

An inquiry under S. 122 of the Code being a judicial inquiry, a Magistrate cannot refuse a surety on the ground that to his personal knowledge the surety is not desirable. 7 S.L.R. 94=15 Cr. L.J. 378=23 Ind. Cas. 746.

——Ss. 122, 4 (1)—Inquiry—Judicial proceedings—Evidence—Admissibility—Police reports—Procedure—Order based on admitted facts or legal evidence.

Proceedings under S. 122 are judicial proceedings as defined in S. 4 (1) and an order under S. 123 can only be based on admitted facts or legal evidence. Reports of Police Inspectors or Muktiyars are not admissible in proceedings under Chap. VIII, Cr. P.C. As no formal procedure is prescribed for such proceedings, a Magistrate need not formally record the evidence. It is sufficient to indicate the nature of the evidence in the formal record in writing of reasons for refusing to accept sureties. If the reasons are sufficient and based on admitted facts or legal evidence, the orders will not be upset in revision by the High Court. 4 S.L.R. 18=11 Cr. L.J. 497=7 Ind. Cas. 592.

6. Magistrate's discretion.

——S. 122—Magistrate's discretion—Interference by High Court.

A Magistrate's discretion under S. 122 is a wide one and the High Court should not lightly interfere with any reasonable exercise of it. 15 Cr. L.J. 727=26 Ind. Cas. 175.

——S. 122—Magistrate's discretion.

The legislature has not particularised any kind of unfitness for a surety but has left the matter to the discretion of Magistrates. The High Court will in each case consider whether the Magistrate's order is reasonable or not. The unfitness, though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness. 30 C.W.N. 80=8 Cr. L.J. 388=4 Ind. Cas. 560.

——Ss. 122, 153—Magistrate's discretion—Interference by High Court.

Per *Geidt, J.*—The unfitness of a surety for good behaviour referred to in S. 112, Cr. P. C., though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness. *Woodroffe, J.*—Under S. 122, Cr.P.C., the Magistrate has to determine whether a person offered as surety is a fit or unfit person. As the legislature has not particularised any kind of unfitness, the matter is left to the discretion of the Magistrate subject to the High Court's power of declaring in each case according to its own circumstances whether the order passed by the Magistrate is reasonable or not. 13 C.W.N. 80=8 C.L.J. 243=8 Cr.L.J. 388=4 Ind. Cas. 560.

7. Magistrate's and Sessions Judge's Powers.

——Ss. 122, 113, 406-A—Magistrate's power to reject sureties—Sessions Judge acting under S. 123—Powers of.

Under Ss. 122, 123, and 406-A, Cr. P.C., the power to reject sureties is given to the Magistrate and there is a right of appeal from an order passed by the Magistrate refusing to accept or rejecting a surety under S. 122, to the Sessions Judge. The clear implication of these provisions of the law taken together is that the Magistrate is vested with the authority either to accept or reject sureties demandable under S. 110 of the Code; it is not open to the Sessions Judge, exercising jurisdiction under S. 123 of the Code, to accept or reject the sureties offered. The course open to the Sessions Judge, under the law as it stands, is to send the proceedings back to the Magistrate, with his decision on the merits of the case, for taking action under S. 122 of the Code. A.I.R. 1934 Cal. 482=35 Cr. L.J. 952=61 Cal. 588=149 Ind. Cas. 460.

——S. 122—Magistrates powers—Sessions Judge—Powers of.

S. 122 prescribes the procedure for testing the fitness of the sureties by the Magistrate. There is no provision in the Code regulating the testing by a Sessions Judge and the fact that the order accepting or rejecting a surety is an appealable order indicates the Sessions Court has no such power. 9 Pat. 741=1930 Cr. C. 425=125 Ind. Cas. 156=31 Cr. L.J. 802=A.I.R. 1930 Pat. 217.

8. Order under Punjab Restriction of Habitual Offenders Act.

——S. 122—Order under Punjab Restriction of Habitual Offenders Act, whether requires confirmation of Sessions Judge.

An order of restriction for a period exceeding one year passed by the Magistrate under the Act does not require confirmation by the Sessions Judge. 1 Lah. 614=59 Ind. Cas. 412=17 P.L.R. 1921=5 P.W.R. 1921 Cr.= 22 Cr. L.J. 108.

9. Pleader certifying sufficiency of surety.

——S. 122—Pleader certifying sufficiency of surety —Court if should admit such certificate.

In criminal proceedings, the Courts should not accept the certificates given by Pleaders as to the solvency or fitness of sureties proposed by their clients as sufficient without further inquiry. A.I.R. 1934 Sind 142=35 Cr. L.J. 1455=28 Sind L.R. 293=151 Ind. Cas. 747.

10. Power to demand security.

——Ss. 122 and 123—Power to demand security— If executive or judicial.

It cannot be overlooked that the question whether it is necessary, in the interest of keeping the peace, to take security from a person, is essentially a question which concerns the Magistrate and the local Police. The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature. A.I.R. 1934 Cal. 482=61 Cal. 588=35 Cr. L.J. 952= 149 Ind. Cas. 460.

11. Sureties—Limitation on.

——S. 122—Sureties—Limitations on—Reasonable.

In imposing restrictions and limitations on sureties, Magistrates must be reasonable and must not act arbitrarily. U.B.R. (1914) II. 44=16 Cr. L.J. 422=28 Ind. Cas. 998.

12. Sureties—Rejection of.

——S. 122—Sureties— Rejection of.

The sureties rejected under S. 122, must be informed of the reasons for their rejection and they must be given an opportunity of contravening them. 14 C.W.N. 709= 11 Cr. L.J. 243=6 Ind. Cas. 124.

——S. 122—Sureties, if can be rejected on Police report—Rejection illegal—Transfer.

When sureties are offered, it is the duty of the Court to accept them unless it is satisfied that they are not proper persons. It should not reject them on Police report. Before refusing to accept or rejecting any surety, the Magistrate should either himself hold an enquiry on oath into the evidence of the surety or cause such enquiry to be held.

Where the Magistrate ignored S. 122, Cr. P.C., while rejecting the sureties offered, it is a circumstance which may entitle the accused to have his case transferred. A.I.R. 1935 All. 517=1935 A.W.R. 300=36 Cr. L.J. 1285=157 Ind. Cas. 1049.

——S. 122—Sureties—If can be rejected on police report.

In case under S. 110, Cr.P.C., the Magistrate cannot reject the sureties merely on the Police report unless he enquires himself or orders an inquiry by another Magistrate. A.I.R. 1935 Pat. 421=16 P.L.T. 478=2 B.R. 32 (1)=36 Cr. L.J. 1473=158 Ind. Cas. 948.

——S. 122—Sureties—If can be rejected– Surety merely on police report is bad.

It is quite open to a Magistrate to ask the police to report on the character of the sureties offered but before finally rejecting them it is his duty to have some materials on which he can act judicially. He cannot reject them merely on a police report without recording any evidence on the point. 65 Ind. Cas. 574=24 O.C. 303=23 Cr. L.J. 142=A.I.R. 1921 Oudh 193.

——S. 122—Sureties—If can be rejected on police reports.

Where a Magistrate called for a report one from the Tahsildar and another from the Police as to the fitness of sureties in a particular case and the Tahsildar answered in the affirmative but the Police reported in the negative and the Magistrate declined to accept the sureties, *held*, that the report by the Police was not admissible in evidence. It was the duty of the Magistrate to have taken evidence as to the basis of the report and he should have come to a decision himself. 13 A.L.J. 469=16 Cr. L.J. 445=29 Ind. Cas. 77.

——S. 122—Sureties—If can be rejected on police report.

Magistrates have no authority to reject sureties merely on an unfavourable report of the police. 15 O.C. 263= 13 Cr. L.J. 760=17 Ind. Cas. 72.

——S. 122—Sureties—If can be rejected on Police report.

Where a Magistrate refused to accept sureties tendered by a person bound down under S. 110, Cr. P.C., upon the following grounds : (*i*) that three out of four sureties are not residents of the village where the defendants live, (*ii*) that none of them has sufficient movable property, (*iii*) that all of them are reported to be of bad character, and (*iv*) that three of them are relations of a person who was suspected of receiving stolen property, :

Held, that the first, second and fourth grounds are not sufficient; that the third ground may be sufficient, but the Magistrate in determining that question cannot act on a report submitted by the Police, but must hold an inquiry in respect thereto. (1904) 3. C.L.J. 575.

——S. 122—Sureties—Rejection on Police reports.

The discretion given to Magistrate under S. 122 is a wide one. There must however be a judicial inquiry showing that a judicial discretion was used. A Magistrate's order rejecting a surety merely on the police report and without independent inquiry is bad. 27 A. 293, Foll. 12 A.L.J. 1004=16 Cr. L.J. 54=26 Ind Cas. 646.

——S. 123.

See also Cr. P. CODE, S. 122.

——S. 123.

Synopsis.

(1) Accused in jail.

(2) Alternative imprisonment.

(3) Bond after date of security.

(4) Committal—If imprisonment.
(5) Concurrent sentences.
(6) Delay in commitment.
(7) Detention.
(8) Imprisonment.
(9) Joint enquiry.
(10) Reference to sessions judge.
(11) Rehearing.
(12) Scope.
(13) Starting-point.
(14) Subsequent order fixing date for furnishing security.
(15) Surety.

(1) Accused in jail.

——Ss. 123 (1), 120 (1), 118—Accused in jail—Proper order to be passed—Period of security, when to commence.

S. 123 (1), Cr.P.C., does not contemplate, that when a suspected person was in prison when the order under S. 118, Cr.P.C., against him is passed, he should be released from prison on the expiration of the sentence in order that he might find his sureties. He can, if it is possible for him to do so, furnish security while he is in prison undergoing his sentence of imprisonment : and he can, if he cannot furnish security before the expiration of his sentence, furnish security on the expiration of that sentence or at any time during the period for which he is committed to prison, in default, and his sureties will be accepted or rejected according to the provisions of S. 122, Cr.P.C.

Consequently, where the suspected person is already undergoing imprisonment at the time an order under S. 118 has to be passed, the proper order is to direct that the period for which the suspect is required to give security shall commence from the date of the expiration of the sentence of imprisonment he is then undergoing. An order detaining him in prison for a certain period on failure to furnish security is not sufficient. A.I.R. 1937 Sind 204=38 Cr. L.J. 1014=31 Sind L.R. 412=171 Ind. Cas. 61.

——S. 123—Accused in jail—Accused asked to furnish security already in prison—Further orders should be postponed till expiry of imprisonment being undergone.

Where the accused ordered to furnish security is already undergoing imprisonment an order of imprisonment on his failure to furnish security will be premature. In such a case no further order is required except on the point whether the imprisonment on failure to furnish security should be rigorous or simple, and on any questions that may arise as to the security tendered. Proper course would be to adjourn the case till after the sentence the accused is undergoing has expired, for further orders. 28 Bom. L.R. 1038=27 Cr. L.J. 1163=97 Ind. Cas. 747=A.I.R. 1926 Bom. 545.

——Ss. 123, 120, 118—Accused in jail—Time from which he should be imprisoned for default—Order directing imprisonment to commence when previous imprisonment continues—Legality of.

S. 120, Cr. P. Code, authorizes that the period for which security is required in an order under S. 118 shall commence on the expiration of any sentence whice the accused may be sentenced to or may be undergoing a the time when the order under S. 118 is made. Bu it is premature and illegal to pass against him an order under S. 123 while such imprisonment lasts. The order under S. 123 should not be passed until the expiry of any term of imprisonment which a person may be undergoing. 4 Bom. L.R. 934.

(2) Alternative imprisonment.

——S. 123—Alternative imprisonment—If renders order invalid as a whole.

In passing an order for security under S. 123, it is wrong for a Magistrate to include in the order a direction that in default of furnishing security the person called upon to furnish security should suffer rigorous imprisonment. The direction for imprisonment in default is invalid, but that will not affect the order so far as it calls upon the person proceeded against to furnish security. That part is valid. 229 Ind. Cas. 474=13 B.R. 381=48 Cr. L.J. 409=A.I.R. 1948 Pat. 84.

——S. 123—Alternative imprisonment.

An order under S. 123 directing that petitioner should, in default of giving security, suffer simple imprisonment for one year, cannot be upheld. 39 M.L.T. 658=26 M.L.W. 537=1927 M.W.N. 788=28 Cr. L.J. 1034=106 Ind. Cas. 218=9 A.I.Cr. R. 186=A.I.R. 1927 Mad. 976=53 M.L.J. 762.

——Ss. 110, 123—Alternative imprisonment.

A Magistrate having passed an order requiring security for good behaviour for a term of 3 years, went on to direct, that in default of finding security, the person against whom the order was made, should be rigorously imprisoned for 3 years. The Sessions Judge acting under S. 123 of the Code of Criminal Procedure, confirmed the order of the Magistrate. *Held*, that although the order directing imprisonment on failure to find security was not an order which the Magistrate could pass, yet it might under the circumstances, be taken to be the order of the Sessions Judge who was the proper court to pass such an order. 1903 A.W.N. 28.

(3) Bond after date of security.

——S. 123—Bond after date of security.

Where a bond is executed after the date on which the period of security commences, it should state the date on which it expires. 4 Bur. L.T. 270=13 Cr. L.J. 62=13 Ind. Cas. 398.

(4) Committal—If imprisonment.

——S. 123—Committal to prison—If imprisonment.

The committal of a person to prison under S. 123, Cr. P.C., amounts to a sentence of imprisonment. A.I.R. 1934 Mad. 457=1934 M.W.N. 486=40 M.L.W. 63=35 Cr.L.J. 1153=67 M.L.J. 300=57 Mad.928=150 Ind. Cas. 796.

——Ss. 123, 397—Committal to prison—If imprisonment.

The word " sentence " in S. 397, Cr. P.C., and its proviso includes an order of committal to, or detention in prison within the meaning of S. 123 of the Code. A.I.R.

1931 Rang. 127=32 Cr. L.J. 714=9 Rang. 110=131 Ind. Cas. 501 (F.B).

——Ss. 123 and 397—Committal to prison—if imprisonment.

The words "committed to prison" in S. 123 (1), Cr. P.C., are equivalent to a sentence to imprisonment and do not merely mean committed to custody. The words "detained in prison" in sub-s. (2) have also a similar meaning. Where a person is ordered by a Magistrate to be "detained in prison" pending the orders of the Sessions Judge under S. 123 of the Code of Criminal Procedure, such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody. An order for imprisonment on failure to furnish security for good behaviour is a "sentence" within the meaning of S. 397 of the Code of Criminal Procedure. (1908) A.W.N. 133=5 A.L.J. 318=30 A. 334 (F.B.).

——Ss. 123, 397—Committal to prison—If imprisonment.

When a person is committed to prison under S. 123, Cr. P.C., for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of S. 397 Cr. P.C. 27 M. 525.

(5) Concurrent sentences.

——Ss. 123 and 397—Concurrent sentences.

Where a person sentenced to rigorous imprisonment in default of security for good behaviour, was also convicted of theft, the two sentences must run concurrently and not one after another. 34 Bom. 326=12 Bom. L.R. 129=11 Cr. L.J. 271=5 Ind. Cas. 861.

——Ss. 123 and 397—Concurrent sentences.

A person commited to prison or detained in prison under S. 123, Cr. P.C., is not "undergoing a sentence of imprisonment" within S. 397, Cr. P.C., and where a man so committed or detained is sentenced to imprisonment for a substantive offence, the sentence should run concurrently with the deduction imposed under S. 123. 3 S.L.R. 114=11 Cr. L.J. 15=4 Ind. Cas. 603.

——S. 123—Concurrent sentences.

The accused was sentenced to a term of imprisonment, for an offence under the Arms Act, 1878, and the sentence was ordered to run concurrently with another sentence previously passed upon him under S. 123, Cr. P. Code. *Held*, (1) that the sentence for the substantive offence must commence at once and cannot be postponed to take effect after the expiry of the period of imprisonment in default of giving security for good behaviour which the accused was at the date of the conviction undergoing; (2) that S. 35, Cr. P.C., applies to sentences on conviction of offences at one trial. It has no application to imprisonments under S. 123 of the Code. 5 Bom. L.R. 26.

—— Ss. 123, 397—Concurrent sentences—Sentence of imprisonment for an offence under S. 176, I.P.C., on a person already undergoing sentence under S. 123., Cr. P.C.

A person committed to prison under S. 123, Cr.P.C., is not undergoing a sentenc eof imprisonment and S. 397, Cr. P.C., does not apply to that case; and where a person undergoing imprisonment under S. 123 is sentenced for an offence under S. 176, I.P.C., to imprisonment, the sentence should be ordered to commence from the date of the order. 27 M. 525, Foll. 30 A. 334 diss. from. (1908) 31 M. 515=4 M.L.T. 223.

(6) Delay in commitment.

——S. 123—Delay in commitment.

If a person fails to give security by the date fixed by the Court, or within such further time as the court may grant, the court should immediately commit him to prison. Commitment long after the date fixed is illegal. 6 M.L.T. 308=10 Cr. L.J. 481=4 Ind. Cas. 36.

(7) Detention.

——S. 123—Detention.

It is by no means clear that an order directing on accused's failure to produce the required sureties, that the accused be detained in prison for a period to be specified hereafter is a legal order. 87 Ind. Cas. 961=19 S.L.R. 101=26 Cr. L.J. 1041=A.I.R. 1925 Sind 321.

——S. 123—Detention.

The order detaining a person who has failed to furnish security under Chapter 8 is not a sentence of imprisonment. 3 S.L.R. 114; 37 B. 178; 31 M. 515 and 14 P.R. 1895, Rel. on; 30 A. 334, Not foll. 66 Ind. Cas. 191=15 S.L.R. 205=A.I.R. 1921 Sind 96=23 Cr.L.J. 255.

(8) Imprisonment.

——S. 123—Imprisonment—Solitary confinement.

A Magistrate has no power to order solitary confinement while acting under S. 123 Cr. P.C. 36 All. 495=12 A.L.J. 823=15 Cr. L.J. 616=25 Ind. Cas. 528.

——S. 123—Imprisonment under S. 123 (6)—Order, how to be made.

Under S. 123 (6), Cr. P.C., imprisonment can be either rigorous or simple and ordinarily the order with respect to this should be made along with the order under S. 123 (1), Cr. P.C., for commitment to prison. A.I.R. 1936 Nag. 265=38 Cr. L.J. 388=I.L.R. (1937) Nag. 173=167 Ind. Cas. 403.

——Ss. 123, 106—Imprisonment in default of furnishing security under S. 123—Appeal—Order under S. 106 should not be passed with non-appealable sentence.

There is no general provision in the Cr. P.C. for allowing an appeal from an order of imprisonment in default of furnishing security passed under S. 123, Cr.P.C., and perhaps it was not contemplated that an order to furnish security under S. 106, Cr. P.C., would be coupled with a non-appealable sentence. It should rarely, if ever, be necessary to do this, and it should certainly not be done until it has been ascertained that the accused is able to furnish security. A.I.R. 1935 Rang. 363=13 Rang. 287=36 Cr. L.J. 1510=158 Ind. Cas. 1115.

——S. 123—Imprisonment for failure to give security—Term, whether commences from Magistrate's order or Sessions Judge's order.

Where a person is ordered by a Magistrate to be detained in prison pending the orders of the Sessions Judge under S. 123 of the Cr. P.C., such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained

in custody. Therefore, if the Sessions Judge orders him to be imprisoned for failure to give security, the period of imprisonment should be taken to commence from the date of the Magistrate's order and not from the date of the Sessions Judge's order. A.I.R. 1931 Oudh 387=8 O.W.N. 888=32 Cr. L.J. 1186=7 Luck. 219=134 Ind. Cas. 406.

——S. 123—Imprisonment.

According to S. 123, a person who is ordered to furnish security for good behaviour but fails to do so shall be detained in prison for the period for which security was demanded. The order of imprisonment for a shorter period is, therefore, bad in law. 123 Ind. Cas. 835=1930 Cr. C. 1=31 Cr. L.J. 583=A.I.R. 1930 Lah. 49.

——Ss. 123 and 397—Imprisonment.

Under S. 397, Proviso 2 an order directing the substantive sentences of imprisonment to take effect on the expiry of the periods of imprisonment imposed under S. 123, Cr. P.C., is illegal. 197 Ind. Cas. 867=(1941) 2 M.L.J. 694=1941 M.W.N. 1031=43 Cr. L.J. 303.

——Ss. 123, 397—Imprisonment—Subsequent conviction for previous offence—Sentence under subsequent conviction, whether runs from expiry of order of detention—'Sentence', meaning of.

The word "sentence" in S. 397, Cr. P.C., and its provisos includes an order of committal or detention in prison under S. 123 of that Code; therefore, where a person who is sentenced to imprisonment in default of furnishing security under S. 123, Cr. P.C., is subsequently convicted of an offence committed prior to the order under S. 123 and sentenced to pay a fine or imprisonment in default, the period of imprisonment in default must run from the expiry of the order of detention passed under S. 123. A.I.R. 1932 Rang. 50=9 Rang. 612=33 Cr. L.J. 174=135 Ind. Cas. 644.

——S. 123 (3)—Imprisonment.

A Magistrate cannot award imprisonment for default of furnishing security. The matter should be referred to the Sessions Judge who should not refuse to entertain the reference on the ground of delay. 57 Ind. Cas. 287 (Lah.)=21 Cr. L.J. 623.

——Ss. 123 and 397—Imprisonment for not furnishing security.

Imprisonment under S. 123 on failure to furnish security for good behaviour is not a "sentence of imprisonment" as required by S. 397 of the Code. Term of imprisonment under S. 397 cannot be made to commence on the expiry of the imprisonment under S. 123. 1 P.L.J. 212=(1917) P.H.C.C. 32=2 P.L.W. 369=17 Cr. L.J. 528=36 Ind. Cas. 496.

——Ss. 123 and 397—Imprisonment in default of security.

A person committed to prison under S. 123 is not under a sentence of imprisonment within S. 397. (37 B. 178 F.) 7 S.L.R. 203=15 Cr. L.J. 592=25 Ind. Cas. 344.

——Ss. 123 and 397—Imprisonment—Sentence in continuation.

A Magistrate is not competent to impose a sentence of imprisonment to take effect in continuation of a period which the accused is undergoing in default of furnishing security. (1914) M.W.N. 500=16 Cr. L.J. 137=27 Ind. Cas. 201.

——Ss. 123 and 397—Imprisonment for default of giving security—Subsequent sentence of imprisonment for substantive offence—Commencement of punishment.

A person in prison under S. 123 (1) cannot be said to be undergoing a sentence of imprisonment and hence, where such a man is sentenced to imprisonment for a substantive offence, the sentence will begin to run from the date of the order and not from the expiration of the detention for default in furnishing security. 14 P.R. 1895=31 M. 515, Foll. 30 A. 334 diss. 8 N.L.R. 20=13 Cr. L.J. 189=13 Ind. Cas. 1005.

——S. 123—Imprisonment—Failure to give security for good behaviour—Subsequent conviction—Sentence.

Where a person who is committed to prison under S. 123, Cr. P.C., for failure to give security to be of good behaviour, is sentenced to imprisonment on a conviction for an offence, the term of imprisonment cannot be deferred but must commence at once. 6 Bom. L.R. 1098.

(9) Joint enquiry.

——Ss. 123, 367, 424—Joint enquiry—Case of individual accused to be separately considered—Applicability of Ss. 367, 424, to proceedings under S. 123.

It is open to doubt whether the provisions of Ss. 367 and 424, Cr.P.C., govern orders under S. 123, Sub-s. (3). But even if they do not the Sessions Judge's order under S. 123, Sub-s. (3), Cr. P.C., should show that he has considered the case of each individual prisoner. Even if the order need not contain all the details required by S. 367, Cr. P.C., still each prisoner has a right to have his case considered on its own merits and the order should show that this has not been lost sight of. When the question is whether a man is a habitual cheat, the fact that he belongs to an organisation formed for the purpose of habitually cheating in concert is relevant under S. 11 of the Evidence Act. 14 C.W.N. 49=37 C. 91=11 Cr. L.J. 23=5 Ind. Cas. 29.

(10) Reference to Sessions Judge.

——S. 123—Reference to Sessions Judge.

If the period for which security is demanded exceeds one year, then the Magistrate is required by S. 123 (2) to submit the record to the Sessions Judge, and it is for the Sessions Judge after examining the record to pass such orders as he thinks fit. In such cases the order fixing the term of imprisonment which the accused is to undergo on default of furnishing security is to be fixed by the Sessions Judge and not by the trial Magistrate. After a Magistrate has submitted the record to Sessions Court under S. 123 (2) the seisin of the case is thenceforward with that court. 103 Ind. Cas. 193=28 Cr. L.J. 657=A.I.R. 1928 Lah. 189.

——S. 123—Reference to Sessions Judge.

Where security for a period of more than a year has been ordered and is not furnished, the case must be

referred to the Sessions Judge, who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security, and when such a case has been referred to the Sessions Judge under S. 123 it is hardly necessary that the case should go in appeal to the District Magistrate. 67 Ind. Cas. 762 =66 P.L.R. 1922=23 Cr. L.J. 454=A.I.R. 1922 Lah. 475.

——S. 123—Reference to Sessions Judge—Sessions Judge must come to an independent finding.

Where a case is submitted to a Sessions Judge under S. 123 (2), the Sessions Judge is bound to examine the evidence himself and come to an independent finding as to the propriety of the order demanding security the amount and the period for in which it is to be demanded. 15 P.R. 1900 (Cr.) and 25 All. 275 Rel. Where he merely confirms the order passed by the trial Magistrate without notice to the petitioner and without examining the record, it is irregular and must be set aside. 35 Bom. 271 and A.I.R. 1925 Oudh 517, Rel. on. 103 Ind. Cas. 193=28 Cr. L.J. 657=A.I.R. 1928 Lah. 189.

——S. 123—Reference to Sessions Judge—Finding—Sessions Judge must come to an independent finding.

Where a person accused under S.110, Cr. P.C., and ordered by a Magistrate to furnish security for a period exceeding one year, fails to furnish security, the Magistrate can only send the case to the Sessions Judge and detain the accused in prison pending the order of the Sessions Judge, but cannot himself sentence the accused to imprisonment subject to confirmation by the Sessions Judge. Sessions Judge in a reference under S.123, is to consider the evidence and to pass an order after doing so, but he should not, without regard to the evidence, send to prison the person who has failed to give the security ordered. 29 P.R. 1910 Cr.=196 P.L.R. 1910=11 Cr. L.J. 635=8 Ind. Cas. 385.

——Ss. 123, 118—Reference to Sessions Judge—Sessions Judge confirming order of Magistrate under S. 123 (3)—Order, if overrides Magistrate's order.

When an order has been passed by a Sessions Judge under S.123 (3), Cr. P.C., the order that is then in force is the order of the Sessions Judge and not the order of the Magistrate. Though it is often the case that Sessions Judges in passing orders under S.123 (3), Cr. P.C., confirm, for reasons given, the Magistrate's order and the use of the word " confirm " is misleading, neverthless the order passed under S.123 (3), Cr. P.C., must be deemed the order of the Sessions Judge, and the order in operation, overriding the order of the Magistrate. A.I.R. 1937 Sind 203=31 Sind L.R. 409=38 Cr. L.J. 961=170 Ind. Cas. 676.

—— S. 123—Reference to Sessions Judge —Sessions Judge need not write full Judgment in a case under S. 123 (2).

S.123 (2) seems to contemplate more of administrative than judicial functions to be exercised by the Sessions Judge when a case is submitted to him under the section. He should, however, hear both the accused persons and the Crown, and see at any rate whether there are substantial grounds for demanding security. It is not, however, necessary to deal with such matter as if it were an appeal, nor is it necessary to write a judgment as if it were an appeal. 83 Ind. Cas. 883=17 S.I.R. 160=26 Cr. L.J. 179=A.I.R. 1924 Sind 120.

——Ss. 123 (3), 367, and 424—Reference to Sessions Judge.

Though it is doubtful whether Ss. 367, 424 apply to orders under S. 123 (3), the Judge, in writing his order under S. 123 (3) should show that he has tried each individual case on its own merits. 37 Cal. 91=14 C.W.N. 49=11 Cr. L.J. 23=5 Ind. Cas. 29.

——S. 123—Reference to Sessions Judge—Proceedings, nature.

Proceedings under S.123 are proceedings not in confirmation but for orders, and the Sessions Judge has to pass a definite order binding over and not confirm an order passed by a Magistrate. 85 Ind. Cas. 944=26 Cr. L.J. 656=A.I.R. 1925 Oudh 517.

——Ss. 123 and 122—Reference to Sessions Judge—Order passed by Sessions Court—Jurisdiction of Magistrate to decide fitness of surety.

A Magistrate has no jurisdiction to decide on the fitness of a surety on a bond ordered by the Sessions Court. 5 S.L.R. 87=12 Cr. L.J. 410=11 Ind. Cas. 594.

——S. 123—Reference to Sessions Judge—Proceedings under—Notice to persons affected—Necessity of.

Proceedings under S.123, Cr. P.C., should not be taken without notice to the persons affected by the order. A.I.R. 1933 Pat. 276 (1)=14 P.L.T. 299=34 Cr. L.J. 813=12 Pat. 770=144 Ind. Cas. 447.

——S. 123 (3)—Reference to Sessions Judge—Sessions Judge's power to go into the merits and to consider the sufficiency of the security.

Sub-s. (3), S.123, Cr. P.C., contemplates a decision by the Sessions Judge as to the merits of the order demanding security for good behaviour. It does not authorise the Sessions Judge to consider the sufficiency of the security offered. 12 C.W.N. 463.

——123—Reference to Sessions Judge—Notice before an order is made under S. 123 (3) to be given.

It is expedient and highly desirable for the ends of justice that a date should be fixed for hearing, and that notice of such date should be given to the person concerned. 27 C. 656 followed. 1903 A.W.N. 79=25 A. 375.

(11) Rehearing.

——S. 123—Rehearing—If can be ordered.

In a submission under S.123, Cr. P.C., the Sessions Judge has no jurisdiction to direct the Magistrate to pass a fresh order under S.112, Cr. P.C., and to try the case *de novo* after complying with the provisions of S.112. A.I.R. 1932 Sind 88=26 S.L.R. 200=33 Cr. L.J. 898=139 Ind. Cas. 783.

——S. 123 (2)—Rehearing—Powers of Sessions Judge.

A Sessions Judge can order a re-trial of proceedings under Chapter VIII, Criminal P.C., by directing the

Magistrate who had disposed of the proceedings to issue a fresh order under S.112, Criminal P.C. A.I.R. 1945 Sind 55=I.L.R. (1944) Kar. 440=46 Cr. L.J. 553=219 Ind. Cas. 273.

——S. 123—Re-hearing.

S. 123 (3) does not empower Sessions Judge to order the re-hearing of a case, though the Judge can ask for further information or evidence. The Sessions Judge can consider the evidence on record and pass such orders as he thinks fit on the evidence without requiring further evidence. 81 Ind. Cas. 936=25 Cr. L.J. 1112=A.I.R. 1925 Cal. 191.

(12) Scope.

——S. 123—Scope—If affected by Sonthal Parganas Justice (Amendment) Regulation, 1940—Conviction by First Class Magistrate—Reference to Sessions Judge—Competency. *See* SONTHAL PARGANAS JUSTICE (AMENDMENT) REGULATION, 1940. 13 B.R. 381.

——S. 123 (3), Scope of.

S.123 (3), Cr. P.C., is intended to meet a situation such as where irregularities have been casued which can be remedied by the re-summoning and re-cross-examination of certain prosecution witnesses and the summoning and examination of certain defence witnesses. S.350 does not apply to a case where Sessions Judge acts under S.123 (3), Cr. P.Code. A.I.R. 1942 Sind 122=I.L.R. (1942) Kar. 252=44 Cr. L.J. 367=205 Ind. Cas. 309.

——S. 123 (3)—Scope of.

The words of S.123 (3) of the Cr. P.C. are wide enough to give discretionary power to a Sessions Judge or High Court, to deal with the case on merits and pass any necessary order. 35 B. 271=13 Bom. L.R. 203=12 Cr. L.J. 257=10 Ind. Cas. 802.

——S. 123 (3)—Scope—Person ordered to give security for good behaviour.

Where the person ordered to give security presented an appéal to the Sessions Judge, *Held*, that the Sessions Judge should have returned the memo of appeal to him for presentation to the District Magistrate instead of forwarding the appeal to the Dt. Magistrate directly. A person ordered to give security for good behaviour by a Magistrate can appeal to the Dt. Magistrate though the proceedings may have been laid before the Sessions Judge under S. 123, Cr. P.C. But the right of appeal is lost as soon as the Sessions Judge has passed orders on the case under S. 123 (3). The Sessions Judge on receiving a record, should at once give notice to the person ordered to give security of the date on which the case will be taken up. If the person ordered to give security does not object to the case being taken up by the Sessions Judge on the ground that he has appealed or the Sessions Judge does not become awarse that an appeal has been filed in the Court of the Dt. Magistrate, the Sessions Judge should proceed to dispose of the case, but if the Sessions Judge is informed or becomes aware that an appeal has been filed, he should wait till the disposal of the appeal. 13 O.C. 354=8 Ind. Cas. 879.

——S. 123 (3)—Scope—Duty of Sessions Judge.

It is a fatal defect in regard to an order under S. 123 (3) that it was passed without giving the accused an opportunity of being heard by the Sessions Judge. Sessions Judge cannot pass orders under S. 123 (3) before the expiration of the accused's sentence of transportation. But he can pass an order on the proceedings submitted to him where the accused was asked to furnish security within one month from the date of sentence as soon as he receives Magistrate's proceedings. (*Per Irwin, J.*) The word ' aforesaid ' operates as a repetition of the words does not give such security on or before the date on which the period for which such security is to be given commences in S.123 (1). 5 L.B.R. 34=10 Cr. L.J. 69=2 Ind. Cas. 531.

(13) Starting-point.

——S. 123—Starting-point—Period should ordinarily begin from date of Magistrate's order.

Where a Sessions Judge to whom a case was submitted under S.123 (2) directed that the period for which the accused were to be bound should begin from the date of his order and not from the Magistrate's order:

Held, that the order in fact amounted to an enhancement of sentence, and that it was undesirable that the Court should do that even if it has the power without special reasons. 83 Ind. Cas. 883=17 S.L.R. 160=26 Cr. L.J. 179=A.I.R. 1924 Sind 120.

(14) Subsequent order fixing date for furnishing security.

——S. 123—Subsequent order fixing date for furnishing security—Validity.

An order for security under S. 123, Cr.P. Code, must also specify the date by which the security is to be furnished; if it does not it is erroneous. But the omission can be repaired by the Magistrate by passing a fresh order for security fixing a specified date for furnishing security. 229 Ind. Cas. 474=13 B.R. 381=48 Cr. L.J. 409=A.I.R. 1948 Pat. 84.

(15) Surety.

——S. 123—Surety—Sessions Judge, if can decide who are fit persons to give security.

There is nothing in S. 123, Cr. P.C., which specifically confers a power on the Sessions Judge, while hearing an appeal to decide who are fit persons to give the security demanded. A.I.R. 1937 Cal. 233=41 C.W.N. 415=38 Cr. L.J. 635=168 Ind. Cas. 716.

——S. 123 (2)—Surety—Sessions Court has no power to test sureties.

A Sessions Court before which proceedings are laid under S.123 (2) has neither any duty cast upon it nor any power to test sureties offered by the person bound down. It is for the Magistrate to deal with the sureties under S. 122. 5 S.L.R. 87, Not foll. 1930 Cr. C. 425=125 Ind. Cas. 156=31 Cr. L.J. 802=9 Pat. 741=A.I.R. 1930 Pat. 217.

——S. 123—Surety—Liability—Extent.

Until case is referred for final orders, proceedings in Magistrate's Court are not terminated so as to end the sureties' liability. 92 Ind. Cas. 889=24 A.L.J. 327=27 Cr. L. J. 377=7 L.R.A. Cr. 78=7 L.R.A. Cr. 152=A.I.R. 1926 All. 297.

——S. 123-A—Applicability—Failure to furnish security by person ordered to do so under U.P. Maintenance of Public Order (Temporary) Act.

S. 123-A of the Cr. P.Code would apply to a case where a person who had been ordered to furnish security under S.3 (3) of the U.P. Maintenance of Public Order (Temporary) Act, fails to furnish such security. 1950 A.W.R. 127=1950 A.L.J. 126=4 A.I. Cr. D. 308=A.I.R. 1950 A.. 307=51 Cr. L.J. 605.

——S. 123-A—Order under for failure to comply with an illegal order of detention under U.P. Maintenance of Public Order (Temporary) Act—Legality. *See* U.P. MAINTENANCE OF PUBLIC ORDER (TEMPORARY) ACT, S. 3 (3) AND CR. P. CODE, S. 123-A. 1950 A.L.J. 350=A.I.R. 1950 All. 500=51 Cr.L. J. 1342.

——S. 125.

Synopsis.

1. Cancellation.
2. District Magistrate's Powers.
3. Modification.
4. Nature of proceedings.
5. Review.
6. Revision.
7. Security to keep the peace—Power of High Court and District Magistrate.

1. Cancellation.

——S. 125—Cancellation of bond—Right of audience.

A Dt. Magistrate dealing with an application under S. 125 of the Cr. P. Code is exercising neither appellate nor revisional jurisdiction and it is not incumbent upon him to hear the muktar of the petitioner before disposing of the application. 19 Cr. L.J. 246=44 Ind. Cas. 38.

——Ss. 125 and 439—Cancellation of bond—Right of audience.

S. 125 does not give a right of appeal against an order directing security to be given to keep the peace. The accused is however entitled under this section to ask the Dt. Magistrate by petition to cancel the bond. Such an application should not be dismissed without giving the applicant or his pleader an opportunity of being heard. If it is dismissed by the Magistrate without giving reasonable facility to the person to represent his case, the order is liable to be set aside in revision. 39 All. 466=15 A.L.J. 469=18 Cr. L.J. 630=39 Ind. Cas. 998.

——S. 125—District Magistrate—Giving date for hearing—But dismissing petition without hearing petitioner—Legality of order.

An order of dismissal of a petition for the cancellation of a bond under S.125 of the Cr. P.C. by the Dt. Magistrate, without hearing the petitioner after having given a date for his appearance is not a proper order and is liable to be set aside. 53 P.L.R 1914=15 Cr. L. J. 143=22 Ind. Cas. 495.

2. District Magistrate's Powers.

——S.125—District Magistrate's powers.

The District Magistrate can cancel a bond for keeping the peace and to be of good behaviour under S. 125 on the only ground that something has supervened since the date of the first Court's order which satisfies him that there is no longer any necessity for keeping the accused person under bond. The District Magistrate has no authority to use S. 125 as if he were sitting as a Court of Appeal. If the order of the first Court is not maintainable in his opinion on the evidence presented, he cannot pass an order under S.125 ; he should refer the case to the High Court on its revisional side. 67 Ind. Cas. 350=44 All. 614=20 A.L.J. 521=23 Cr. L.J. 398=A.I.R. 1922 All. 191.

——S.125—District Magistrate's powers.

Though no appeal lies from an order under S. 107, the District Magistrate can order the discharge of the appellants from the necessity of giving security for their future behaviour, setting aside the order of the lower Court, in his executive capacity, as well as cancel the bond for keeping peace or for good behaviour. 73 Ind. Cas. 515=24 Cr. L.J. 627=A.I.R. 1922 Pat. 420.

——S. 125—District Magistrate's powers.

The District Magistrate or the Deputy Commissioner has jurisdiction to cancel the bond ordered to be executed by a Sub-divisional Magistrate under S. 107 of the Code. But as his jurisdiction is executive and neither appellate nor revisional he cannot vacate the order passed by the latter as *ultra vires* and quash the proceedings. In such a case he ought to refer it to the High Court. The High Court has power to set aside his order as being without jurisdiction, when the Distirct Magistrate quashes order under S.107 as *ultra vires* and does not merely order the cancellation of the bond. 66 Ind. Cas. 425=23 Cr. L.J. 281=3 Pat. L.T. 103=A.I.R. 1922 Pat. 334.

——S. 125—District Magistrate's powers.

The parties to this case were ordered to furnish security for good behaviour. An application was made to the Dt. Magistrate who cancelled the order. *Held*, that the District Magistrate could only consider the application as one for revision and could only recommend the cancellation of the order to the High Court. 41 All. 651=17 A.L.J. 830=I U.P.L.R. (H.C.) 125=20 Cr. L.J. 489=51 Ind. Cas. 473.

——Ss. 125, 406—District Magistrate's powers.

The terms of S.125 are sufficiently wide to cover a case where the District Magistrate finds that the materials before the Subordinate Magistrate were not sufficient to justify an order for taking security. S. 406 gives an appeal to the Dt. Magistrate from an order to furnish security for good behaviour while S.125 relates to orders for keeping the peace as well as to those from which S.406 allows an appeal. 11 N.L.R. 98=16 C.L.J. 555=29 Ind. Cas. 827.

——Ss. 125 and 107—District Magistrate's powers.

S. 125 does not confer any appellate or revisional powers on a Dt. Magistrate but confers an original jurisdiction for binding down persons to keep the peace. A person so bound down has to apply by way of revision to the Sessions Judge and has no remedy by way of appeal to the Dt. Magistrate. 32 C. 948, Foll. 1 O.L.J. 541=15 Cr. L.J. 721=26 Ind. Cas. 169.

——Ss. 125, 107 and 118—District Magistrate's powers.

A Dt. Magistrate could entertain a petition to cancel a bond to keep the peace on the sole ground that the

Magistrate below passed the order on insufficient evidence. 37 Mad. 125=(1913) M.W.N. 715=14 M.L.T. 328=25 M.L.J. 459=14 Cr. L.J. 546=21 Ind. Cas. 146.

——Ss. 125 and 107—District Magistrate's powers.

An order of the First Class Magistrate ordering a person to keep the peace is not appealable to the Dt. Magistrate who can, if he thinks the order improper, only submit the case to the High Court for exercise of its revisional jurisdiction. The Dt. Magistrate can cancel the bonds under S. 125 only on the ground of their being no longer necessary. 35 All. 103=11 A.L.J. 16=14 Cr. L.J. 63=18 Ind. Cas. 351.

——Ss. 125 and 476—District Magistrate's powers.

S. 125, Cr. P. Code, does not give the Dt. Magistrate any power to hear an appeal. He can cancel the bond for proper reasons but he cannot direct prosecution under S. 476, Cr. P. Code for offence under S. 471, I.P.C. 37 Cal. 72=14 C.W.N. 306=11 Cr. L.J. 147=5 Ind. Cas. 555.

——S. 125—District Magistrate's powers.

A District Magistrate has power under S.125 of the Criminal Procedure Code to direct the cancellation of a bond to keep the peace executed pursuant to an order of a Subordinate Magistrate for any reasons which may appear sufficient to him. He is not restricted to grounds which may have arisen subsequent to the execution of the bond and which may render the continuance of the bond unnecessary ; he may cancel the bond on the ground that it should never have been required. 4 C.L.J. 428=11 C.W.N. 25=1 M.L.T. 368=34 C. 1 (F.B.).

——S. 125—District Magistrate's power to cancel bonds for keeping the peace.

The jurisdiction conferred by S. 125, Cr. P.C., is not appellate or revisional, but an original jurisdiction in the exercise of which the District Magistrate may cancel any bond for keeping the peace when it is made to appear that by reason of circumstances arising subsequent to the date of the execution of the bond the continuance of the latter is not necessary. An order for cancelling a bond cannot be made before it has been executed. No appeal lies to the District Magistrate in the case of orders to keep the peace ; but in a proper case, he may make a reference to the High Court under the provisions of S. 438, Cr. P.C. 9 C.W.N. 860=32 C. 948.

3. Modification.

——S. 125—Modification.

A District Magistrate can cancel at any time a bond under S. 107, Cr. P. Code, for keeping the peace or leave the bond alone; he cannot alter or modify it. He can however under Ss. 406 & 423 alter a bond for good behaviour. 67 Ind. Cas. 346=6 N.L.J. 274=23 Cr. L.J. 394=A.I.R. 1922 Nag. 180.

4. Nature of proceedings.

——Ss. 125 and 428—Nature of proceedings—Remand by Appellate Court.

A proceeding under S. 125 of the Cr. P. Code is neither appellate nor revisional. S. 428 of the Code dealing with remand has no application to an order under S. 125. Where a Dt. Magistrate finds than an order directing the furnishing of security is irregular he should set it aside. He has no jurisdiction to remand the case to the Magistrate for further enquiry. 20 Cr. L.J. 221=49 Ind. Cas. 781.

5. Review.

——S. 125—Review—District Magistrate cannot review order passed by Deputy Magistrate.

An application under S. 125 is not an appeal and does not give power to the District Magistrate to review an an order passed by a Deputy Magistrate on the ground that it was improperly passed. If he on such evidence as may be laid before him finds that the danger of a breach of the peace no longer exists he may set aside the bonds on this ground. 71 Ind. Cas. 668=24 Cr. L.J. 204=A.I.R. 1923 All. 484.

6. Revision.

——Ss. 125, 435 and 438—Revision—High Court—Concurrent power—Practice.

Where the High Court has concurrent revisional powers with the Sessions Court and the Dt. Magistrate, the aggrieved party should in the first instance seek his remedy in the subordinate court. The revisional powers of a Sessions Judge or of a Dt. Magistrate are not in any way limited by S. 125 of the Code. 3 Pat. L.J. 302=4 Pat. L.W. 327=19 Cr. L.J. 589=45 Ind. Cas. 397.

7. Security to keep peace—Power of High Court and District Magistrate.

——Ss. 125, 438 and 439—Security to keep the peace—Dt. Magistrate—High Court—Powers of.

A Magistrate of the first class ordered certain persons to execute a bond to keep the peace but the Sessions Judge on revision was of opinion that the applicants should not have been bound over. He made a reference to the High Court. *Held*, that the order was passed by a Magistrate subordinate to the Dt. Magistrate and the record should under S.125 of the Cr. P. Code, be laid before the Magistrate to deal with the matter. Where a code gives a particular court jurisdiction to act in certain matters it is that court which should be applied to and not the High Court. 40 All. 140=16 A.L.J. 39=19 Cr. L.J. 188=43 Ind. Cas. 604.

——S. 127—Penal Code (Act 45 of 1860), S. 151—Assembly to exercise lawful rights in peaceful manners—Others determined to attack and cause riot—Duty of Police—Order commanding peaceful assembly to disperse, legality of—Disobedience of order, whether offence.

In order that a Police officer may lawfully command an assembly to disperse in the exercise of his powers under S. 127, Cr. P.C., the assembly must either be an unlawful assembly or must be one likely to cause a disturbance of the breach of the peace. Whether an assembly is likely to cause a disturbance of the public peace has to be judged from its own acts and behaviour. A peaceful and lawful procession cannot be regarded as likely to cause a breach of the peace within the meaning of the section merely because some other body of persons are bent upon attacking them and causings a riot. It is the duty of the Police in such cases to use sufficient force to prevent the riot and not to disperse those who exercise their legal rights.

In the absence of the requisite conditions contained in S. 127, Cr. P.C., a command to disperse under the section would not be lawful and disobedience cannot be punished under S. 151, I.P.C. Although the Police Officer's opinion is relevant and may be of great weight, it is impossible to hold that the Criminal Courts have no jurisdiction to determine the legality of the command. A.I.R. 1933 Nag. 277=34 Cr. L.J. 705=144 Ind. Cas. 232.

——**Ss. 127 to 132**—*Per Madgavkar, J.*—With regard to the introduction of material law it is settled law that firstly a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. Secondly, neither the military nor the citizens can refuse or impose conditions on such aid. Thirdly, the necessity must be proved not merely of recourse to the military, but also of the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being and the Courts have power to go into the question whether such necessity existed. Fourthly, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that the jurisdiction of the Courts ceases. Fifthly, the powers exercised by the military commonly but incorrectly known as " Martial Law " in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal and therefore, need acts of indemnity, if they are not to be questioned.

An officer of the Government has no right, because of a certain number of evil-doers who break the peace, to declare war against every other person in a large area as a rebel, abolish at one stroke the ordinary laws and tribunals and place the military in possession free to deal and to punish as they will and restore tranquillity so-called through terror. It is only when practically the entire population of a certain area is so widely and so deeply disaffected and so armed that it is able to enforce its own law and the King's law and writ do not run that an armed rebellion or insurrection as distinguished from riot can be said to exist and necessity to arise.

The military have no right to refuse to aid the civil authorities unless the ordinary laws and tribunals are abolished. It is the right of the civil authorities to demand and the duty of the military to furnish all the armed aid that may be necessary in the suppression of disorders and breaches of peace, and this duty is cast only not upon the military but also upon all loyal citizens and subjects of the Crown actively, to aid in the suppression of disorders.

The justification for the acts of the military lies not merely in their *bona fides* but in the existence of the necessity, *i.e.*, in the proof of such a state of war, insurrection or armed resistance as to justify the cessation of the ordinary law and its replacement by military force pure and simple. The question of necessity or whether the proved facts amount to necessity is a question of fact for the Courts. If necessity is proved, as in the cases referred to above, then the acts of military are not justiciable by the ordinary Courts, unless it is proved they are so justiciable and "the Courts have at any rate in time of peace jurisdiction in respect of acts which have been done by military authorities and others during a state of war." A.I.R. 1931 Bom. 57= 32 Bom. L.R. 1613=32 Cr. L.J. 403=55 Bom. 263= 129 Ind. Cas. 596.

——**S. 132—Applicability—Difference between S.132 and I.P. Code, S. 79.**

S. 79, I.P.C., can only be applied when all the facts are known, *i.e.*, when the trial is over; S. 132, Cr. P.C., can only operate before the trial begins. Protection given by S. 79, I.P.C., is protection against conviction, while the protection given by S.132, Cr.P.C., is a protection against trial. These provisions cannot, therefore, be held to be identical.

The proposition that in order to decide whether a prosecution is barred under S. 132, Cr. P.C., for want of the sanction of the Local Government only, the complaint and the sworn statement should be referred to, is not a correct one.

S. 132, Cr. P.C., is framed in very wide terms and the object of S. 132 as of S. 197 (1) is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them, while they were acting or purporting to act as public servants. The policy of the Legislature in enacting the section is to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted to confer on the Local Government, if they choose to exercise it, complete control of the prosecution and there is nothing in these precautions to which the public at large can legitimately take exception. A.I.R. 1933 Mad. 268=34 Cr. L.J. 528=1932 M.W.N. 1225=143 Ind. Cas. 115.

——**S. 132—Scope—Police officer in charge of patrol boat has no power to disperse unlawful assembly by force.**

The power to disperse an unlawful assembly by force is not given by the Code to any police officer below the rank of an officer-in-charge of a police station. An examination of the Police Manual shows that the powers of an officer in charge of a patrol boat are no higher than those of an officer-in-charge of an outpost. From such an officer the power to investigate cognizable cases has been withheld and this is a power which he would necessarily have under S. 156 if he were in charge of a police station. 77 Ind. Cas. 819=50 Cal. 318=25 Cr. L.J. 467= A.I.R. 1923 Cal. 517.

—S. 133.

Synopsis.

1. Applicability
2. Bonafide claim
3. Cancellation of order
4. Conditional order
5. Costs
6. Dropping proceedings
7. Jurisdiction
8. Jury
9. Local inspection
10. Local inquiry
11. Magistrates extra judicial investigation
12. Magistrates own enquiry
13. Magistrates powers
14. Market
15. Nature of proceedings
16. Nuisance
17. Obstruction
18. Procedure
19. Public place
20. Public right
21. Revision
22. Right of party
23. Scope
24. Vague order
25. Validity of order
26. Miscellaneous

1. Applicability.

——S. 133—Applicability—Burial ground, order closing—Jurisdiction:—An order prohibiting the use of a grave-yard is not such an order as can be made under S. 133 of the Code of Criminal Procedure. 12 C.W.N. 70.

——S. 133—Applicability—Causing overflow of water into other lands by raising level of one's own low land—S. 133, is not applicable—Persons damnified by the tortious act might have their remedy by way of civil proceedings. A.I.R. 1933 Cal. 150=34 Cr.L.J. 679 (1)=144 Ind. Cas. 75.

—S. 133—Applicability—Channel used by public.

The provisions of S. 133, Cr.P. Code, can be applied to a channel which could lawfully be used by the public for 6 months when there is water in it. A.I.R. 1950 Assam 138=51 Cr.L.J. 1177.

——S. 133—Applicability—Dispute between two villages as to right of digging and clearing a water course.

Dispute between two villages in respect of the rights of one to dig and to clear a water course for irrigation purposes, which is denied by the other is a fit one for the application of S. 133 to avoid a breach of the peace. 25 P.W.R. (Cr.) 1912=13 Cr. L.J. 594=16 Ind. Cas. 162.

—S. 133—Applicability—long standing obstructions—Opposite party claiming by adverse possession—His remedy.

In a case under S. 133, Cr.P.C., for removal of obstruction, all that the Courts have to see is whether the encroachment has in fact been made upon a public place and not that the encroachment causes or does not cause any inconvenience to the public.

In such a proceeding, Court is precluded from considering the question whether the opposite party has acquired by adverse possession a right in the plot wherein the alleged obstruction to the public right existed. The only question to be seen into is whether the obstruction is such that it attracts the provisions of S. 133 and other relevant sections in Chap. X of the Code. S. 133 can be applied equally to long-standing obstructions and to unlawful obstructions recently built in a public place. Where the opposite party claims that by adverse possession, the public have lost their right to use the plot as puplic place, the obvious remedy of the opposite party is to deny the existence of any puplic right in respect of this plot in a proceeding under S. 139-A. A.I.R. 1943 Pat. 32=43 Cr.L.J. 903=9 B.R. 55=202 Ind. Cas. 783.

——S. 133—Applicability.

S. 133, Criminal P. C. is not intended for the removal of long standing obstructions but for unlawful obstructions lately built on public places.

Where a road has been recently constructed, the obstruction to it caused by the branch of the trees along side can be held to be a recent one even if the trees have been in existence for a number of years. If, however, the road was constructed several years ago, then it cannot be said that the trees that have stood alongside the road for a number of years constitute a new obstruction. A.I.R. 1939 Lah. 276 =40 Cr. L. J. 758=42 P.L.R. 219=183 Ind. Cas. 292.

——S. 133—Applicability.

——S.133, Cr.P.C., is not intended for long standing obstructions but for an unlawful obstruction lately built in a public place. It is only on proof of urgency or imminent danger to the public interest that action under S. 133 et seq can be taken, and these provisions should not be allowed to be used as a substitute for litigation in Civil Courts. Chapter X of the Code deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest. The fact that an obstruction, has been allowed to stand, without objection, in a public place for many years itself indicates that there is no such emergency or imminent danger to the public interest. The existence of a long standing obstruction cannot, therefore, without proof of something having recently happened, be considered to be a "public nuisance," A. I. R. 1938 Lah. 523=40 P.L.R. 492=39 Cr.L.J. 775=I.L.R. (1939) Lah. 381 =176 Ind. Cas. 669.

—S. 133—Applicability—Long standing obstructions,

S. 133, Cr.P.C., is not intended for the removal of long-standing obstructions, but for unlawful obstructions lately built on public places. A.I.R. 1935 Lah. 28=37 Cr.L.J. 70=159 Ind. Cas. 374.

—S. 133—Applicability—Long standing obstructions.

S. 133 is not intended for long standing obstructions but for an unlawful obstruction lately built in a public place. A.I.R. 1926 All. 157 (1), Foll. 120 Ind. Cas. 796=31 Cr.L.J. 167=1933 Cr. C. 965= A.I.R. 1930 Lah. 361.

——Ss. 133, 137, 139-A—Applicability—Power of Court.

Ss. 133, 137 and 139-A relate to the abatement of public nuisances. They are only attracted when there exists in respect of the subject-matter a public right. Therefore, the fundamental position is that there must be a public right. If that right is denied, then the Magistrate is forbidden to proceed under this Chapter until the existence of the right claimed has been determined by a Civil Court. But the right denied must clearly be the right which is said to have been obstructed and not any and every right which has no bearing on the matter at issue.

In cases of obstruction, the obstruction complained of must lie on the public way in respect of which right is claimed. Of course, the sections do not apply if the obstruction is on a private land and not on public road. But when the obstruction is caused on the public road by a dam erected on private land S. 133 will apply. A.I.R 1945 Nag. 226=1945 N.L.J. 243=I.L.R. (1945) Nag. 461=47 Cr.L.J. 217=221 Ind. Cas. 581.

——S. 133—Applicability—Proceedings under S. 133 are valid only if encroachment is recent.

If the encroachment is held by the Magistrate to be a recent one, proceedings under Ch. X, Cr.P.C., would be perfectly valid. If however, it is discovered that the obstruction is an old one, proceedings under Ch. X, Cr.P.C., would not be justified A.I.R. 1939 Lah. 452=41 P.L.R. 515=40 Cr.L.J. 933= 184 Ind. Cas. 352.

——S. 133—Applicability.

—S. 133 is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for a number of years. 24 A.L.J 112=6 L.R.A.Cr. 190= 27 Cr.L.J. 27=91 Ind. Cas. 59=A.I.R. 1926 All. 157.

——S. 133—Applicability.

—S. 133 is not intended to be applicable to a case where there is a bona fide dispute as to the existence of a public way. Such a dispute should be left to be determined by a Civil Court. 63 Ind. Cas. 828=22 Cr.L.J. 700 (Lah.)

——S. 133—Applicability — Magistrate cannot order removal of privy on the ground it is newly made—Chapter X when applicable :—

Where a privy is allowed to remain in such a condition as to be a nuisance to passers lawfully using a public place or way, proceedings to cause the nuisance to be abated can be instituted under Chapter X of the Code of Criminal Procedure. But S. 133 of the Criminal Procedure Code does not empower a Magistrate to order a privy to be removed because it is only recently made in any locality. 4 Bom. L.R. 882.

——S. 133.

2. Bona fide claim.

a. Civil dispute
b. Competency of Magistrate to decide whether claim is barred by limitation
c. Duty of Magistrate
d. Effect on conditional order
e. Evidence produced
f. Jurisdiction when ousted
g. Long user may put an end to both public and private rights
h. Mode of enquiry
i. Order absolute when proper
j. Proper procedure
k. Question of fact
l. Removal of building
m. Should not be disregarded.

——S. 133—Bona fide claim—Civil dispute.

——When civil dispute is involved, the Magistrate has jurisdiction to refuse to interfere.

The Magistrate must deal with an alleged "public" way even though it is disputed. These summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a Civil Court. 28 All. 98, Diss. A.I.R. 1922 Cal. 59 (F.B.), Ref. Private property cannot be converted into public merely because it looks as though it ought to be and because to do so would be convenient to a section of the public who have enjoyed permissible user over it. 74 Ind. Cas. 849=45 All. 656=21 A.L.J. 529=4 L.R.A.Cr. 106= 24 Cr.L.J. 817=A.I.R. 1924 All. 1.

——Ss. 133 and 137—Bona fide claim—Civil dispute.

Where there is a bona fide dispute as to whether an encroachment exists or not, S. 133 should not be applied in order to relieve the Government of the necessity of filing a civil suit. The existence of a genuine dispute as to title suitable for decision by the Civil Courts is a sufficient ground within the meaning of S. 137 for holding that the order under S. 137, where the alleged encroachment has been in existence for over 20 years, is not reasonable and proper. 15 Cal. 564, Foll. 72 Ind. Cas. 958=24 Cr.L.J. 494=A.I.R. 1923 Oudh 22.

——S. 133—Bona fide claim—Competency of the Magistrate to decide whether the claim is barred by limitation:—In a proceeding under S. 133, Cr. P.C., the petitioner raised a claim of proprietary right to the land in dispute and the Magistrate came to the conclusion that if the petitioners had any right it was barred by limitation. He, however, stayed the passing of final orders for one month in order to allow the petitioner an opportunity of establishing his right by a civil suit and subsequently, more than two months after expiration of that period made his order absolute. **Held**—That the order of the Magistrate under S. 133, Cr.P.C., was bad in law. The Magistrate should have refrained from exercising jurisdiction when a bona fide claim to the land was raised and he was not competent to decide whether the claim was barred by limitation. 12 C.W.N, 267=7 C.L.J. 118=35 C, 283.

——S. 133, 137—Bona fide claim—Duty of Magistrate — Finding as to the bona fides of claimant is necessary.

The Magistrate should find whether a claim is bona fide even though not justified. Where the Sub-Divisional Magistrate failed to find that the petitioner's claim, even though not justified, was not bona fide.

Held, that his proceedings cannot be sustained. 15 C. 564, 2 P. L. J. 67 Foll. 74 Ind. Cas. 1047=4 P. L. T. 402=1 Pat. L. R. Cr. 154=24 Cr. L. J. 855=A.I.R. 1923 Pat. 540.

——Ss. 133, 137—Bona fide claim—Duty of Magistrate.

In a proceeding under S. 136, the Magistrate must enquire at the outset into bona fides or otherwise of the claim of the petitioners, 42 C. 158; 7 C. W. N. 117, Fol. S. 137 is imperative and mandatory and the Magistrate in a proceeding under that section cannot assume the role of an arbitrator simply because both the parties agree to his acting as such; consent or waiver does not vest him with jurisdiction. 10. Cr. L. J. 482, Fol. 25 C. L. J. 349=21 C. W. N. 926=18 Cr. L. J. 738=40 Ind. Cas. 738.

——S.133—Bona fide claim—Duty of Magistrate.

S. 133 should be used sparingly as an order passed under it cannot be questioned in any Civil Court. When a person called upon to show cause under S. 133 raises a question of title the Magistrate must decide whether it is raised bona fide or simply to oust his jurisdiction. If it is bona fide he must refer him to the Civil Court and if he does not have recourse to the Civil Court within a reasonable time, he may make his order absolute. 42 Cal. 158=18 C. W. N. 1086=15 Cr. L. J. 698=26. Ind. Cas. 146.

——S. 133—Bona fide claim—Duty of Magistrate.

S, 133 contemplates only an inquiry as to the existence of the obstruction complained of and not an inquiry into question of title and if a bona fide claim of private right is raised, the Magistrate should leave the determination of the question to the Civil Court and should not make an order under this section. 18 C. W. N. 1148=19 C. L. J. 631=15 Cr.L.J. 515=24 Ind. Cas. 603.

——Ss. 133, 138—Bona fide claim — Duty of Magistrate.

In a proceeding under Chapter X, Cr. P. C., relating to the obstruction of a pathway it is the duty of the Magistrate before referring the matter to the jury to decide himself whether or not the claim of right to the land in question is made in good faith and whether the pathway is a public one or not, and it is only on deciding that there is no such claim that any matter can be referred to the jury. 11 Cr. L. J. 365=14 C. W. N. 544 =6 Ind. Cas. 271.

——Ss. 133, 137—Bona fide claim—Duty of Magistrate.

When, in the course of proceedings under Ss. 133, 137, Cr. P. C., a claim of ownership is set up by the petitioner, the Magistrate has to see whether it is a bona fide claim on the part of the maker, or is a mere pretence to oust his jurisdiction. In the latter case, the jurisdiction will not be ousted; but in the former case, the Magistrate's proper course is to stay his hand and to allow the dispute to be settled in civil courts. The question is not whether the claim is established to the Magistrate's satisfaction, but whether it is advanced in good faith and is supported by prima facie respectable evidence. 15 C. 564 foll. 10 Bom. L. R. 563.

——Ss. 133, 138, 139—Bona fide claim of right —Duty of Magistrate.

When a complaint is made to the Magistrate of an obstruction in a pathway alleged to be public and the opposite party appears and claims the pathway to be a private one, it is the duty of the Magistrate before any proceedings are taken under S. 133, Cr. P. C. (Act V of 1882) and before any reference is made to a jury appointed under S. 13 to determine whether the claim set up by the opposite party is bona fide and whether the road or pathway is a public pathway. 10 C. W, N. 845,

——S, 133—Bona fide claim of title—Duty of Magistrate.

When in a matter under S, 133 the person called upon to show cause raises a question of title, it is for the trying Magistrate to decide whether the question so raised is raised bona fide, But the trying Magistrate ought not to go further and decide whether ther title set up does or does not exist, (1905) A, W, N, 202=2 A, L, J, 599=28 A 98.

——S. 133—Bona fide claim of title — Duty of Magistrate—Procedure.

A Magistrate acting under S, 133 Cr, P. C., should first of all satisfy himself as to the bona fides of the claim, if any, and then determine whether the parties should be referred to the civil court. 27 C. 279; 17 C. 562 ref. to 9 C. W. N. 72=31 C. 979.

——S. 133—Bona fide claim—Effect on conditional order.

——The existence of a genuine dispute as to title suitable for decision by the Civil Court is a sufficient ground for holding that the conditional order is not reasonable and proper. 73 Ind. Cas, 523=24 Cr, L, J. 635=A, I, R, 1923 Oudh 152;

——Ss. 133, 139—A—Bona fide claim—Evidence produced.

Where an application is made to a Magistrate that a certain person has erected a building and thereby blocked a public right of way, and such a person produces certain evidence under the provisions of S, 139-A, Cr. P. C., to prove that no right of way existed, it cannot be said that the contention of such person is frivolous or that it is entirely unsupported by evidence and the matter is one which can only properly be decided by a competent Civil Court. The Magistrate must stay proceedings under S. 139-A and has no jurisdiction to proceed with the case until the decision of a competent Civil Court. A.I.R. 1939 All. 187=40 Cr. L. J. 375 (1) = 1939 A.W.R. 71=180 Ind. Cas. 495.

——S. 133—Bona fide claim—jurisdiction when ousted.

There is no jurisdiction to make an order under the section, where a bona fide question as to the way being public is raised and the question should be left for determination by the Civil Court. To have this effect however the claim must be bona fide and not a mere pretence to oust jurisdiction and it is for the Magistrate to say whether the claim is bona fide or not. A Magistrate who issues a conditional rule under S. 133 can make the Rule absolute upon the evidence recorded and report submitted to him by another Magistrate to whom he had referred the matter, under the last paragraph of clause (1) of S. 133, 73 Ind. Cas. 802=2 Pat. L. R. Cr. 21=24 Cr. L. J. 690= A.I.R. 1924 Pat. 418.

——S. 133—Bona fide claim—Jurisdiction when ousted.

When in proceedings under S. 133 of the Cr. P. Code arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, the Magistrate's jurisdiction is not ousted thereby.

Per Sanderson. C.J.—If the Magistrate does not think the claim well founded, though he considers it to have been made in good faith, he may in his discretion allow the defendant a reasonable time to assert the claim made by him in a Civil Suit and if he does not go to the Civil Court within such time or fails there, the Magistrate has power to continue the proceedings under S. 133 of the Cr. P. Code.

Per Sanderson, C. J. Teunon and Ghose JJ.—With regard to case of Belat Ali v. Abdur Rahim (8 C.W.N. 143) it could not be said having regard to the facts of that case, that it was wrongly decided. 67 Ind. Cas. 177=49 Cal. 682= 23 Cr. L. J. 353=35 C.L J. 247=26 C.W.N. 442=A.I.R. 1922 Cal. 59 (F.B.)

——S. 133—Bona fide claim of right—jurisdiction, ouster of:—It does not follow that, because the land over which a right of way is claimed, belongs to a particular person, that, therefore, that person must necessarily be acting bona-fide when he denies that there is a way over his land. The question of bona fides of a claim is a matter of fact which has to be enquired into like any other question of fact. When, however, there is in fact a bona fide claim of right in a case in which a person is required to remove a nuisance, the Magistrate's jurisdiction is ousted and he has no power to make an order under S. 133. 1 C.L J. 434.

——S. 133—Bona fide claim—jurisdiction when ouste:— It is not open to any person illegally causing obstruction to public property to set up a bogus question of title for the purpose of ousting the jurisdiction of a Magistrate, and not with standing the raising of such a question the Magistrate is entitled to hear the case sufficiently to enable him to make up his mind whether or not a bona fide question of title is raised. But where a bona fide question of title is raised the Magistrate ought not to proceed under S. 133, but should leave the matter to be decided by the civil court. 2 A.L J. 599=1905 A.W.N. 202= 28 A. 98.

——S. 133—Bona fide claim of title—jurisdiction:—In a proceeding instituted against the petitioner under S. 133, Cr. P. C., for certain acts which were complained of as nuisance committed in a public place, the petitioner raised a question of title, and the Magistrate, believing it to have been raised bona fide, stayed the proceeding, giving the petitioner two months' time to establish his claim in a civil suit:—Held, that the Magistrate had acted properly and in strict accordance with the ruling in 15 C. 564. 8 C.W.N. 143.

——S. 133 et seq—Bona fide claim—jurisdiction—ouster:—The provisions of S.133 and the following sections of the Criminal procedure Code do not apply to cases where there is a bona fide dispute as to the existence of a public right; and S. 133 does not contemplate an enquiry into disputed questions of title. 4 Bom. L.R. 687.

——S. 133—Bona fide claim—Long user may put an end to both public and private rights.

A long user by a person of what is claimed to be a part of the public way may be taken as a bona fide assertion of claim ousting the jurisdiction of the criminal court to pass a summary order under S. 133 against him. Vice versa a long user by the public of a place as part of a public road or way raises a presumption of relinquishment by the owner thereof of his right over it. 9 P.L.T. 587= 108 Ind. Cas. 559=29 Cr. L.J. 422=10 A.I.Cr.R. 127=A.I.R. 1928 Pat. 268.

——S. 133—Bona fide claim—Mode of enquiry.

What is to be considered under S. 133 and in the following sections is whether there is or is not a Bona fide private claim to title. If there is such a claim the Magistrate cannot proceed further and if there is not, he is to proceed as indicated in the section. It is not open to Magistarte to select some and reject other evidence on the ground that even if taken he would not believe it, 15 Bom. L. R. 57=14 Cr. L. J. 74=18 Ind. Cas. 410.

——S. 133—Bona fide claim—Order absolute—When proper.

When proceedings are taken under S. 133 against a person who denies the existence of public right and which denial is bona fide, the Magistrate's jurisdiction is ousted but if the denial is mere pretence the Magistrate can make

his order final. It is sufficient if the evidence produced is not false. The Magistrate has no jurisdiction to weigh the evidence. 4 Pat. 783=7 P.L.T. 136=27 Cr. L.J. 9=91 Ind. Cas. 41=A.I.R. 1926 Pat. 170.

——S. 133—Bona fide claim—Proper procedure.

A Magistrate has jurisdiction to take action under S. 133 even where a bona fide claim of right is raised by the defendant, but when the question whether the right rested in the public is seriously disputed, and its decision becomes a defficult matter of mixed fact and law the proper procedure for a Magistrate to employ is under S. 139-A (2) to stay proceedings until the matter of the existence of such right has been decided by a competent Civil Court and the existence of a genuine dispute as to title suitable for decision by the Civil Court is a sufficient ground for not making an order absolute under S. 137. A.I.R. 1924 All. 1, Foll; A.I.R. 1923 Oudh 152; 42 Cal. 158 and 36 All. 209, Rel. on; 50 All. 871=26 A.L.J. 1285=110 Ind. Cas. 213=29 Cr. L.J. 661 =9 L.R.A. Cr. 118=10 A.I.Cr. R. 201=A.I.R. 1928 All. 627.

——Ss. 133 and 137—Bonafide claim—Proper procedure.

Where a claim of right raised in answer to a conditional order under S. 133, was found to be bona fide and it was ordered that unless the party sought to establish his right in the Civil Court within a limited time, his bona fides would not be accepted in a Criminal Court. Held, that the Magistrate should not have made the order without taking evidence adduced by one side or the other. 23 C.W.N. 774=20 Cr. L.J. 752=53 Ind. Cas. 160

——Ss. 133 and 138—Bona fide claim—Proper procedure.

When a conditional order under S. 133 is passed and the person aggrieved raises a bona fide claim that the subject of the contention is private property, the Magistrate is bound to investigate it and cannot leave it to a jury under S. 138; but if once the jury is appointed the Magistrate cannot determine before the jury proceeds with it. 7 Bur. L. T. 23=15 Cr. L J. 259=23. Ind. Cas. 467.

——S. 133—Bona fide claim—Question of fact.

In proceedings under S. 133 of the Cr. P. Code, it in necessary to establish, first that the act complained of is a nuisance or an obstruction and secondly, that it was committed in a public place or in a place which may be lawfully used by the public. The question of the bona fides of a claim is a question of fact and has to be inquired into like any other question of fact. 1 Cal. L. J. 434, Foll. 20 Cr. L. J. 556=51 Ind. Cas. 844.

——S. 133—Bona fide claim—Removal of building—If order for sustainable.

Where applicant bona fide erected a building on land which had been in his possession for a number of years and the building obstructed the view of the Home Signal from the Distant Signal in a railway line—Held, that, as the petitioner had put forward his claim in good faith, the order for removal of the building could not be maintained. 61 Ind. Cas. 517=22 Cr. L.J. 389 (Cal.)

——S. 133—Bona fide claim — Should not be disregarded.

Where the dispute was as to the closing of an old drain, and the accused definitely asserted that the drain was not a public one but the Magistrate instead of proceeding under S. 139(a) at once took evidence under S. 137 and where the Magistrate also did not find in clear words that the drain was a public one.

Held, that the trial was vitiated by wrong procedure. 86 Ind. Cas. 809=23 A.L.J. 187 =26 Cr. L. J. 873=A.I.R. 1925 All. 311.

——S. 133—Bona fide claim must be taken into consideration by a Magistrate.

Where in a proceeding under Chapter X of the Cr. P. Code regarding an alleged obstruction to a public path, a claim is made that the path is private the Magistrate should first inquire whether the claim is a bona fide one or not, and it is only when he finds that the claim is not bona fide that he should take proceedings under the Chapter. If the claim is bona fide, the parties should be left to take further proceedings, in the Civil Court, and if the parties do not go to the Civil Court within a reasonable time, he may proceed again. 61 Ind. Cas. 175=22 Cr. L. J. 351 (Cal).

3. Cancellation of order.

——S. 133—Cancellation of order—Magistrate cannot cancel an order made under S. 133 merely on the written statement by opposite party without taking evidence.

On application by a petitioner a Magistrate made a conditional order requiring the opposite party to remove the obstruction, or to appear before him and to show cause against the order. The opposite party filed a written statement showing cause against the aforesaid order and alleging that there had been litigation between the parties and ultimately a passage five feet wide had been left for the public. The Magistrate, who succeeded the privious Magistrate, on perusing the statements of the parties, but without taking any evidence, cancelled the order under S. 133, Cr. P.C.

Held, that the Magistrate had not followed the provisions of part 4, Ch. 10 and that the order could not, therefore, be allowed to stand. 118 Ind. Cas. 863=30 Cr. L.J. 973=A.I.R. 1929 Cal. 21.

——S. 133—Cancellation of order.

—Non-service of notice in a proceeding under S. 133 is not a ground giving the Magistrate jurisdiction to cancel his previous order for removel of obstruction. The procedure to be followed is as under S. 140 (2). 44 C.L.J. 211=31 C.W.N. 530=28 Cr. L.J. 30=7 A.I. Cr. R. 218=99 Ind. Cas. 62=A.I.R. 1927 Cal. 70.

4. Conditional Order.

——Ss. 133, 137, 139-A and 537—Conditional under made absolute after enquiry under

S. 139-A — Evidence not taken under S. 137—Legality—S. 537, if can cure defect.

Where after the making of a conditional order under S. 133 of the Cr. P. Code, the Megistrate makes an enquiry under S. 139-A of the Code and the order is made absolute without taking evidence under S. 137, it is an illegality and not an irregularity. The Magistrate must first take proceedings under S. 137, when the person against whom the conditional order is made denies the public right of way. The provisions are mandatory and their non-observance cannot be cured by S. 537, Cr. P. Code. 223 Ind. Cas. 463=1946 O.W.N. 108=1946 O.A. (C.C.) 90=1946 A.L.W. (C.C.) 102=1946 A.W.R. (C.C.) 90=1946 A.Cr.C. 22=A.I.R. 1947 Oudh 65=47 Cr.L.J. 398.

——S. 133—Condititional order—Not made absolute—Effect.

—Where the order under S. 133, Cr. P. C., was not made absolute under S. 139 (1) and further proceedings had to be dropped as provided in S. 139 (2), S. 140, Cr. P.C. cannot apply to the case. A.I.R. 1942 Mad. 113=1941 M.W.N. 813 =43 Cr. L.J. 314=198 Ind. Cas. 131.

——Ss. 133 and 137—Conditional order—cannot be made absolute without complying with the provisions of S. 137 which are mandatory and which cannot be disregarded by the Magistrate. 1 P. L. W. 292=18 Cr. L J. 448=38 Ind. Cas. 1008.

——S. 133, 135, 137, 141—Conditional order under S. 133—Application to show cause and also for the appointment of a jury—Illegality—jury failing to do their duty—Magistrate's power to make order absolute without taking evidence—The party against whom a conditional order under S. 133, Cr. P.C., is made cannot both show cause against the order and ask for the appointment of a Jury. S. 135, Cr. P.C., gives the person against whom the conditional order is made the right to adopt either of these alternatives. If he adopts the former alternative the Magistrate is bound to take action under S. 138 and if he adopts the second alternative, then the Magistrate is bound to take action under S. 138. Both Ss. 137 and 138 are imperative in their terms. The Magistrate has no discretion in the matter. Where the petitioners against whom a conditional order under S. 133, Cr. P.C., was made, applied to the Magistrate for showing cause against the order and also for the appointment of a jury, but in the end elected to proceed with the application for the appointment of a jury, but the jury failing to submit their verdict within the time granted them by the Magi trate the Magistrate proceeded under S. 141 to make the order absolute:—**Held**, the Magistrate was justified in making the order absolute without taking evidence under S. 137, the petitioners not having taken any action, after the jury had failed to perform their duty, to move the Magistrate for taking evidence in their behalf. **Semble**:—The petitioners might have been allowed after the jury had failed to perform their duty to revert to their application for showing cause, and to adduce evidence, if they had moved the Magistrate for that purpose. 13 C.W.N. 367=10 Cr.L.J. 494=4 Ind. Cas. 72.

——Ss. 133 and 136—Conditional order—Failure to comply or to object—Penal Code, S. 188:—A person against whom an order under S. 133, Cr. P.C., is passed, if he neglects to take any steps whatever in respect of such order, either by way of compliance or objection in the manner provided by law, renders himself liable to be proceeded against under S. 188, I.P.C., and it is not necessary that a further notice should be given to him as provided for in S. 140, requiring him to perform the act directed by the order within a fresh period of time. 18 M. L. J. 216=31 M. 280=3 M.L.T. 403.

5. Costs.

——S. 133—Costs.

It is unjust to recover costs from a party who is not served with notice. 44 C.L.J. 211=31 C.W.N. 530=7 A.I.Cr.R. 218=99 Ind. Cas. 62=28 Cr.L.J. 30=A.I.R. 1927 Cal. 70.

——S. 133—Costs.

There is no provision in Chapter X for the payment of costs by any party to the proceeding. 85 Ind. Cas. 357=40 C.L.J. 597=26 Cr.L.J. 517=A.I.R. 1925 Cal. 399.

6. Dropping Proceedings.

—S. 133—Dropping proceedings on party agreeing to subscribe to warfund.

It is highly improper for any Magistrate or any presiding officer of a Court to invite subscription to public or charitable funds from anybody appearing in his Court, either in the capacity of a party or a witness or professionally, or to entertain suggestions made by anybody else that donations should be accepted from such. The 'dropping' of a proceeding (in this case proceeding under S. 133, Cr. P.C.) by a Magistrate on one of the parties agreeing to make a donation to the war fund is illegal. A.I.R. 1942 Pat. 337 (1)=23 P.L.T. 40 =8 B.R. 659=43 Cr.L.J. 633=200 Ind. Cas. 301.

7. Jurisdiction.

——Ss. 133, 529 (f) and 537—Jurisdiction—Transfer of the case to another Magistrate who made the order absolute—Legality of order—Defect if curable under S. 529 (f) or 537.

Ss. 134 and 135, Cr. P. Code, provide for special procedure with respect to proceedings relating to public nuisances, and the special procedure laid down in these sections must be strictly followed.

The Magistrate passing the conditional order under S. 133, Cr. P. Code, is to exercise his power of sending the case to another first class Magistrate in the manner set down in S. 133, that is to say, by ordering in the conditional order itself that the person concerned was to appear before the other Magistrate at a certain time and place. If he fails to do so, he cannot pass such an order at a later stage. If he passes such an order at later stage, it would be without jurisdiction and the other Magistrate would get no jurisdiction to proceed with the case on account of an order so made. The defects in such a procedure cannot be cured either under S. 529 (f) or S. 537 of the Cr. P. Code. 1950 A.L J. 363=1950 A.W.R. 609=4 A.I.Cr.D. 757=A.I.R. 1950 A. 475=51 Cr. L. J. 1248 (2).

——Ss. 133 and 192—Jurisdiction—Transfer of case after appearance of party to some other magistrate—If permissible.

It is clear from S. 133 (1), Cr. P. Code, that a Magistrate passing a preliminary order has to decide,

while passing that order, whether cause has to be shown before him or before some other Magistrate. He is to make up his mind at that stage. There is no scope for the view that when a person appears pursuant to an order passed by a Magistrate under S. 133 directing the person to show cause before him such Magistrate before whom he appears can transfer the case to some other Magistrate. S. 192, Cr. P. Code, has no application whatsoever to proceedings under S. 133, Cr. P. Code, and does not empower a Magistrate who directs a person to appear before him under S. 133, Cr. P. Code, to transfer the case to any other Magistrate. He must try the case himself. 34 C.W.N. 228, Foll. 54 C.W N. 228=51 Cr.L.J. 205=A.I.R. 1949 Cal. 637.

——**S. 133—Jurisdiction** — Transfer of case after appearance of party to some other Magistrate—If permissible.

Where a Magistrate of the first class orders the opposite party under S. 133, Cr. P. Code, to appear before him to show cause or contest the order, and that party so appears and puts in a written statement, he has no power to transfer the case at that stage to another Magistrate for disposal, and a final order passed by the latter Magistrate is, therefore, without jurisdiction. 229 Ind. Cas. 168=48 Cr.L.J. 295=49 P.L.R. 8=A.I.R. 1948 Lah. 49.

——**Ss. 133, 137, 537, 529 (f)—Jurisdiction**—Conditional order by Sub-Divisional Magistrate—Subsequent transfer to Second Class Magistrate—Order of transfer, if without jurisdiction or merely irregular—Applicability of Ss. 529 (f) and 537.

Where a Sub-Divisional Magistrate makes a conditional order requiring the party to appear before himself, he should strictly speaking, dispose of the case himself. If, after the person appears before him, the Sub-Divisional Magistrate transfers the case for disposal to another Magistrate he will not be acting in strict accordance with the provisions of Ss. 133 and 137. But if he does so transfer the case, it cannot be said that he acts without jurisdiction so that all the subsequent proceedings will be rendered void. If he, instead of thus transferring the case by the conditional order itself, transfers it subsequently after the person against whom the order is made appears and shows cause before him, all that can be said is that he is exercising the power of transfer conferred by the section in an irregular manner which irregularity will be cured by Ss. 529 (f) and 537. Want of jurisdiction must be distinguished from irregular exercise of jurisdiction. A.I.R. 1945 Pat. 334: 24 Pat. 16=47 Cr. L.J. 29=221 Ind. Cas. 183.

——**Ss. 133, 139 (1) 529 (f) and 537—Jurisdiction—Transfer of case to competent Subordinate Magistrate—Order under S. 139-A—Validity.**

Where a conditional order under S. 133 is made by a Sub-Divisional Magistrate and on appearance of party the case is transferred to a competent Subordinate Magistrate, order under S. 139-A passed by the latter is within jurisdiction and the irregularity caused by the transfer order is curable under Ss. 529 (f) and 537, Criminal P. C. A.I.R. 1945 Pat. 316=24 Pat. 23=12 B.R. 134=47 Cr. L.J. 179=221 Ind. Cas. 418.

——**Ss. 133, 139-A, 135, 137—Jurisdiction—Magistrate passing conditional order can transfer case for enquiry under S. 137—Appointment of jury.**

The inquiry under S. 139-A no doubt precedes the stage of inquiry under S. 137 or S. 138, but the Magistrate holding the enquiry under S. 139-A need not himself dispose of the case. There is nothing in the Code to prevent the Magistrate who passed the conditonal order under S. 133 from transferring the case to some other Magistrate for making inquiry under S. 137.

But an application for the appointment of a jury must be made to the Magistrate by whom the conditional order under S. 133 was passed and S. 138 shows that the appointment of a jury must be made by the same Magistrate to whom the application for the purpose is made. A.I.R. 1943 Pat. 115=21 Pat. 759=9 B.R. 217=44 Cr.L.J. 364=205 Ind. Cas. 302.

——**S 133—Jurisdiction—Party appearing to show cause—Magistrate, if can send case to other Magistrate.**

Where upon an application under S. 133, Criminal P.C., the Magistrate, after recording some evidence orders the opposite party to remove the obstruction by certain date or to appear before him to show cause againt the removal of obstruction and the party appears before him, the Magistrate must himself proceed with the case and has no power at such stage to send the case for disposal to another Magistrate A.I.R. 1938 Lah. 323=39 Cr.L.J. 603=175 Ind. Cas 517.

——**S. 133—Jurisdiction.**

The Magistrate making conditional rule can refer the matter for disposal to another Magistrate subordinate to him except when jury is demanded under S. 135. 42 Cal. 158, 17 Cal. 562 and 25 Cal. 278, Rel. on. 105 Ind. Cas. 238=6 Pat. 428=8 P.L.T. 452=8 A.I.Cr. R. 306=28 Cr.L J. 910=A.I.R. 1927 Pat. 265.

——**S. 133—Jurisdiction—Procedure is irregular** where the evidence was taken by one Magistrate and final order was passed by another.

A conditional order was made under S. 133, by a Magistrate whereby the petitioner was required to appear before the said Magistrate to show cause against the order. After that the parties appeared before him and the papers were forwarded to another Magistrate for inquiry and report. After evidence having been recorded and a report made by that Magistrate, the first Magistrate made his final order.

Held, that the procedure followed in this case is irregular and the order should be set aside on that ground. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate under S. 137 to take evidence as in a summons case, if the fiinal order was to be made by him. 68 Ind. Cas. 619=24 Bom. L.R. 807=47 Bom. 89=23 Cr. L. J. 587=A.I.R. 1922 Bom. 384.

——**S. 133—Jurisdiction—Long user of a public way ousts jurisdiction of Criminal Court.**

Long user by a person of what is claimed to be a part of a public way may be taken as a **bona fide** assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under S. 133. But the evidence brought forward in denial of the public right must be taken as a whole and if the statements of the witnesses on the point in themselves also contain a refutation of the claim made, then the suggested inference does not follow and the jurisdiction is not ousted. A.I.R. 1945 Pat. 309 =24 Pat. 104=26 P.L.T. 208.

——S. 133—Jurisdiction—Long user of part of public way—Criminal Court's jurisdiction.

Long user by a person of what is claimed to be a part of the public way may be taken as a **bona fide** assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order. 193 Ind. Cas. 336 = 21 P.L.T. 1028 = 7 B.R. 504 = 42 Cr. L. J. 401.

—S. 133—Jurisdiction—Proceedings under—Public nuisance by trade—Dispute between parties, whether trade should be stopped or not—Overwhelming evidence proving trade to be nuisance—Magistrate ordering trade to be stopped and giving adequate reasons why its regulation was not proper.

In proceedings under S. 133, Cr. P. C., the only dispute between the parties was whether the trade which was being carried out by the opposite party and which had become a public nuisance should be ordered to be stopped. There was no dispute that it should be regulated in any manner. The opposite party were insisting that they were carrying on their trade in a proper manner and that it was in these circumstances not a nuisance. There was overwhelming evidence which proved the existence of nuisance which was injurious to the health and physical comfort of the public. The Magistrate ordered the trade to be stopped and gave adequate explanation as to why he did not think it proper to pass a Conditurinal order for regulating the trade:

Held, that the Magistrate had complete jurisdiction to adopt either of the courses provided in S. 133 and as he had exercised his discretion in a proper and legal manner, it was not within the province of a court of Revision to impose some conditions for regulating the trade which the evidence in the case did not justify and to which the minds of the parties were never directed. A.I.R. 1939 Pat. 183 = 17 Pat. 669 20 P.L.T. 288 = 5 B.R. 505 = 40 Cr. L.J. 516 = 180 Ind. Cas. 852.

——S. 133—Jurisdiction of Magistrate to pass order regulating conduct of trade—Expendiency of passing such orders.

A Magistrate has jurisdiction to pass an order under S. 133, Cr. P. C., directing a person to whom a licence has been granted by a Municipality, for carrying on a trade to take precautions so as to prevent his trade from being a nuisance to the community, but it is generally inexpedien· that a Magistrate should take action in such cases as these matters are left by the Legistlature to the control of the Municipal Boards.

Where a person had erected a lime-kiln with the consent of a Municipal Board and had been working the kiln for several years and it appeared that the kiln in question was not a danger to the Community and did not cause discomfort to any one except the complainant and his neighbours who had deliberatley chosen to reside in a position where they were liable to be inconvenienced by the smoke and smell of the kilns:

Held, there was no justification for passing an order under S. 133, Cr. P. C., directing the licensee to remove the kilns. A.I.R 1932 All. 159 = 1932 A.L.J. 49 = 33 Cr. L.J. 524 = 54 All, 359 = 137 Ind, Cas, 626.

——S. 133— Jurisdiction—Successive proceedings—If can be drawn up—Order under S. 139-A, staying proceedings until decision by Civil Court—jurisdiction to re-open matter and draw up fresh proceedings.

Where a Magistrate has passed a competent order under S. 139-A, Cr. P. Code, staying the proceedings started under S. 133 until the matter is decided by a Civil Court, he has no jurisdiction to re-open the matter subsequently and to start fresh proceedings under S. 133 in respect of the same matter, which has been referred to the Civil Court. 229 Ind Cas. 285 = 13 B.R. 365 = 48 Cr. L.J. 360 = A.I.R. 1948 Pat. 15.

——S. 133—Jurisdiction—Fresh proceedings.

——There is nothing in law to prevent a Magistrate drawing up fresh proceedings under S. 133 based on proper materials. 34 C.W.N. 957 = 128 Ind. Cas. 810 = 32 Cr. L.J. 189 = A.I.R. 1931 Cal. 2.

——Ss. 133 and 137—Jurisdiction—Waiver.

No waiver of a right by a party can confer on the Magistrate authority to act in a manner not prescribed by the Legislature. Therefore in a case, under S. 133, Cr. P. Code, if the party appears and shows cause the Court should follow the procedure laid down in S. 137 and take the evidence even if the party agrees to abide by the arbitrary decision of the Magitrate. 10 C.L.J. 482 = 11 Cr. L.J. 1 = 4 Ind. Cas. 436.

——S. 133—Jurisdiction—Modification of order.

——S. 133 clearly contemplates that in suitable cases the order initially made may be modified and the modified order may be allowed to stand. 86 Ind. Cas. 219 = 23 A.L.J. 43 = 26 Cr. L. J. 731 = 6 L.R.A. Cr. 86 = A.I.R. 1925 All. 310.

8. Jury.

——S. 133, 138—Jury—Appointment of.

——A Magistrate must exercise his own discretion in nominating a proportion of the jury. He cannot accept the names suggested by the original complainant without exercising his own discretion in the matter; otherwise it is an illegality. 23 Cal. 499 and 26 Cal. 869, Foll., 37 All. 26 Dist, 117 Ind. Cas. 333 = 31 Bom, L.R 79 = 30 Cr. L.J. 785 = A.I.R. 1929 Bom. 79.

——Ss. 133, 138—Jury—Appointment of.

——When the Magistrate appoints only the nominees of the two parties, with a foreman appointed by himself, the jury is not constitued legally and is incapable of making a legally binding award. 23 Cal. 499, Foll. 9 A.I. Cr.R. 202 = 28 Cr.L.J. 1036 = 106 Ind. Cas. 220 = A.I.R. 1928 Lah. 187.

——Ss. 133, 138—Jury—Appointment of.

——If the Magistrate is of opinion that a jury should be appointed he as well as the party showing cause must nominate the jury. 62 Ind. Cas. 817 = 22 Cr. L.J. 577 (Cal.).

——Ss. 133, 138—Jury—Appointment of—Member of District Board—Eligibility in case of dispute wherein Board is interested.

A member of the District Board who is appointed to carry out certain public functions is an unsuitable person to be nominated by the District Board to serve on a pay for purpoes of seeing whether there is an encroachment on the public property under the control of the District Board. 1930 A.L.J. 1335=1931 Cr. C. 417 =32 Cr. L.J. 565=130 Ind. Cas. 627=A.I.R. 1931 A. 257.

——Ss. 133, 137—Jury—Appointment of—Principle to be observed.

It is highly improper for a Magistrate to appoint friends and supporters of the complainant to serve on the Jury in a case of nuisance though it is not illegal for him to enquire the names of respectable persons of the neighbourhood. A Court should bear in mind the public good and should not use the section as a substitute for civil litigation for the settlement of a private dispute. 37 All. 26=12 A.L.J. 1241=16 Cr. L.J. 40=26 Ind. Cas. 632.

——Ss. 133, 138—Appointment of Jury—Error.

——The nomination of a Jury is a nomination of the Court which has to try the case and irregularity with regard to that matter is an irregularity which goes to the root of the proceedings. It is doubtful whether in any event the provisions of S. 537, could cure the irregularity in this respect. 3 Cal. 499, Ref. 120 Ind. Cas. 289=31 Cr. L.J. 53=1930 Cr. C. 335 (2)=A.I.R. 1930 Pat. 199.

——Ss. 133, 135, 138, 139-A—Jury—Order under S. 133 made absolute—Right to trial by jury.

It is open to a person against whom an order under S. 133, Cr. P.C. has been made absolute to elect to have the matter tried by a jury even after the enquiry under S. 133-A has been finished by the Magistrate. A.I.R. 1933 Cal. 318=56 C.L.J. 249=34 Cr. L.J. 532 =143 Ind. Cas. 178.

——Ss. 133, 138—Jury—Five persons named as jurors—Report by four, one being ill—Whether legal.

Where five persons were appointed jurors according to S. 138 but only four of them dealt with the case, one of them being ill and unable to attend, and on the report of the four the conditional order was made absolute. **Held,** that, notwithstanding that the jury as a body can act by a majority, that act must be by a majority out of a jury of five people who investigated the case; therefore in the present case the report was not legal and that order should be set aside. 11 Cr. L.J. 402=6. Ind. Cas. 777.

——S 133—Jury.

——A Magistrate should not accept only a part of the verdict of jury and base his order there on. 85 Ind. Cas. 357=40 C.L.J. 597=26 Cr. L.J. 517=A.I.R. 1925 Cal. 399.

——S. 133—Jury.

——It is the duty of the Magistrate in a proceeding in respect of an obstruction to a footpath under Chapter X before referring the matter to the jury to decide himself whether or not the claim is made in good faith, and whether the pathway is a public one or not. 72 Ind. Cas. 617=24 Cr. L.J. 457=4 Lah. 224=5 L.L.J. 420 =A.I.R. 1923 Lah. 525.

——Ss 133, 139 (1) Jury—Finding of jury based only on local investigation—Validity of:— A verdict given on mere local inspection and without taking evidence by a jury appointed under S. 138, Cr. P.C. is illegal. 26 C. 869 foll, 6 C.W.N. 886.

——S. 133—Jury—May be appointed at the desire of the claimant.

In a proceeding under S. 133 in respect of a way the Magistrate must first decide whether the way in question is or is not a public way and whether the claim to the contrary is put forward in good faith. If he concludes that the way is a public way and that the claim to the contrary is merely a pretext to oust the Magistrate's jurisdiction, he can then appoint a jury if the claimant still desires the appointment of a jury. 61. Ind. Cas. 843=22 Cr. L.J. 459 (Cal.).

——S. 133—Jury—Absence of some jurors at the time of investigation—Effect.

A report of the jurors under S. 133, Cr. P. Code, is defective if any four out of five jurors were present at the investigation. Such a report is illegal and should not be relied on. The Magistrate should allow the procedings to begin with a fresh jury. 31 Cal. L.J. 371 =56 Ind. Cas. 240=21 Cr. L.J. 448=24 C.W.N. 928.

——Ss. 133 to 143 (Ch. X.)—Jury—Magistrate's duty before reference to.

Before reference to Jury, the Magistrate should decide, whether the claim of right to the land in question is made in good faith and whether the pathway is public. He may refer the matter to the Jury only when he decides that there is no such claim. 14 C.W.N. 544=11 Cr. L.J. 365=6 Ind. Cas. 271.

——Ss. 133 and 139—Jury—Finding—Inconsistency.

If the jury or a majority of them found that the order of the Magistrate is reasonable and proper, the Magistrate is bound to make the order absolute though he might think that there is an inconsistency in the finding. Under S. 133, Cr. P. C. the way need not be generally used by the public if it "is or may be lawfully used by the public." 10 Cr. L. J. 210=3 Ind. Cas. 7.

——Ss. 133 etc.—Jury failing to hear and try—Procedure.

Where persons have in good faith chosen a trial by jury, and through no fault of their own, their chosen tribunal fails to hear and try their case, they cannot claim then that their case should be heard by the Magistrate as a summons case under S. 137 (1) but the Magistrate would clearly desire in such circumstances that they should be given an opportunity briefly to state their case. A.I.R. 1940 Sind 24=I.L.R. (1939) Kar. 179=31 Cr.L.J. 364=186 Ind. Cas. 723.

——Ss. 133, 138, 140, 141—Jury failing to return the verdict—Appointment of a fresh Jury—Magistrate's discretion.—Where, in a proceeding under S. 133, Cr.P.C., the Jury appointed under S. 138 failing to return the verdict on account of certain causes, the

petitioner appeared before the Magistrate and prayed for the appointment of a fresh Jury, but the Magistrate refused the prayer and, proceeding under S. 141, Cr.P.C., made his original order absolute: **Held**:— That the Magistrate in so doing did not exercise a proper discretion. He ought to have, in the exercise of his discretion, appointed a fresh Jury in compliance with the prayer of the petitioner. 12 C.W.N. 1047.

——**Ss. 133, 139—Jury.**

—**Jury men refusing to give verdict**—Fresh jury can be appointed.

If some three men of the jury deliberately shirk their duty by not giving any verdict at all, probably because they do not want to offend either party, which amounts to a perverse refusal on the part of the men to decide then, in accordance with the note in para. 9 on page 220 of Sohoni's Criminal Procedure Code, 9th Edition, it is competent on the part of the Court to appoint a fresh jury. 66 Ind. Cas. 420=44 All. 575=20 A.L.J. 472= 23 Cr.L.J. 276=A.I.R. 1922 All. 297.

——**S. 133, 139—Jury.**

—**Before completion of appointment of jury, one juror submitting his report**—Report of majority of jury, whether illegal—Duty of Court.

Where one of the jurors had already submitted his report before the completion of the appointment of the jury, he is not a fit person to be on the jury and the constitution of the jury as completed is essentially defective. In such cases, the report of the majority of the jury itself becomes illegal and one that cannot be acted upon. Under the circumstances, the Court can appoint a fresh jury and allow the proceedings to go on with a fresh jury. A.I.R. 1940 Pat. 717=21 P.L.T. 793=42 Cr.L.J. 202=7 B.R. 239=191 Ind. Cas. 595.

———**Ss. 133 et seq—Jury—Functions of.**—Where, at the request of a person upon whom a notice has been served under S. 133 of the Code of Criminal Procedure, a jury is appointed under S. 138 of the Code, it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. It is not for the Magistrate to decide whether such an objection is raised **bona fide** before referring it to the jury. I.L.R. 26 C. 869. **Held also** that there is no special procedure laid down by the code to be adopted by a jury appointed under S. 138 in coming to a finding on the questions submitted to them. I.L.R. 18 A. 158 ref. to. **Held** also that a person who has applied for a jury under S. 138 is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstuction was caused in the exercise of a **bona fide** claim of right. (1903) A. W. N. p. 181 foll. (1908) A.W.N. 151=5 A.L.J. 488=30 A. 364.

——**S. 133—Jury**—Respective duties of the Magistrate and of the jury:—A Magistrate passing an order against a person under S. 139, Cr.P.C., cannot do so relying merely upon a conviction of the person under S. 283, I.P.C., in respect of the same matter, but must follow the procedure laid down in S. 133 and the subsequent sections of the Criminal Procedure Code. Prior to the appointment of a Jury the Magistrate should himself determine the question, which is the most important question in proceedings under S. 133, Cr. P. C., and which alone gives him jurisdiction, namely, whether the pathway in which the obstruction is said to have been erected was in fact a public pathway or not, Where the Magistrate referred the whole case to the Jury and the Jury returned a verdict that the order was a proper order, but that the road was a private road: **Held,** it was incumbent upon the Magistrate to determine the latter point and not to leave it to the jury. 3 C.L.J. 360.

——**S. 133—Jury—Function of.**

The Jury appointed under S. 138 Cr. P. Code, are simply persons selected by the parties to determine in an informed way whether the order as passed by the Magistrate for the removal of an obstruction is or is not a reasonable order, and it is not competent to the Magistrate to leave to the Jury the decision of the question whether a path way is public or not and whether the claim of private path way set up is **bona fide** or not. 10 C.W.N. 845.

——**S. 133—Jury—Functions of.**

When a Jury is claimed and appointed they have only to try the question whether the Magistrate's conditional order is reasonable and proper. The question whether there was a public right of way cannot be p. operly referred to the Jury. The Magistrate has to decide it. 9 C.W.N. 72=31 Cal. 979.

9. Local inspection.

——**Ss. 133, 137** — Local inspection—Rule made absolute merely on inspection—No opportunity for offering evidence.

When a party had appeared and showed cause against the preliminary order passed under S. 133, this order should not under S. 137 have been made absolute merely on a local inspection in the course of which it does not appear that the party concerned had any opportunity of offering any evidence. A.I.R. 1934 Pat. 316 (1)=15 P.L.T. 288=35 Cr.L.J. 1020= 149 Ind. Cas. 839.

——**Ss. 133, 137—Local inspection.**

The provisions of S. 137, are imperative and failure to comply with them vitiates the order. When the opposite party appears before the Magistrate, shows cause and alleges that what was climed as a public pathway was not so, the Magistrate should record evidence on the matter of the complaint as in a summons case. He is not justified in consenting to act, so to say, as an arbitrator and to decide the matter simply after a local inspection. Consent of the parties or waiver does not vest him with a jurisdiction to proceed in such a manner. 21 C.W.N. 926, Rel. on. 99 Ind. Cas. 415=49 All. 270=55 A.L.J. 155=8 L.R.A. Cr. 25=28 Cr.L.J. 159=7 A.I.Cr.R. 198 =A.I.R 1927 All. 267.

——**Ss. 133, 137—Local inspection** — Existence of hayricks in premises—Conditional order—Validity.

Where on a mere representation by a person that the existence of hayricks in petitioner's premises is a nuisance and likely to cause conflagration, the Magistrate on a personal inspection made an order absolute that the hayricks were a nuisance, **held,** that the Magistrate should not have made the order on his own opinion formed by inspection but should have called on the informant to adduce evidence that the hayricks were a nuisance. The order was therefore illegal. 17 M. L. T. 142=16 Cr. L. J. 207=27 Ind. Cas. 767.

10. Local inquiry.

——S. 133—Local inquiry with the consent of parties—Should not be the basis of an order under S. 133.

Information or report on which the Magistrate acts is no evidence under S. 133. Necessary opportunity ought to be given to show cause and adduce evidence under S. 133 (b). Orders must be definite and unambiguous directing persons clearly how they are to comply with it. In an order against various persons it was alleged that various unlawful obstructions were caused on public way. The order is vague; unless it is made definite, all persons mentioned therein are responsible for all the obstructions. 44 Cal. 61=20 C.W.N.1171=17 Cr.L.J. 409=35 Ind. Cas. 969.

——Ss. 133, 137—Local investigation—Order on—Legality of.

Where in a proceeding under S. 133 of the Code the opposite party appears and shows cause, the Magistrate should hold, under S. 137 of the Code, an enquiry as provided for the trial of summons. The consent of the parties to have the case decided upon the local inspection, does not dispense with the necessity of holding a regular trial under S. 137 and deciding the case on legal evidence. 20 Cr.L.J. 217=49 Ind. Cas. 777.

11. Magistrate's extra Judicial investigation.

——Ss. 133 and 556—Magistrates' Extra judicial investigation.

A Magistrate should never judicially act in a case which he has himself extra-judicially investigated. Therefore a person who as Chairman of a certain Local Board issued a notice calling upon the petitioner to remove an obstruction and the petitioner submitted a representation which proved infructuous, he should not subsequently initiate proceedings as Magistrate under S. 133, Cr. P. Code. 10 C.L.J. 484=11 Cr.L.J. 2=4 Ind. Cas. 437.

12. Magistrates' own enquiry.

——Ss. 133 and 137—Magistrates' own enquiry—Value of.

A Magistrate is not entitled to rely on the result of his own enquiries or substitute it for the evidence given by parties in making the conditional order absolute. 23 C.W.N. 1054=20 Cr.L.J. 322=50 Ind. Cas. 658.

13. Magistrates' powers.

——Ss. 133, 137 (3)—Magistrates' powers—Order under S. 133, if can be passed on personal opinion of Magistrate.

An order under S. 133, Cr.P.C., cannot be passed merely on the personal opinion of the Magistrate. He must take evidence as in a summons case and it is only when this has been done that the Magistrate can make the conditional order absolute. A.I.R. 1935 Lah. 28=37 Cr. L.J. 70=159 Ind. Cas. 374.

——S. 133—Magistrates powers—If can pass order on his own opinion without evidence taken.

The provisions of S. 137 (1) are mandatory and before making the conditional order absolute, it is imperative that evidence should be taken in the case as in a summons case. The Magistrate cannot, without recording evidence, act on his own opinion. 31 All. 453, Foll. 101 Ind. Cas. 897=7 A.I.Cr.R. 439=8 L. R.A.Cr. 68=28 Cr.L.J. 510=A.I.R. 1927 All. 825.

——S. 133—Magistrates' powers.

S. 133 of the Cr. P. Code does not give the District Magistrate or Sub-divisional Magistrate or a Magistrate of the first class power to pass any order that they like for any breach of the law. The section confers extraordinary powers which were meant to be exercised under extraordinary circumstances where recourse to proceedings under the ordinary law was not possible due to the urgency of the matter. The idea behind the provisions of the section is that if the Magistrate does not take action and only directs the public to have recourse to the ordinary courts of law or takes action under the ordinary law in the Courts established for that purpose, irreparable damage would be done. The Magistrates are not expected to use the power under S. 133 against a person who can easily be prosecuted under the ordinary law. 1949 A.W.R. 440=A.I.R. 1949 A. 650=50 Cr.L.J. 991.

——S. 133—Magistrates' powers—Powers to abate nuisance under S. 133, if curtailed by S. 44, Madras Public Health Act (III of 1939) and S. 195, Madras Local Boards Act (XIV of 1920).

The powers of a Magistrate to abate a nuisance under S. 133, Cr.P.C., have not been curtailed by the powers conferred on local authorities to abate nuisance under S. 44, Madras Public Health Act and S. 195, Madras Local Boards Act. It is clear from a comparison of these several provisions that there is nothing in conflict between them, the only differences between them being in the remedies provided. Further, the Cr.P.C., being an Act of the Indian Legislature, its provisions cannot be, in any way affected by a local Act. A.I.R. 1943 Mad. 357=56 M.L.W. 152=(1943) 1 M.L.J. 237=44 CrL.J. 533=1943 M.W.N. 177=I.L.R. (1944) Mad. 64=206 Ind. Cas. 546.

——S. 133—Magistrates' powers—Magistrate, for good reasons, can at any stage refuse to take further action.

In proceedings under S. 133, Cr.P.C., it is open to the Magistrate at any stage for good reasons shown to refuse to take any further action in the matter. The informant has no rights in these proceedings. A.I.R. 1943 All. 19=1942 A.L.J. 584=44 Cr.L.J. 205=1942 A.W.R.H.C. 325 (2)=I.L.R. (1943) All. 22=204 Ind. Cas. 326.

——S. 133—Magistrates' powers—Whether can continue with two proceedings under S. 133, side by side with regard practically to same subject-matter.

Quoere.—It is doubtful if a Magistrate can continue with two proceedings under S. 133 Criminal P.C., side by side with regard to practically the same subject-matter, because the danger is that by this procedure, a Magistrate may get a chance of reviewing an order which he had already passed. A.I.R. 1936 Pat. 577=37 Cr.L.J. 1159=165 Ind. Cas. 542.

——S. 133—Magistrate's power to take action.

A Magistrate can take action under S. 133 if on inquiry and information he finds that some nuisance should be removed from any river-way or channel which is used by the public. 34 All. 345=9 A. L. J. 355=13 Cr. L.J. 183=13 Ind. Cas. 999.

——S. 133—Magistrate's power—Reconstruction of removed obstruction—If can be ordered.

——Under S. 133, (2) it is only the power to order the removal of an obstruction which is given to a Magistrate. There is no provision for re-construction of an obstruction which has once been removed under this section. 85 Ind. Cas. 357=40 C.L.J. 597=26 Cr. L. J. 517=A.I.R. 1925 Cal. 399.

——Ss. 133, 137 and 140—Magistrate's powers.

——A Magistrate is not justified in going behind the order of his predecessor under Ss. 133 and 137, Cr. P. Code and coming to a decision as to its legality. Even though a Magistrate has discretion under S. 140 (2), Cr. P. Code this discretion must be judicial discretion and no Magistrate has judicial discretion to sit as a Court of appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not. 10 W.R. Cr. 27 and 25 Cal. 425, Ref. 72 Ind. Cas. 77=27 C.W.N. 459=24 Cr. L. J. 317=A.I.R. 1923 Cal. 589.

——S. 133—Magistrates' powers.

——Magistrate can only make a notice under S. 133 absolute if the person against whom the order is made does not appear under S. 135 and protest against it. If the person appears and puts in a written statement it is then the duty of the Magistrate to proceed under S. 137 as if the case were summons case. 76 Ind. Cas. 826=20 A.L.J. 692=25 Cr. L. J. 266=A.I.R. 1922 All. 335.

—S. 133—Magistrates' powers—Proceedings which have been dropped—If can be revived.

——The whole object of the procedure enacted under Chap. X is for the Magistrates to make speedy orders and deal speedily with cases where a public nuisance has been committed, and it is for this reason that the jurisdiction of the Civil Court is barred under S. 133, (2). It is therefore improper to revive a proceeding under S. 133 which has begun four years before and dropped. 23 Bom. L.R. 844=22 Cr. L.J. 605=62 Ind. Cas. 877=A.I.R. 1921 Bom. 29.

——S. 133—Magistrates' powers—Dropping proceedings—Fresh proceeding—Jurisdiction:—There is no bar in law to the revival of a proceeding under S. 133, Cr. P. Code, with regard to the same matter which had been previously dropped, provided there are materials before the Magistrate upon which **prima facie** he could act. The question whether matter instituted does not properly come within the purview of S. 133, Cr. P. C., must be raised and decided at the trial. 5 C.W.N. 173.

14. Market.

——S. 133—Market—Old market existing—New market opened by another—Carrying on trade not injurious to health or physical comfort—Order closing new market illegal:—A person who opens a new market close to an old one cannot, by the mere fact of opening such market, be said to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community, and a Magistrate is not justified in passing an order under S. 133, Cr. P. C., closing the new market. Even the fact that people from the old market are forcibly dragged from it to the new one will not justify the order under S. 133, Cr. P.C. 14 M.L.J. 207.

—S. 133—Market.

——An order suppressing a market for the sale of cattle, on the ground that the market is situated in a congested part of the town, and that owing to the cattle having to be driven through narrow and congested lanes, there was obstruction and inconvenience to the public, is valid. 62 Ind. Cas. 822=22 Cr. L. J. 582 (Cal.).

15. Nature of proceedings.

—S. 133—Nature of proceedings—Not intended to settle private disputes.

Criminal cases and cases under the Cr. P. C. are not contests between private persons. The proceedings under S. 133, Cr. P. C. are not intended to settle private dispute between two members of the public. They are not originated by the filing of complaint or something of that kind. Any person naturally can give a Magistrate information of the existence of any state of affairs, but when the Magistrate acts on that information, he is acting **suo motu**. The person who gives the information has no rights in the matter and is not a person who may be described as a party to the proceedings. If the Magistrate issues a preliminary order under S. 133, for the removal of an obstruction or something of that kind, the question which arises is one between the Magistrate on the one side on behalf of the public at large and the person, on the other, to whom notice has been issued. A.I.R. 1943 All. 19=1942 A.L.J. 584=44 Cr. L. J. 205=1942 A.W.R.H.C. 325 (2)=I.L.R. (1943) All. 22=204 Ind. Cas. 326.

—S. 133—Nature of proceedings — Not intended to settle private disputes.

The proceedings under S. 133, Criminal P. C. are not intended to settle private disputes between different members of the public. They are, in fact, intended to protect the public as a whole against inconvenience. If a person has any private right which he wishes to enforce, he should take his trouble to the Civil Court. A.I.R. 1942 All. 443=1942 A.L.J. 558=44 Cr. L.J. 76=1942 A.W.R.H.C. 312=203 Ind. Cas. 495.

——Ss. 133, 140—Nature of proceedings under Chap. X.

In a case where the flour mills have been working for ten years and that too, under a licence from the Municipal Board, it would not be proper to have recourse to the provisions of Chap. X, Criminal P. C. The proceedings under the Chapter are of a summary nature and intended to enable Magistrates to deal with cases of emergency and not intended to enable a complainant to obtain, by having recourse to this Chapter, relief which he should seek in the Civil Court. A.I.R. 1940 Oudh 75=41 Cr. L.J. 99=15 Luck. 140=1939 O.W.N. 966=1939 A.W.R. 252=184 Ind. Cas. 754.

—S. 133—Nature of proceedings.

—The Cr. P. C. calls the order under S. 133 a conditional order and the form in which the conditional order is expressed is such as not to amount to an injunction. A.I.R. 1938 Nag. 84=I.L.R. (1938) Nag. 348=176 Ind. Cas. 257.

—S. 133—Nature of proceedings.

——S, 133 deals with only public nuisances and not with private nuisances. So an application for removal of obstruction of a private path-way does not lie under the section. 81 Ind. Cas. 942=11 O. L. J. 659=25 Cr. L. J. 1118=A.I.R. 1925 Oudh 130.

S. 133.

16. Nuisance.

a. Boats Causing back wash
b. Brick-kilns
c. Discharge into river of effluence from factory
d. Encroachment on public way
e. Inquiry
f. Latrine
g. Mill
h. Noise from iron yard
i. Parking Buses in private land
j. Potential nuisance
k. Prostitutes
l. Removal of
m. Rubbish thrown on vacant lnad
n. Tree likely to fall

—S. 133—Nuisance—Boats causing back wash.

——S. 133 deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless but in course of which a public nuisance might be committed. There was rivalry between two steamer companies who vied with each other in attracting passengers. It was alleged that their practices of taking up passengers from the boats and of taking passengers from places other than the recognized jetties caused backwash and involved danger to the public.

Held, that S. 133 did not apply.

Per **S. K. Ghose, J.**—S. 133 is not confined to trades which are injurious in themselves. It applies on the contrary to the cases of trades which become injurious by reason of conduct of them. 1930 Cr. C. 1157=A.I.R. 1930 Cal. 757.

——S. 133—Nuisance—Brick-kilns—Order relating to mode of carrying on trade.

The objection was to the mode in which petitioners carried on their occupation of manufacturing bricks not against the occupation itself and this was not sufficient to bring the case within S. 133 of the Code. S. 133 relates to an existing state of affairs and not to the possibility of future results. S. 133 relates to existing affairs and not to **possibilities**. Cl. 3 of the section deals with trades which are injurious to health and physical comfort, and it cannot be used to interfere with lawfull trade, or free right of enjoyment of every individual unless it causes nuisance. An order under S. 133 proceeding on the grounds not covered by the notice to the accused is illegal. 1 Lah. 163=21 Cr L. J. 462=12 P.W.R. 1920 (Cr.)=56 Ind. Cas. 446.

——S. 133—Nuisance—Discharge into river of an effluent from a factory is covered—There must be definite, scientific and convincing evidence against the accused.

The second paragraph of Sub-S. (1) of S. 133 gives ample power to make an order prohibiting the discharge from a factory into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream. It would be necessary to prove substantially, before an order could be made against any of the parties that the effluent from its factory was noxious. That sources of public water supply are polluted by industrial factories, must be convincingly proved, by means of scientific enquiry against a wrong doer before any order can be passed against him. 8 P.L.T. 302=28 Cr. L.J. 317=100 Ind. Cas. 541=A.I.R. 1926 Pat. 506.

——S. 133—Nuisance—Encroachment on public way is itself nuisance.

Encroachment upon a public road is an obstruction to the public path, and it is a nuisance in itself under S. 268 of the Penal Code. No length of user can justify an encroachment upon a public way. The question of a sufficient width of the road being left in support of the encroachment, for public use is no ground for allowing the encroachment or obstruction to continue. It is the duty of the Magistrate to come to a finding, whether the claim of the person complained of, to such encroachment is **bona fide** or not, and question of possession is relevant for this purpose. 6 Pat. 428=8 P.L.T. 452=8 A. I. Cr. R. 306=28 Cr. L.J. 910=105 Ind. Cas. 238=A.I.R. 1927 Pat. 265.

——Ss. 133 to 140—Nuisance—Encroachment on road—Right to abate—Limits of—English and Indian Law compared.

There is no statutory provision in India justifying a private person or a member of the public in demolishing a building and causing loss to another person by way of abating a nuisance. On the other hand, the scheme of the Legistlature indicates that in the case of such a public nuisance, persons aggrieved should not take the law into their own hands, but must resort to the particular procedure laid down therein. Even in England, there is no unconditional right to abate a public nuisance. A.I.R. 1934 Mad. 95=57 Mad. 351=35 Cr. L.J. 437=1933 M.W.N. 905=38 M.L.W. 996=147 Ind. Cas. 553.

——S. 133—Nuisance—Encroachment upon unmetalled portion of a Government road:—Any obstruction upon a public road is a nuisance within the meaning of S. 133, whether in point of fact it causes practical inconvenience or not. (1901) A.W.N. 30=23 A. 159.

——S. 133—Nuisance—Encroachment on the unmetalled portion of a Government road:—Held, that a person who built a wall which encroached upon the unmetalled portion of a Government road might be properly proceeded against under S. 133. (1901) A.W.N. 25.

——Ss. 133, 137, 135 — Nuisance — Inquiry — In determining whether final order under S. 137 is legal, Court is concerned only with evidence given at enquiry.

A Court in an enquiry on complaint for nuisance is concerned only with the evidence which

is given at the inquiry. Any information or **exparte** statements on which the conditional orders were passed are not relevant for the purpose of determining whether the final order under S. 137, Cr. P.C. was a legal and proper one. Nor can a final order under S. 137, be legally based on the result of a local inspection by the Magistrate. A.I.R. 1939 Bom. 92 =41 Bom. L.R. 84=40 Cr. L.J. 444= 180 Ind. Cas. 511.

——**S. 133—Nuisance—Latrine near a public well,**

——When an application is made for the removal of a privy on the ground that its continuance near a public well would render the water of the well insanitary and unfit for use, and there is no denial of the existence of the public right in the well and the atmosphere surrounding it, an enquiry under S. 139, Cr. P. C., is not feasible. To such a case S. 133 applies if the Magistrate thinks that the nuisance should be removed from the public place. A.I.R. 1936 Pat. 409=2 B.R. 619=1936 P.W.N. 358= 163 Ind. Cas. 514.

——**S. 133—Nuisance—Latrine in private place—S. 133, if applies.**

The nuisance contemplated in S. 133, Criminal P.C. is a nuisance in any way, river or channel which is or may be lawfully used by the public or which is in a public place. Where, therefore, a latrine has been constructed upon the applicant's own land, that is, in a private place, the provisions of S. 133, do not apply. Where a latrine has been completed and is a nuisance, the owner should be directed to remove the nuisance and to prevent the user of the latrine amounting to a nuisance rather than to demolish the building which is being so used. A.I.R. 1935 All. 926=1935 A.W.R. 1004=37 Cr. L.J. 347 (2)=159 Ind. Cas. 198.

——**S. 133—Nuisance—Latrine—Construction of on one's land is not a nuisance.**

The construction of a latrine by a person on his own land cannot be considered a nuisance. There would be a nuisance if on its construction its use was made in such a way as to lead to a nuisance to neighbours. 25 Cal. 425, Foll. 26 A.L.J. 86=9 A.I. Cr. R. 12=8 L.R.A. Cr. 172=107 Ind. Cas. 242 =29 Cr. L.J. 233=A.I.R. 1928 All. 128.

——**S. 133—Nuisance—Mill—Noise of:**

Held, that the noise of the mill caused discomfort to the residents of the locality and amounted to nuisance. A.I.R. 1934 Nag. 193 (1)=17 N.L.J. 54=36 Cr. L.J. 591 (1)=154 Ind. Cas. 365 (1).

——**S. 133—Nuisance—Mill—Magistrate in previous proceedings regulating working of mill**—Orders complied with—Further working, whether nuisance for fresh proceedings—Redress in Civil Court.

The law does not contemplate a continued interference with the carrying on of the trade.

The working of flour mills working under a licence from a Municipality as regulated by the order of a Magistrate in previous proceedings under S. 133, Cr. P.C. cannot be described in law as a nuisance for the purposes of fresh proceedings under Chap. **X.** of the Cr. P.C. Where, in such a case a fresh complaint is made, the Magistrate should leave the complainant to move either the Municipal Board or to seek his redress in the Civil Court. A.I.R. 1940 Oudh 75=41 Cr. L.J. 99= 1939 A.W.R. 252=1939 O.W.N. 966=15 Luck. 140= 184 Ind. Cas. 754.

——**S. 133—Nuisance—Mill—Flour-mill causing vibrations and inconvenience to two neighbours**—Public nuisance —Order under S. 137, held not justified.

A flour-mill caused vibrations to the premises of two neighbours and caused them inconvenience and they alone filed complaint regarding nuisance. There was no evidence to show that similar nuisance or inconvenience or injury to health or physical comfort was caused to anybody else by the mill.

Held, that the working of the mill engine did not amount to a public nuisance. Any damage or inconvenience caused to the complainants' premises by the working of the engine must be regarded as a private nuisance and order under S. 137, Cr. P. C., was not justified;

Held, further that even if persons other than complainants were injured in their health or physical comfort by this flour mill, still it was not a case for prohibiting the flour mill but for regulating it in some way. A.I.R. 1939 Bom. 92=41 Bom. L.R. 84=40 Cr. L.J. 444=180 Ind. Cas. 511.

——**S. 133—Nuisance—Noise from iron yard—Party having licence from Municipality—Remedies of injured person.**

Under S. 133 a noise which is injurious to the physical comfort of the community is a nuisance, though the opposite party has a licence for his iron-yard from the Municipality. The Magistrate does not lose his jurisdiction under S. 133 of the Code of Criminal Procedure though there is an alternative remedy. 32 Cal. L.J. 42=57 Ind. Cas. 829=21 Cr.L.J. 669.

——**Ss. 133 and 139-A—Nuisance Parking of buses in private land**—Absence of evidence regarding nuisance to the public—Conviction wrong.

The parking of buses in sheds built upon private land cannot amount to a public nuisance **prima facie.**

Where there was no evidence whatever that the act of the petitioner in parking buses in sheds upon a private site caused any nuisance to any one and much less to the public at large nor was there any evidence to show that the members of the public had complained against the petitioner for causing public nuisance,

Held, in the circumstances it would be wrong to extend the order under S. 139-A of the Cr. P. Code especially when the preliminary order under S. 133 of the Cr. P. Code was itself wrong. 61 L.W. 405 (2)= 1948 M.W.N. 493 (1)=A.I.R. 1949 Mad. 75=49 Cr. L.J. 666=(1948) 1 M.L.J. 414.

——**S. 133—Nuisance only potential—Nuisance** ceasing to exist—Order should not be made absolute.

S .133, Cr.P.C, applies to an existing nuisance and not to a nuisance that is likely to arise in future. So where the nuisance has abated an order under S. 133 should not be made absolute. A.I.R. 1936 Pat. 577=3 B.R. 69=37 Cr. L.J. 1159=165 Ind. Cas. 542.

——**S. 133—Nuisance only potential.**

S. 133, Cr.P.C., can have no application to something which may become a nuisance that is a potential nuisance, but applies only where the nuisance is in existence

in a way, river or channel which is or may be lawfully used by the public and which is in existence in a public place. A.I.R. 1935 All. 926=1935 A.W.R. 1004=37 Cr. L.J. 347 (2)=159 Ind. Cas. 198.

——S. 133—Nuisance—only potential.

S. 133, Criminal P. C., does not permit the removal of the construction of a proposed cess pool on the ground that it may prove a nuisance in the future. A.I.R. 1934 Nag. 230=17 N.L.J. 158=35 Cr. L.J. 1414=151 Ind. Cas. 754.

——S. 133—Nuisance only potential—Danger must be at the time of enquiry and not at future indefinite time.

The section deals with the condition of things at the time when the enquiry is held. If at such a time a house or branch of a tree is likely to fall and thereby endanger the life of passers-by action under the section is justified the section is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. 83 Ind. Cas. 664=22 A.L.J. 436=5 L.R.A.Cr. 84=26 Cr. L. J. 104=A.I.R. 1924 All. 667.

——Ss. 133, 139—Nuisance—Prostitutes—Removal of house—Jury's report.

The mere existence of houses of prostitutes by the road side and the fact that they ply their trade in those houses cannot affect the 'physical comfort' of the passers-by. Certain prostitutes were directed to remove their houses on the road side as public nuisance. A jury nominated at their request suggested that they should mend their ways of life but need not remove their houses. The magistrate, nevertheless, passed a final order for the removal of their houses. **Held** that the order was neither legal nor reasonable. 5 C.W.N. 566.

——Ss. 133, 140—Nuisance—Removal of—Procedure relating to evidence.

In a proceeding under S. 133 before any order can be passed under S. 140, the complainant must produce evidence and until this has been done, the opposite party is not bound to produce any evidence. 11 A.L.J. 931=15 Cr.L.J. 23=22 Ind. Cas. 167.

—S. 133—Nuisance—Rubbish thrown on vacant land between two houses.

——Where, on the vacant land between two houses rubbish is thrown,

Held, that proceedings under S. 133 cannot be taken. 64 Ind. Cas. 841=24 O.C. 327=23 Cr.L.J. 57=A.I.R. 1921 Oudh 204.

—S. 133—Nuisance—Tree likely to fall and cause damage to wall—Order, if can be passed.

A tree which is likely to fall down and cause damage to a wall does not constitute a puplic nuisance, and no order can therefore be passed under S. 133, Cr.P. Code, in respect of such a tree. 52 C.W.N. 755=A.I.R. 1949 Dacca 11=50 Cr.L.J. 782.

17. Obstruction.

—Ss. 133, 137 (2)—Obstruction—User of land as public path way not established—Proceedings, if should be dropped—Nature of proof to be adduced by person defending.

If the person who alleges that a public pathway has been obstructed is unable to show that a public pathway exists, the Magistrate is certainly neither required nor entitled to act as if it had been found that a public pathway did exist; and in the absence of evidence of actual dedication, the person defending the case under S. 133, Cr.P.C., has merely to adduce reliable evidence to show that the use of the path by the public has not been sufficiently long to establish a prescriptive right. The fact that the pathway may have been used for $2\frac{1}{2}$ years would not warrant the Magistrate enforcing its use as public path against the wishes of the owner, who is perfectly entitled to close it if he pleases. A.I.R. 1934 Pat. 438=15 P.L.T. 386=1 B.R. 199=36 Cr.L.J. 367=153 Ind. Cas. 471.

—Ss. 133, 135 (b)—Obstruction—Proceeding for removal of—Preliminary inquiry, whether necessary—Application for trial by jury—Is a waiver of right to claim that matter is of civil nature.

The expression 'on taking such evidence, if any, as he thinks fit' in S. 133 (1), Criminal P.C. does not make it incumbent on the Magistrate to hold such an inquiry.

A member of the District Board who is appointed to carry out certain public functions is not an unsuitable person to be nominated by the District Board to serve on a jury for purposes of seeing whether there is an encroachment on the public property under the control of the District Board.

If a party against whom proceedings under S. 133, Cr.P.C., have been initiated, applies to have the case tried by a Jury under S. 135 (b), Cr.P.C., without contending that the matter is one for the Civil Court to decide, he must be deemed to have waived the right to claim that the matter is of a civil nature. A.I.R. 1931 All. 257=1930 A.L.J. 1335=32 Cr.L.J. 565=1931 Cri. Cas. 417=130 Ind. Cas. 627.

—S. 133—Obstruction.

——When there is a chabutra obstructing a public way the fact that in a particular case the public may have lot of room to go along the road, without needing to walk upon that particular site of the chabutra, has nothing to do with the case, and the public road authorities can secure its removal. A.I.R. 1930 All. 751=128 Ind. Cas. 604.

—S. 133—Obstruction.

——Obstruction must be of public use of a public river, way or channel. 22 Bom. 988, Rel. on. 110 Ind. Cas. 213=50 All. 871=26 A.L.J. 1285=29 Cr.L.J. 661=9 L.R.A.Cr. 118=10 A.I.Cr.R. 201=A.I.R. 1928 All. 627.

—S. 133—Obstruction—Catchment area—Channel may include a catchment area with a water course in the centre.

The word "channel" is not defined in the Code but the word is quite wide enough to include a catchment area in the centre of which there is a water-course. Where such water-course is obstructed and the water which flows into the water-course is attempted to be carried away by certain persons to their own village tank by building a bund and cutting a new channel and by cutting down a new portion of the old bund of the catch-

ment area to make the water run away in a direction different to that of the water course and to prevent it falling into the Urani.

Held, that their act can be held to be an obstruction to the water course. 91 Ind. Cas. 537=22 M.L.W. 470=1925 M.W.N. 663=27 Cr.L.J. 105=A.I.R. 1926 Mad. 165.

—S. 133—Obstruction.

——An obstruction at 15½ feet over country road, having regard to the normal traffic was held to be not an unlawful obstruction within the meaning of the section. 83 Ind. Cas. 664=22 A.L.J. 436=5 L.R.A.Cr. 84=26 Cr.L.J. 104=A.I.R. 1924 All. 667.

—S. 133—Obstruction—Order for removal—public river.

An order directing the removal of a dam constructed across a public river forming an unlawful obstruction to the river course and causing damage to the lower riparian owners is justified. 6 O.L.J. 616=21 Cr.L.J. 55=54 Ind. Cas. 407.

——S. 133—Obstruction to a channel not used by the public—Whether Magistrate can interfere.

Where the owner of a low field raised its level so as to hold back the surplus water from his neighbour's fields that used to flow across his land, it was held, the Magistrate could not proceed under S. 133 of the Cr. P. Code. 36 All. 209=12 A.L.J. 248=15 Cr. L.J. 229=23 Ind. Cas. 181.

—S. 133—Obstruction—Right lost by disuetude— Right of way to the public:—**Held,** that the right to put up a bund in a river has been lost by long disuetude and that the public have acquired a prescriptive right-of-way through the river, that consequently the petitioner's act in erecting a bund and making the river unfordable was a public obstruction within the meaning of S. 133, Cr.P.C. Held, also that even if the right to put up bunds was subsisting, such right is subject to the maxim 'Sic utee tus ut alienum non laedas.' 32 C. 930=2 Cr. L.J. 762.

18. Procedure.

(See also Cr.P. Code. Ss. 137, 138 and 139-A.)

Synopsis.

a. Claim of right set up.
b. Decision of question of title.
c. Duty of Magistrate
d. Enquiry to be like summons procedure.
e. Evidence must be recorded
f. Evidence of previous conviction under S.341 I.P.C.
g. Finding that there is no reliable evidence
h. Mere existence of reliable evidence
i. Notice
j. Obstruction to public way
k. "On taking such evidence"—Meaning
l. Opportunity to prove claim
m. Opportunity to show cause
n. Opposite party appearing
o. Order without evidence—Not validated by consent of parties
p. Order without enquiry as to whether obstruction was nuisance
q. Power of first class Magistrate to remit case to second class Magistrate
r. Preliminary examination before appointment of jury
s. Proceedings under S. 133 if can be converted into one under S. 147
t. Prosecution to lead evidence
u. Removal of nuisance
v. Right to claim Jury
w. Stay when ordered
x. Miscellaneous

——S. 133—Procedure—Claim of right set up—Duty of Magistrate.

Before any proceedings are taken by a Magistrate under S. 133 or before any reference is made to a jury the Magistrate himself, when a claim for right is set up, must determine the bona fides of that claim and whether the way or pathway is a public one. He cannot leave the decision of that question to a jury appointed under S. 138, Cr. P. Code. Though there is no express provision of law that the Magistrate has to follow the procedure indicated above, it is too late to go back upon a long time of cases in at least 3 of the High Courts in India which lay down the above procedure. 2 P.L.J. 67=3 P.L.W. 404=18 Cr.L.J. 452=39 Ind. Cas. 292.

——Ss. 133, 139-A—Procedure — Decision of question of title—procedure.

The law provides for two distinct stages in any enquiry under Chap. X, Criminal P. C. The first stage is prescribed by S. 139-A, Criminal P.C., and it is only when the provisions of that section have been complied with and when the Magistrate finds that there is no reliable evidence in support of the denial of the alleged public right by the persons against whom the conditional order is issued that the Magistrate should commence the second stage of the enquiry as provided by S. 137, Criminal P.C. The law does not contemplate the decision by a Magistrate making a summary enquiry under Chap. X, Criminal P. C., of any question of title upon weighing evidence produced on both sides. All that a Magistrate is required to do under S. 139-A, Criminal P. C., is to hold an enquiry merely to satisfy himself that there is or is not some prima facie evidence in support of the denial of the public right by the person on whom the conditional order is served. In dealing with this part of the enquiry, it is no doubt open to him to allow the witnesses if any, produced by the person denying the public right, to be cross-examined, but he cannot allow the opposite party to produce definite evidence to the contrary and then proceed to weigh the evidence on both sides, in order to decide finally whether the alleged public right does or does not exist. A.I.R. 1938 All. 653=1938 A.L.J. 1013=1938 A.W.R. 640=40 Cr.L.J. 143=178 Ind. Cas. 742.

——Ss. 133, 137, 138, 139-A—Procedure—Duty of Magistrate.

Where an accused is hauled up under S. 133, the Magistrate shall question him whether he denies the existence of the public right. If he does so, the Magistrate shall, before proceeding under S. 137 or S. 138, enquire into the matter and if he finds any reliable evidence in support of such denial, he shall stay the proceedings.

Where the provisions of S. 139-A are ignored the proceedings that follow thereafter are ultra vires. 42 P.L.R. 80.

——Ss, 133 and 139-A—Procedure — Duty of Magistrate.

Where the Magistrate has not complied with the provisions of S. 139-A, Cr.P.C., by not holding an inquiry into the correctness of the denial of the public right before proceeding under S. 137 or 138, Cr.P.C., and has not asked the person against whom the proceedings are taken whether he wanted to adduce any evidence in support of his denial, the order under S. 133, for removal of encroachment is illegal and must be set aside. A.I.R. 1939 Lah. 452=41 P.L.R. 515=40 Cr.L.J. 933=184 Ind. Cas. 352.

——S. 133—Procedure—Duty of Magistrate — Duty to specify the obstructions raised by each person.

When, in proceedings under S. 133 instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, but it is not alleged that all the persons had jointly raised those obstructions, it is essential that the order should state accurately, with regard to each person, the specific obstructions made by him which he is required to remove. 44 Cal. 61, Foll. 106 Ind. Cas. 220=9 A.I.Cr.R. 202=28 Cr.L.J. 1036=A.I.R. 1928 Lah. 187.

——Ss. 133, 137, 139-A—Procedure—Duty of Magistrate—Duty to ask question under S. 139-A before proceeding under S. 137—Omission to do so—Effect.

In a proceeding under S. 133, Criminal P.C., upon the opposite party's appearance, the Magistrate should forthwith ask him as to whether he denies the existence of any public right in respect of the way etc., and it is only after the question contained in S. 139-A has been decided that the Magistrate should, if he decides to go on with the case at all, proceed under S. 137, to take evidence.

Where an enquiry is held under S. 137 before the Magistrate decides the question contained in S. 139-A, this irregularity is not immaterial; for, while dealing with the matter as if he was acting under S. 137, the Magistrate would direct his mind to arriving at a final determination of a question, while if he had considered the terms of S. 139-A, he would have only had to consider whether there was any reliable evidence in support of the opposite party's denial that there was any public right of way.

The object of S. 139-A was to substitute a test of whether there was any reliable evidence in support of the opposite party's claim for the test which the Courts had gradually come to impose, whether the accused's claim was bona fide.

[The unfortunate position in which S. 139-A, Criminal P. C., has been placed, commented upon.] A.I.R. 1932 All. 366=1932 A.L.J. 339=33 Cr.L.J. 618=138 Ind. Cas. 556.

——S. 133—Procedure — Enquiry under S. 133 should be like that in a summons case.

Where on a complaint, notice under S. 133 has been served and the person complained against appears and shows cause against the order passed to remove the obstruction, the Magistrate should take evidence as in a summons case. Referring the matter to a Naib Tahsildar for enquiry and deciding it on his report is an irregularity vitiating the order. 98 Ind. Cas. 102=3 O.W.N. 844=27 Cr. L.J. 1254=7 A.I.Cr.R. 34=A.I.R. 1927 Oudh 26.

——S. 133—Procedure — Evidence must be recorded.

When the accused appears to show cause against a notice under S. 133, Criminal P.C., the Magistrate should take evidence as in a summons case.

Where he omitted to do so and did not even record the statement of the accused or question him as required by S. 139-A of the Code and passed a confirmatory order on a mere inspection of the locality:

Held, that the order was wholly illegal and could not be upheld. A. I. R. 1931 Oudh 397=8 O.W.N. 651=32 Cr. L.J. 1165=132 Ind. Cas. 800.

——S. 133—Procedure — Evidence—must be recorded.

—A Magistrate cannot make an order under S. 133 absolute without recording evidence and simply on the basis of a local inspection made by him. A.I.R. 1922 All. 265; 44 Cal. 61, Foll. 100 Ind. Cas. 371=49 All. 475=25 A.L.J. 377=28 Cr.L.J. 291=8 L.R.A.Cr. 59=7 A.I.Cr.R. 391=A.I.R. 1927 All. 350.

——S. 133—Procedure—Evidence must be recorded in a proceeding under the section.

Where the accused was served with a notice under S. 133 to remove a shed and the Magistrate without recording any evidence for the prosecution made the order absolute and directed the shed to be removed,

Held, that the procedure to be followed in such cases is as in a summons case and that evidence must be recorded. 32 P.R. 917 Cr.; 31 A. 453; 24 C. 395, Ref. 73 Ind. Cas. 503=24 Cr. L.J. 615 =A.I.R. 1924 Lah. 392.

—S. 133—Procedure—Evidence must be recorded.

An order under S. 133, Cr. P. C., cannot be made absolute without taking evidence of witnesses produced by the party against whom it is passed. A.I.R. 1936 Pat. 577=3 B.R. 69=37 Cr. L.J. 1159=165 Ind. Cas. 542.

—S. 133 — Procedure — Evidence must be recorded.

——Where notice has been issued under S. 133 and the accused has appeared to show cause against the order under S. 135, a Magistrate is bound under Ss. 134 and 135 read with S. 244 to record such evidence as might be produced for the prosecution and to examine the accused and take such evidence as he might produce in his defence. 61 Ind. Cas. 285=24 O.C. 267=22 Cr. L.J. 765= A.I.R. 1921 Oudh 147.

——S. 133—Procedure—Evidence of previous conviction of petitioner under S. 341, Penal Code is not sufficient.

Where to pass an order for the removal of a building on the ground that it obstructed a village street, the fact that the petitioner had been previously convicted under S. 341, Penal Code, in

respect of the same building by a Magistrate of the third class and the conviction had been upheld by the Dt. Magistrate had been relied on.

Held: The Magistrate should have proceeded de novo as in summons cases. 32 P. R. 1917 Cr. Ref. 5 L.L.J. 81=A.I.R. 1924 Lah. 128.

——Ss. 133, 137, 138, 139-A—Procedure—Finding that there is no reliable evidence is support of denial of right of way—Magistrate not proceeding under Ss. 137 or 138—Legality of—Stay of.

Where in a proceeding under S. 133, Cr. P.C., the Magistrate, after finding under S. 139-A that there was no reliable evidence in support of the petitioner's denial of right of way, made the rule against the petitioner absolute without proceeding under S. 137 or 138:

Held, (i) that the Magistrate erred in making the order and that he must take up the matter further and proceed as laid down in S. 137 or 138;

(ii) that he would be competent to stay the proceedings only if he found affirmatively that there was reliable evidence in support of the petitioner's denial. A.I.R. 1934 Pat. 145 (1)=14 P.L.T. 778=35 Cr. L.J. 488=147 Ind. Cas. 804.

——S. 133 — Procedure — Mere existence of reliable evidence in support of denial of right, whether sufficient to stop hands of Magistrate in proceedings under S. 133.

In a proceeding under S. 133, Criminal P. C., what S. 139-A requires is that the Magistrate should be satisfied that there is reliable evidence in support of the denial of the public right. The moment he finds that, he has to stop his hands and leave the matter for the Civil Court to decide. As to what is reliable evidence, it will depend upon the circumstances of each case. But a good test is that if the evidence adduced stands unrebutted, the public nature of the right will be demolished. A.I.R. 1939 Pat. 460=6 B.R. 6=18 Pat. 76=40 Cr. L. J. 837=20 P.L.T. 748=184 Ind. Cas. 47.

——S. 133 — Procedure — Notice — Proceedings under S. 133—Enquiry under S. 139-A—Local inspection—Jury under S. 135-B—Applicants against whom proceedings started, and their jurors absenting on date fixed and also on adjourned date—Provisional order confirmed without notice to applicants:

Held, there was no obligation on the Court to issue notice, as the applicants had been negligent or obstructive and had wilfully abstained from appearing before the jury. A.I.R. 1936 All. 65 =1935 A.W.R. 1134=1935 A.L.J. 1089=36 Cr.L.J. 1472=158 Ind. Cas. 759.

——Ss. 133, 139-A—Procedure—Obstruction of public way.

Under S. 139-A, Criminal P. C., when an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of a way, the Magistrate shall question the respondent as to whether he denies the existence of a public right in respect of the way. And if the respondent does so, the Magistrate shall, before proceeding under S. 137 or S. 138, enquire into the matter and if in such enquiry, the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court. A.I.R. 1931 Lah. 62=32 P.L.R. 11=32 Cr. L. J. 621=130 Ind. Cas. 834.

——S. 133—Procedure—"On taking such evidence" — Meaning — procedure in case of encroachment.

The expression "on taking such evidence, if any, as he thinks fit" does not make it incumbent on the Magistrate to hold an inquiry regarding an alleged encroachment on a public road without issuing notice to the opposite party and permitting him to file written statement and produce evidence. 1930 A.L.J. 1335=A.I.R. 1931=A. 257= 130 Ind. Cas. 627=32 Cr. L.J. 565.

——S. 133—Procedure—Opportunity to prove his claim—Absence of.

Where an order under S. 133 was made without the first party being required to adduce evidence in support of their claim, but the second party was called upon to show cause and they were required to adduce evidence in support of their denial of the right claimed by the first party.

Held, that the order was made without the first party being called upon to give evidence to prove their claim, and it cannot stand. 104 Ind. Cas. 635=31 C.W.N. 963=28 Cr. L. J. 859=9 A.I. Cr.R. 41=A.I.R. 1928 Cal. 96.

——Ss. 133 and 136—Procedure—Opportunity to show cause against confirmation—Necessity.

Where after making a preliminary order under S. 133, Cr. P. Code, against a lady who observes purdah, the notice was served on her agent who promptly applied for time but it was refused and the preliminary order was made absolute.

Held, that in a matter like this it was essential that the party aggrieved should have sufficient opportunity to meet the charge and as in the circumstances, sufficient opportunity was not given to the person concerned to show cause against the confirmation of the preliminary order, it should be set aside. 59 L.W. 554 (1)=228 Ind. Cas. 17= A.I.R. 1947 Mad. 243 (2)=48 Cr. L.J. 4=1946 M.W.N. 763=(1946) 2 M.L.J. 271.

——S. 133—Procedure—Opportunity to show cause—Essential.

A conditional order was made under S. 133. The opposite party denied the claim. He was asked to adduce evidence.

Held, that the contention that the party understood that he was to adduce evidence in support of his case relevant to an enquiry under S. 139-A, had force and inasmuch as no specific opportunity was givn to him to adduce evidence under S. 137, the order complained of should be set aside. 116 Ind. Cas. 384=49 C. L. J. 49=30 Cr. L. J. 622=13 A. I. Cr. R. 69=33 C. W. N. 201=A. I.R. 1928 Cal. 879.

——Ss. 133, 342, 488—Procedure — Opposite party appearing—Examination on oath—False evidence — Perjury—S. 193:—A person against whom proceedings under S. 133, Cr.P.C., are taken, is not an accused person and he commits an offence under S. 193, I.P. C., if he makes false a statement during his examination on oath in the proceedings. 9 C. W. N. 983=2 C. L. J. 149.

——Ss. 133, 137, 139-A—Procedure—Opposite party appearing and denying existence of public right procedure.

Where on a preliminary order being made under S. 133, Criminal P. C., the opposite party appears before the Magistrate and contends that the place in question is in his private possession and thus denies the right of the public in the place, the

Magistrate must follow the procedure prescribed in S. 139-A introduced by the amending Act of 1923 and decide whether the evidence put before him by the opposite party supporting the denial of the existence of any public right in the place in question is reliable and sufficient in his opinion to support the case of the opposite party. If he finds that there is any reliable evidence in support of such denial, the Magistrate has no option but to stay his hands and to refer the parties who moved the Magistrate to take action to go to the Civil Court. If the Magistrate, in such a case, instead of proceeding as above, proceeds to conduct an inquiry straightway under S. 137 and after taking evidence on both the sides passes an order, such order is totally without jurisdiction and is liable to be set aside. A. I. R. 1939 Mad. 465=49 M.L.W. 476= 1939 M.W.N. 409= (1939) 1 M.L.J. 649=40 Cr. L.J. 813=I. L. R. (1939) Mad. 1030=183 Ind. Cas. 567.

——Ss. 133, 137, 139-A—Procedure—Opposite party appearing and denying right—Procedure to be followed.

Where a Magistrate passed a conditional order under S. 133, Criminal P. C., requiring the persons against whom a complaint had been made to remove certain wire-fencing from the road, or to show cause, and they appeared and denied the existence of the road and of the right of the public over it by user, and the Magistrate considered the evidence produced by either side and came to the conclusion that the public had acquired a right over the strip of land alleged to be the road and made his conditional order for the removal of the wire-fencing absolute:

Held, that the Magistrate's procedure was irregular. As the presons against whom the conditional order was passed appeared in Court and denied the existence of the road or of the right of the public in respect of it, the Magistrate ought to have proceeded under S. 139-A instead of under S. 137, as he did.

Under S. 139-A, Criminal P. C., the Magistrate has first to determine whether the claim put forward by the persons against whom a conditional order was made is bona fide or a mere pretence, and it is only when the Magistrate is of opinion that the claim is not bona fide, but a pretence that he should proceed to pass final order. Under the section, all that the Magistrate has to do is to determine whether the evidence put forward is reliable enough to show that the claim is advanced in good faith. Unless the Magistarte comes to a definite finding in this behalf, he cannot proceed to act under S. 137 or S. 138, Criminal P. C. All that the Magistrate has to satisfy himself about is that the evidence put forward is not false. It is possible that the Civil Court may not consider the evidence as sufficient to substantiate the existence of the private road in the land, but such a finding can only be delivered by the Civil Court, not by the Magistrate. If he finds any reason to enable him to treat the evidence as false, then alone he has power to continue the proceedings. The Magistrate has, therefore, to consider the evidence solely from the point of view of the person who produces it and find whether the evidence considered ex parte is genuine and tends prima facie to support the existence of the private right or the non-existence of any public right as urged by the party. If the Magistrate finds that the evidence is reliable, it ousts his jurisdiction. A.I.R. 1933 Nag. 267=35 Cr.L.J. 145=29 Nag. L.R. 361=146 Ind. Cas. 601.

——Ss. 133, 137—Procedure—Opposite party appearing—Starting proceedings.

When a person ordered to show cause under S. 133, Criminal Procedure Code, appears and shows cause, the Magistrate is bound to take evidence as in a summon case, i. e, the complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence, if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. 6 A. L. J. 635=31 A. 453 =10. Cr. L. J. 297=3. Ind. Cas. 482.

——S. 133—Procedure—Opposite party appearing and producing evidence.

Where a conditional order under S. 133 for the removal of an encroachment on a public way is passed by the Magistrate, and a person who was served with a notice of this order appears before the Magistrate under S. 139-A of the Code, and produces evidence to show that he has not committed any encroachment, the Magistrate cannot proceed to make his order absolute but must either stay the proceedings or proceed under S. 137 or S. 138, according as he finds the evidence reliable or unreliable. A.I.R. 1939 All. 116=1938 A.L.J. 1145=40 Cr. L. J. 286=1938 A.W.R. 841= 179 Ind. Cas. 970.

——Ss. 133, 137 — Procedure — Order made without evidence, not validated by consent:—An order under S. 133 of the Criminal Procedure Code made upon no legal evidence and based upon information gathered at a local enquiry is illegal, although the parties may have consented to such an irregular procedure. The provisions of S. 137 are mandatory, and no waiver on the part of the petitioners can confer on the Magistrate authority to act in a manner not prescribed by the Legislature. 13 C.W.N. 367 applied. 10 C.L.J. 482=4 Ind. Cas. 436=11 Cr. L.J. 1.

——S. 133—Procedure — Order under S. 133, without inquiry as to whether obstruction amounts to nuisance.

An order under S. 133, Criminal P. C. without an inquiry as to whether the obstruction in dispute amounted to a nuisance under S. 133, is improper. Before passing any orders under S. 133, an inquiry should be made into these matters. A.I.R. 1939 Lah. 276=40 Cr. L.J. 758=42 P.L.R. 219 =183 Ind. Cas. 292.

——Ss. 133, 135, 138 and 139—Procedure—Power of First Class Magistrate to remit the case to Second Class Magistrate.

Where a First Class Magistrate made an order under S. 133 of the Cr. P. Code, directing the petitioner not to work a ginning factory at nights or to appear before a Second Class Magistrate on a specified day and move to have the order set aside, the petitioner applied under S. 135 of the Cr. P. Code, to the First Class Magistrate to appoint a jury. A jury was empanelled under S. 138 who returned their verdict to the First Class Magistrate who thereupon sent the case for disposal to the Second Class Magistrate. **Held,** the First Class Magistrate alone was

competent to deal with the case further. 37 M.L.J. 313=10 L.W. 297=(1919) M.W.N. 696=20 Cr. L.J. 761=53. Ind. Cas. 489.

——S. 133 — Procedure — Preliminary enquiry before appointment of jury—Necessity of.

In proceedings under S. 133, Criminal P. C., before the appointment of the jury, there ought to be a preliminary enquiry contemplated by S. 139-A, Criminal P. C. The object of S. 139-A is that before the Criminal Court passes an order which is irrevocable, there must be grounds to believe that the objection against the passing of the order has no substance. Before a serious enquiry is started by the Magistrate or before the Magistrate proceeds to appoint a jury, a summary preliminary enquiry is essential and that is provided in S. 139-A of the Criminal P.C., namely, an enquiry to find out whether there is any substance in the objection. If there is reliable evidence available in support of the denial of existence of public right, etc., the Magistrate must stay his proceedings. A.I.R. 1933 Pat. 676=35 Cr. L.J. 54=146 Ind. Cas. 406.

——S. 133—Procedure—Proceeding under S. 133—If can be converted into one under S. 147—Magistrate finding after hearing parties that dispute relates to alleged right of user of land—Drawing up of proceedings under S. 147—Legality. See Cr. P. Code, S. 147. A.I.R. 1950 Pat. 315=51 Cr. L.J. 1188.

——S. 133—Procedure.

An order under S. 147 is without jurisdiction if it is made in proceedings under S. 133. 15 C.W. N. 667=12 Cr. L.J. 43=9 Ind. Cas. 262.

——Ss. 133, 137, 138 etc.—Procedure—Prosecution has to lead evidence.

The procedure in cases under Chap. X, Criminal P. C. is constantly causing difficulty to the Courts. The pitfall which most frequently leads to error is the omission to observe that when an order under S. 133 has been made with reference to an obstruction in a public way and the person to whom the order has been addressed appears before the Magistrate, the Magistrate must, before proceeding to the inquiry contemplated by Ss. 137 and 138, question the person as to whether he denies the existence of any public right in respect of the way or place. At this stage, it is clearly for the person so proceeded against to adduce evidence in support of his denial of a public right of way and the Magistrate ought to make a finding whether the existence of a public right is denied or not, and if it is denied, whether there has been produced or not reliable evidence in support of the denial. If the existence of a right of way is not denied or if there is no reliable evidence in support of the denial, the Magistrate should then proceed to the inquiry under Ss, 137 and 138, and in this inquiry it is for the prosecution to lead evidence and the person proceeded against to answer it. A.I.R. 1936 Pat. 639=17 P.L.T. 791=3 B.R. 107=38 Cr. L.J. 29=165 Ind. Cas. 942.

Ss. 133, 139 and 141—Procedure—Removal of nuisance—Order.

A Magistrate, on a complaint that public rights in a channel were interfered with, proceeded to inquire under S. 133 and came to the conclusion that the channel was a public channel and passed orders under Ss. 139 (1) and 140 (1) Cr. P. C. Held, that the Magistrate was not bound to enquire that the accused had a bona fide claim of right to the channel and refer the matter to the Civil Court. 28 C.L.J. 211=19 Cr. L.J. 947=47 Ind. Cas. 671.

——S. 133—Procedure—Right to claim jury:—The procedure prescribed by S. 133 et seq., Cr. P.C., confers, on the person called on to submit to it, the right to claim a jury and generally provides for the ascertainment of right as well as for the actual removal of the obstruction. 9 Bom. L.R. 30.

——S. 133—Procedure—Stay when to be ordered ——Provisional order to remove obstruction from public way—Party denying public way at place of obstruction—Map showing place belonged to his wife, produced—On previous occasion under similar proceeding, Magistrate holding no public way existed—Stay of proceeding.

The Magistrate passed a provisional order that one B should remove an unlawful obstruction from a public way. B appeared to oppose this order and put in a written statement in which he said, among other things, that there was no public way at the place where the alleged obstruction had been put up and produced copies of the village records which showed that the alleged obstruction was in certain plots which were recorded as being the property of B's wife obtained by her as a result of a partition. There was also an order passed by a Magistrate on a previous occasion in similar proceedings under S. 133, Criminal P.C., that no public way existed:

Held, that it was the duty of the Magistrate to stay the proceedings until the matter of the existence of the right of way had been decided by competent Civil Court. A.I.R. 1936 All. 142=1936 A.L.J. 76=37 Cr. L.J. 365=1936 A.W.R. 195 (2)=160 Ind. Cas. 889.

——Ss. 133 and 139-A—Procedure—Stay when to be ordered.

—Under S. 139-A, Cr. P.C. what has to be seen is whether the denial of public right by the second party is supported by any reliable evidence. If it is, the Magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent Civil Court. Under the law, as it is at present, it is the party moving for proceedings under S. 133, or somebody interested in asserting such right, who has got to go to the Civil Court to establish its existence. A.I.R. 1934 Cal. 545=38 C.W.N. 391=61 Cal. 390=59 C.L.J. 290=35 Cr. L.J. 1374=151 Ind. Cas. 691 (2).

——S. 133—Procedure.

—When a Magistrate commences proceedings under S. 133, he is not at liberty to proceed otherwise than in conformity with the rule laid down in Ch. 10. 8 W.R. 37 Cr. Foll. 109 Ind. Cas. 354=9 L.L.J. 522=29 Cr. L.J. 530=A.I.R. 1928 Lah. 95.

——S. 133—Procedure.

Where proceedings are taken against a person who sets up a title to land which he is required to vacate, the Court cannot pass a summary order but must proceed in accordance with S. 137. 100 Ind. Cas. 374=49 All. 453=25 A.L.J. 424=8 L.R.A. Cr. 58=28 Cr. L.J. 294=7 A.I.Cr.R. 389=A.I.R. 1927 All 384.

—S. 133—Procedure.

——When proceedings are taken under S. 133 relating to the obstruction of and encroachment over a public drain the Magistrate ought to stay the proceedings under S. 139-A (2) and relegate the parties to the remedies open to them in the Civil Court, in a case where the person against whom the proceedings under S 133 are taken produces the settlement record evidencing his title to the land in dispute. 81 Ind. Cas. 904=25 Cr. L.J. 1080=A.I.R. 1925 Cal. 268.

——S. 133—Procedure.

In a proceeding under S. 133, in respect of an alleged public right of way, if the respondent denies the existence of the right, the Court cannot proceed under S. 137 or S. 138 without deciding under S. 139-A whether there is any reliable evidence in support of respondent's denial. A.I.R. 1930 Pat. 199, Ref. 1930 Cr. C. 1222=A. I. R. 1930 Lah. 1046=129 Ind. Cas. 222.

——Ss. 133 and 137—Procedure.

In proceedings under S. 133, Cr. P. Code, the Magistrate made a conditional order but dropped the proceedings on the opposite party taking the objection in showing cause that the Court, had no jurisdiction to proceed with inquiry on the ground of the way having been the subject of previous inquiry under S. 133; **Held,** that the Magistrate was bound to follow S. 137, Cl. (1) before making any final order and that on the facts of the case there was no room for the application of the doctrine of **res judicata.** 42 Cal. 702=19 C.W.N. 332=16 Cr.L.J. 415=28 Ind. Cas. 799.

——Ss. 133 and 139-A—Procedure—Miscellaneous.

Where a conditional order under S. 133, Criminal P. C., is passed against a person for obstructing a public way and in an inquiry, such a person denies a public right of way, proceedings under S. 139-A should be taken before the proceedings under S. 137, Criminal P. C. A.I.R. 1937 Lah. 676=39 P.L.R. 484 =38 Cr.L.J. 1056=171 Ind. Cas. 279.

——S. 133—Procedure—Miscellaneous.

Where the petition prayed to take proceedings under S. 133, Cr.P.C., for the removal of the obstruction and the opposite party denied the title of the petitioner and claimed that it was entirely his and in support of this, produced extracts from Record of Rights and partition proceedings:

Held, that this was enough for the disposal of the case under S. 139-A, Cr.P.C., and the Magistrate need not have taken any further evidence. A.I.R. 1935 Pat. 218 (2)=16 P.L.T. 179=1 B.R. 678=36 Cr.L.J. 1051=156 Ind. Cas. 1006.

——Ss. 133, 139-A, 137—Procedure—Miscellaneous.

A proceeding under Chap. X, Cr.P.C., began with a report of the Police and on that, the Magistrate issued notices under S. 133, Cr. P. C., against K and others for having constructed a dam across a public channel. The applicants, K and others asserted that this was a private channel. Evidence was produced before the Magistrate under S. 139-A on this point as to whether the channel was public or private, and the Magistrate found that there was no reliable evidence in support of such denial. Before the Magistrate could proceed under S. 137, an application was made to the Magistrate asking that he should stay his proceedings till the decision of the civil suit which the applicants had filed in the Civil Court, for a declaration that the channel in question was not a public natural channel and that the dam was an old one and was not an obstruction in the channel, The Magistrate refused the application and the Sessions Judge considered that the Magistrate was wrong and referred the question of the stay of the criminal proceedings to the High Court for orders:

Held, that as the criminal proceeding was first instituted, the proceeding to be stayed would not be the criminal proceeding but it would be the civil suit. Although the stay asked for in the present case does not come under S. 10, Civil P.C., because the stay is asked in a criminal proceeding, yet as the stay is asked because of a civil suit, the principle of S. 10 might be applied.

Held, further, the Magistrate having found that there was no reliable evidence in support of the denial was bound to proceed under S. 137 and that the stay was rightly refused. A.I.R. 1934 All. 131=1934 A.L.J. 342=35 Cr. L.J. 1445 (2)=4 A.W.R. 561=151 Ind. Cas. 897.

19. Public place.

——S. 133—Public place—What is—Railway land not a public place.

There is no warrant for the view that Railway land is necessarily a public place especially railway land which is outside the railway fencing at a railway station. Where there is a finding of fact that the accused has encroached on the railway land left outside the railway fencing, but there is no finding that the land encroached upon is in a way or that if it is in a way, it is on one which is or may be lawfully used by the public.

Held, that S. 133 would apply. The observation which the Magistrate made when discussing the question why the land is outside the fencing **viz.,** "It is said that it appears to have been done for the sake of the public to use the well" cannot be considered to be a finding that there is a way over the land encroached upon. 74 Ind. Cas. 1047=4 P.L.T. 402=1 Pat. L. R. Cr. 154=24 Cr. L.J. 855=A.I.R. 1923 Pat. 540.

20. "Public right."

——Ss. 133, 139—"Public right", what is.

A class or community residing in a particular locality may come within the term "public" and the right enjoyed by them is a public right. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class. The question has to be decided on the facts of the case. Where, in a village of 200 houses, some persons claim a right to irrigate their fields with the water channel, the right claimed is not a public right. A.I.R. 1939 Pat. 460=6 B.R. 6=18 Pat. 76=40 Cr.L.J. 837=20 P.L.T. 748=184 Ind. Cas. 47.

——S. 133—Public right of way:—The mere fact that the residents of a particular village had a right to take their cattle across a field was not sufficient to constitute a public right of way. (1906) A.W.N. 190.

21. Revision.

——Ss. 133, 139-A, 137, 439—Revision—Notice under S. 133, issued—Magistrate's failure to question accused under S. 139-A, on date of hearing—Effect—Way encroached upon admitted to be public way—Failure to question, held no irregularity—No interference.

It is the duty of the Magistrate after issuing notice under S. 133, Cr.P.C., on the date of hearing to ques-

tion the accused under S. 139-A, as to whether he denied the existence of any public right in respect of the way alleged to have been obstructed. Where the Magistrate does not so question, his order may be set aside and he may be directed to re-hear the proceedings from the stage where the accused should have been questioned.

But when the way alleged to have been encroached on is admitted to be public way, if the Magistrate had remembered to put the question contemplated by S. 139-A, the answer must necessarily have been that that party did not deny the existence of a public right of way. Hence the procedure of the Magistrate in taking up forthwith the enquiry under S. 137, as to whether the public way had been encroached on or not, must be regarded as an irregularity not affecting the merits. In such a case, the High Court will not interfere in revision. A.I.R. 1943 Pat. 3=9 B.R. 56=43 Cr.L.J. 923=203 Ind. Cas. 70.

——**Ss. 133, 439—Revision**—Order under S. 133—Procedure irregular—Interference in revision by High Court.

The High Court will not in revision interfere with an order under S. 133, Criminal P.C., merely because the procedure of the Magistrate was irregular. The High Court will only interfere if substantial injustice has been done. A.I.R. 1942 All. 443=1942 A.L.J. 558=44 Cr.L.J. 76=1942 A.W.R. 312=203 Ind. Cas. 495.

——**S. 133—Revision—Interference of High Court.**

It is not the practice of the High Court to entertain applications for revision of the order of a Magistrate in a case under S. 133 unless the party has first moved the Sessions Judge to make a reference to the High Court. 63 Ind. Cas. 410=48 Cal. 534=22 Cr.L.J. 650=A.I.R. 1921 Cal. 76.

22. Right of party.

——**Ss. 133, 135—Right of party.**

A person against whom an order under S. 133 has been passed has a right to show cause or to apply for a jury; an application for both these reliefs, however, cannot be made. 13 C.W.N. 367=10 Cr.L.J. 494=4 Ind. Cas. 72.

23. Scope.

——**S. 133—Scope—Order under, for removal of encroachment — Extent of encroachment not determined.**

In a proceeding under S. 133, Cr.P.C. an order for the removal of a house alleged to be an encroachment or obstruction on a public way but without any finding as to the extent of the encroachment or as to the claim not being made in good faith, is illegal. 21 C.L.J. 116=16 Cr.L.J. 160=27 Ind. Cas. 224.

——**Ss. 133 and 144—Scope—S. 283—Petition of complaint—Non-examination of complaint before local inquiry.**

It is not proper to make an order issuing notice under S. 144 of the Cr. P. Code with respect to another land in the same order sheet in which the proceedings for obstruction under S. 283, I.P.C. are instituted. There can be no prosecution under S. 283, I.P.C. simultaneously with a proceeding under S. 133 of the Cr. P. Code. 1 Pat. L.T. 564.

——**S. 133—Scope—Private person, if can insist that Magistrate shall pass orders under S. 133.**

No private person has a right to insist that a Magistrate shall pass orders under S. 133, Criminal P.C. Whether such orders should be passed is a matter of discretion for the Magistrate. If he does not choose to interfere, the party aggrieved has his normal remedy in the Civil Court. A.I.R. 1937 All. 785=1937 A.L.J. 903=39 Cr.L.J. 148=1937 A.W.R. 866=172 Ind. Cas. 642.

——**S. 133—Scope.**

—S. 142, Criminal P.C. is not an independent section but is controlled in its effects by S. 133, Criminal P.C. A reference to S. 133, Criminal P.C. shows that the section is confined to certain matters which are specifically mentioned therein, and cannot be brought into play or govern or control other matters, which are quite extraneous to it. A.I.R. 1937 Lah. 101=I.L.R. (1937) Lah. 303=39 P.L.R. 863=39 Cr.L.J. 13=171 Ind. Cas. 941.

——**Ss. 133, 142—Scope—S. 133, whether governs cases where imminent breach of peace is apprehended.**

It is nowhere contemplated by S. 133, Criminal P.C. that it would govern cases where an imminent breach of the peace is apprehended. The serious injury or the "imminent danger" contemplated by S. 142, Criminal P.C., refers to the injury or danger emanating from those things themselves which are specified in S. 133, and consequently, S. 142, is limited in its scope. An order under S. 142, can, therefore, be passed only if an injury or danger specified in S. 133, was apprehended and not otherwise. A.I.R. 1937 Lah. 101=I.L.R. (1937) Lah. 303=39 P.L.R. 863=39 Cr. L. J. 13=171 Ind. Cas. 941.

——**S .133—Scope.**

A Magistrate, passing an order under S. 142, Criminal P.C., not only is not precluded from making a final order under S. 137, but Ss. 133, 137 and 142, taken together mean that the Magistrate, in spite of making an order under S. 142, is entitled to proceed with the case and make a final order under S. 137. A.I.R. 1936 Cal. 692=63 C. L. J. 5=38 Cr. L. J. 173=166 Ind. Cas. 221.

——**S. 133—Scope.**

An order under S. 133, Criminal P.C. binds the person against whom the order is passed and nobody else. A.I.R. 1935 All. 79=36 Cr. L. J. 144=1935 A. L. J. 18=4 A.W.R. 935=152 Ind. Cas. 737.

——**S. 133—Scope—"Community"—Meaning of.**

It is quite clear from S. 133 (1), para. 3, Cr.P. Code, that the section aims at preventing any conduct which would be injurious to the health or physical comfort of the community. The word "community" used therein cannot be taken to mean residents of a particular house; community means something wider than that. It means the public at large or the residents of an entire locality. 85 C. L. J. 276=4 A.I.Cr.D. 273=A.I.R. 1950 Cal. 349=51 Cr. L. J. 1315.

——**S. 133 — Scope — 'Public' and 'community', meanings of—Trade injurious to neighbours but not to community in general—Jurisdiction to make order.**

Though the words 'community' and 'public' are used indiscriminately in S. 133, Criminal P.C., there is no reason for making a distinction between the public and the community and for holding that a man may carry on a trade or occupation that is injurious to the health or physical comfort of his neighbours or of the public without becoming liable under S. 133, merely on the ground that there may be some part of the community which is not affected. A.I.R. 1931 All. 433=1931 A. L. J. 912=53 All. 706=33 Cr. L. J. 331=136 Ind. Cas. 621.

——**S. 133—Scope—"Injurious to the physical comfort of the community".**

The interference with public comfort must be considerable and must be caused to a considerable section of the public. 117 P.L.R. 1911=20 P.W.R. Cr. 1911=12 Cr. L.J. 146=9 Ind. Cas. 891.

——**S. 133—Scope—Section applicable only to muisances of a physical nature susceptible of removal**:—S. 133 applies only to an existing physical obstruction or nuisance which is capable of being removed. The section could not be made use of to put a stop to and prohibit certain objectionable accompaniments to ceremonies practised by a religious sect to the discomfort and annoyance of the majority of their fellow-towns men. 1901 A.W.N. 126.

——**S. 133—Scope of.**

S. 133 can be applied by a Magistrate only if there is an obstruction situated on a way which may be lawfully used by the public or on a public place. 12 A.L.J. 1024=15 Cr. L.J. 724=26. Ind. Cas. 172.

——**Ss. 133 and 139-A—Scope—Conditional order under S. 133—Opposite party showing cause—Magistrate discharging conditional order on ground of no inconvenience to public by reason of erection or encroachment—Legality.**

Where upon a petition under S. 133, Cr. P. Code, a conditional order is passed, and the opposite party appears and denies encroachment or obstruction to the public, what the Magistrate has to find in an inquiry under S. 139-A, is whether there is any reliable evidence in support of the denial of the existence of any public right in respect of the land over which the obstruction or encroachment is alleged to stand. If there is such evidence, then the Magistrate has to find whether there is any existence of public right over the land in question.

Where the Magistrate does not consider any of these questions, and does not make any clear finding that the public had or has any, and if so, what right over it, and all he finds is that there is no inconvenience to the public by reason of the erection or encroachment, he does not act in the correct or proper way; he only misconceives the scope of an inquiry under S. 139-A. The question of inconvenience is not a material question before the Magistrate, and he acts illegally in discharging the conditional order on the ground that there is really no public grievance as the encroachment does not cause any inconvenience to the public. The public has a right to use every inch of a public path or way and no one has a right to encroach upon any portion of it. The order discharging the conditional order is therefore liable to be set aside. A.I.R. 1927 Pat. 265, ref. 4 A.I.Cr.D. 335.

24. Vague order.

——**S. 133—Vague order.**

An order under S. 133 which does not enable the persons against whom it is directed, to understand what they are to do to comply with it, should be set aside as being vague and indefinite. 11 C.L.J. 114=11 Cr. L.J. 213=5 Ind. Cas. 722.

25. Validity of order.

——**S. 133—Validity of order—"Remove" does not include restoring** status quo.

It would be manifestly straining the meaning of the word "remove" in para. (2), S. 133, to hold that removal of the trade or occupation includes ordering the person carrying on the trade, to restore the **status quo**. **A** bought some land for the purposes of brick kilns just outside the municipal limits of a town and proceeded to dig pits in the ordinary course of the trade or occupation of brick-making. It was complained that those pits constituted a breeding ground for mosquitoes; and further that the smoke and the sparks from the chimneys constituted a nuisance and a danger. The Magistrate ordered the making of the bricks to cease and the pits to be filled up.

Held, that the portion of the order requiring **A** to fill up the pits ought to be set aside. 116 Ind. Cas, 21=51 All. 489=1929 A.L.J. 177=10 L.R.A. Cr. 44=11 A.I. Cr.R. 296=30 Cr.L.J. 561=A.I.R. 1929 All. 114.

——**S. 133—Validity of order.**

——In a proceeding under S. 133, Cr. P. C., an order passed under S. 137, of the Code without inquiry enjoined under S. 139-A, Cr.P.C., could not stand. A.I.R. 1936 Pat. 360=17 P.L.T. 399=2 B.R. 595 (2)=37 Cr. L.J. 846 (1)=163 Ind. Cas. 402.

——**S. 133—Validity of order.**

——In a case under S. 133, an enquiry is obligatory. The Magistrate cannot make his conditional order absolute, without taking such evidence as the parties may adduce as in a summons case. 66 Ind. Cas. 186=9 O.L.J. 64=23 Cr.L.J. 250=A.I.R. 1922 Oudh 29.

26. Miscellaneous.

——**Ss. 133, 136, 137, and 139—Miscellaneous—Reference to arbitration— Permissibility—Conditional order made absolute on finding of arbitration—Legality.**

Under Ch. 10, Cr. P. Code, a conditional order under S. 133 can only be made absolute according to Ss. 136, 137 and 139, Cr. P. Code. There is no provision in the chapter for any reference of a public nuisance to arbitration, and no provision for the making of a conditional order absolute as a result of the finding of the arbitration. 2 D.R. 133.

——**S. 133—Miscellaneous—Matter under S. 133—If can be referred to arbitration.**

——A matter under S. 133 cannot be decided by arbitration even though the parties agree to such a course. 42 C. 702; 3 P.L.J. 248; 1 P.L.W. 292 and 21 C. W.N. 926 Foll. 61 Ind. Cas. 55=2 P.L.T. 6=22 Cr.L.J. 327.

——**S. 133—Miscellaneous.**

——Jurisdiction of Civil Court is barred only when the order is conditional but not when order is absolute.

The procedure adopted by Magistrate under S. 133 is more or less summary and his decision goes so far as to fix upon the party who must go to the Civil Court to get a civil dispute decided. 121 Ind. Cas. 560=1929 Cr. C. 358=10 L.R.A.Cr. 136=51 All. 1025=12 A.I.Cr.R. 292=A.I.R. 1929 All. 833.

——**S. 133—Miscellaneous—Inoculating children—Order to stop—Whether order legal.**

An order of a magistrate forbidding the inoculation of children during an outbreak of small-pox by their parents and guardians, is not legal, since they were not carrying on a trade under S. 133. U.B.L.R. (1913) I. 180=15 Cr.L.J. 253=23 Ind. Cas. 205.

——**S. 134—Interpretation.**

——**When—Order communicated to persons concerned—the method of service is immaterial.**

The word 'Person' includes any company or association or body of persons whether incorporated or not. It can, therefore, include all the male adults resident in a certain **mohalla**. When the order is communicated to those concerned, it is immaterial that the method in which it was served on them is not strictly in accord-

ance with the provisions of S. 134. 72 Ind. Cas. 617=24 Cr.L.J. 457=4 Lah. 224=5 L.L.J. 420=A.I.R. 1923 Lah. 525.

——S. **134—Service of notification of order.**

Where, as required by S. 134, Cr.P.C., no copy of an order under S. 144, of the Code is stuck up, the irregularity would be immaterial provided the persons whom it was sought to prosecute in respect of any disobedience of the order had knowledge of its contents:

Held, that the sevice of the order which was only a precise of formal order under S. 144, was insufficient, giving no sufficient information regarding prohibited acts, and benig inconsistent with main order, no conviction could be sustained. A.I.R. 1940 Cal. 358=44 C.W.N. 641=41 Cr.L.J. 864=I.L.R. (1940) 2 Cal. 110 =190 Ind. Cas. 228.

——**S. 134—Substituted service.**

If service of the notice of conditional order under S. 133 is effected in the manner provided by S. 71, regardless of the question whether it could be served in the manner provided by S. 69 or by S. 70 service of notice is defective. 94 Ind. Cas. 907=43 C. L. J. 113=27 Cr. L. J. 715=31 C.W.N. 148=A.I.R. 1926 Cal. 1208.

——**Ss. 134 (2), 70, 71—Procedure under S. 134 (2), when can be resorted to.**

It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-s. (2) S. 134, Cr.P.C., may be resorted to. A.I.R. 1935 Cal. 251=39 C.W.N. 141=60 C. L. J. 474=36 Cr. L. J. 736=155 Ind. Cas. 416(1).

—Ss. 135, 139-A—Jury, appointment of—Prayer for, if can be entertained after decision under S. 139-A.

After the decision under S. 139-A, Cr. P. C., a Magistrate can entertain an application for the appointment of a jury from the party against whom the decision is made. A.I.R. 1941 Pat. 370=22 P.L.T. 312=7 B.R. 954=42 Cr. L. J. 784=195 Ind. Cas. 602.

——**S. 135**:—Where the persons, against whom an order under S. 133, Cr. P. C., is passed, have chosen to be heard by a jury, on failure of the jury to function, the Magistrate is not required to hold a further enquiry, if he has before him material upon which he can pass a reasonable order under S. 141, Cr. P.C. A.I.R. 1940 Sind 24=I.L.R. (1939) Kar. 179=31 Cr. L. J. 364=186 Ind. Cas. 723.

——**S. 135—Purpose of.**

The purpose of S. 135, Cr. P. C., is clear. The persons against whom conditional order has been passed under S. 133 must either obey the order or show cause why the order should not have been made. They can be heard once in their defence. But they cannot be heard twice. A.I.R. 1940 Sind 24=I.L.R. (1939) Kar. 179=41 Cr. L. J. 364=186 Ind. Cas. 723.

—S. 135—Right to jury.

——It is open to a person against whom an order under S. 133, Cr. P. C., has been made absolute, to elect to have the matter tried by a jury even after the enquiry under S. 139-A has been finished by the Magistrate. A.I.R. 1933 Cal. 318=56 C. L. J. 249=34 Cr. L. J. 532=143 Ind. Cas. 178.

—S. 135 (b)—If a party against whom proceedings under S. 133, Cr. P. C., have been initiated applies to have the case tried by a jury under S. 135 (b), Cr. P. C., without contending that the matter is one for the Civil Court to decide, he must be deemed to have waived his right to claim that the matter is of a civil nature. A.I.R. 1931 All. 257=1930 A. L. J. 1335=32 Cr. L. J. 565=130 Ind. Cas. 627.

—S. 136—Effect of amendment.

——In view of the amendment of S. 497 of the Cr. P. Code, Courts will be less fettered than before. 81 Ind. Cas. 220=51 Cal. 402=38 C.L.J. 388=25 Cr. L. J. 732=A.I.R. 1924 Cal. 476.

——**Ss. 136 and 137—Exparte order—Jurisdiction to set aside.**

A Magistrate might set aside an order passed by him under S. 136, C.P. Code **ex parte** on the ground that the opposite party was not able to attend on the day fixed. Where an order absolute under S. 136 is set aside, the Magistrate must proceed to record evidence as provided by S. 137, Cr. P. Code. It is only after taking evidence that he can make the order absolute or drop the proceedings. 42 Cal. 702; 31 All. 453, 11 A.L.J. 93 Foll. 4 Pat. L.W. 50=19 Cr. L.J. 214=43 Ind. Cas. 790.

—S. 137. See also Cr. P. Code Ss. 133 etc.

Synopsis.

1. **Bona fide claim—Duty of Magistrate. [See Cr. P. Code S. 133]**
2. **Condition order served—onus**
3. **Denial of public right—Procedure.**
4. **Enquiry by Magistrate**
5. **Evidence recorded under S. 139-A—If can be treated as evidence under S. 137**
6. **Finding against denial of right**
7. **Final order**
8. **Local inspection [See Cr. P. Code Ss. 133-137 Local inspection]**
9. **Local investigation [See Cr. P. Code Ss. 133-137—Local inspection]**
10. **Magistrate if can make order absolute on his personal opinion [See Cr. P. Code S. 133 —Magistrate's Powers]**
11. **Magistrate sitting alone without jury cannot modify order**
12. **Order not good on abatement of nuisance—Order should be set aside**
13. **Order made without enquiry under S. 139-A.**
14. **Power of High Court**
15. **Procedure**
16. **Public nuisance**
17. **Scope**
18. **Transfer to another Magistrate**

—S. 137—(1) Bona fide claim-Duty of Magistrate.

See Cr. P. Code, S. 133—**Bona fide** claim.

2. Condition order served—Onus.

—S. 137—Conditional order under S. 133 served —Onus.

A person against whom the conditional order is made and who is required to show cause against the same has only to show cause in respect of the matters complained of, and the complainant has to make out a **prima facie** case, that is to say, he has to produce before the court legal evidence as in a summons case which would justify a finding that what is complained of amounts to a public nuisance. The burden of proof is not on the person served with conditional order. A.I.R. 1939 Bom. 92=41 Bom. L.R. 84=40 Cr. L. J. 444=180 Ind. Cas. 511.

3. Denial of public right—Procedure.

—Ss. 137, 133, 139-A—Denial of public right— Procedure—Enquiry under S. 139-A—Necessity of.

Where in proceedings under S. 133, Criminal P.C., alleging obstruction to a public right the opposite party denies the existence of any public right in

respect of the land, the Magistrate should hold an enquiry under S. 139-A, with a view to ascertaining whether there was any reliable evidence in support of the denial on the part of the opposite party of the existence of any pubic right in respect of the land in question and to record a clear finding on the point before proceeding further. If his finding is to the effect that there was reliable evidence in support of the denial of the opposite party, he is bound to stay proceedings until the matter of the existence of the alleged public right has been decided by a competent Civil Court. If, on the other hand he finds that there was no reliable evidence in support of the denial of such a right, then and then only is he entitled to proceed further and to deal with the matter under the provisions of S. 137, Criminal P.C. The original order should not be made absolute under S. 137 without holding an enquiry and recording a finding under S. 139-A. A.I.R. 1933 Cal. 790 =37 C.W.N. 823=35 Cr. L. J. 89=146 Ind. Cas. 558.

4. Enquiry by Magistrate.

——Ss. 137 and 139-A—Enquiry by Magistrate—Different stages.

Proceedings under Chap. X, Cr. P. Code, are to be taken in distinct stages. The enquiry under S. 139-A must end with a finding in terms of that section and it is only when the denial of the public right is found not to be well-founded that the enquiry under S. 137 should be undertaken. Where there is no finding by the Magistrate one way or the other and there has been no enquiry other than a purported enquiry under S. 139-A, an order absolute passed by the Magistrate must be held to be bad. A.I.R. 1949 Cal. 583=51 Cr. L.J. 125.

—S. 137—Enquiry—Recording evidence.

——The provisions of S. 137 are imperative. The complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence if so advised. Hence where a Magistrate makes his conditional order under S. 133 final without recording statement of the complainant or taking prosecution evidence in the presence of the accused, the whole trial will be vitiated by material irregularity. 11 Lah. 247= 31 P.L.R. 503=A.I.R. 1930 Lah. 662.

——S. 137—Enquiry.

——Where the Magistrate fixed arbitrary limit of time, namely, 5 minutes for the cross-examination of the witnesses and secondly, he came to no clear finding as to the **bona fide** of the claim set up by the party against whom the order was directed,

Held, that the Magistrate's order under S. 137 should be set aside and a re-trial should take place. 62 Ind. Cas. 412=34 C.L.J. 172=22 Cr.L.J. 524=A.I.R. 1921 Cal. 118.

——S. 137—Enquiry—'Shall take evidence'.

The words "shall take evidence in the matter as in a summons case" in S. 137 do not mean that the person showing cause is to start the proceedings and produce evidence against a case which he never heard. He has a right to hear the evidence, as in a summons case, produced by the opposite party, and then he may produce his own evidence if directed and necessary. A Magistrate who calls upon the person proceeded against to produce his evidence first and, considering that evidence of no weight, makes the conditional order absolute, is acting without jurisdiction and his order is illegal. 31 All. 453=6 A.L.J. 685=10 Cr.L.J. 297= 3 Ind. Cas. 482.

5. Evidence recorded under S. 139-A—If can be treated as evidence under S. 137.

——Ss. 137 and 139-A—Evidence recorded under S. 139-A—Treating as evidence under S. 137—Legality.

There is nothing illegal in the order of a Magistrate treating the evidence recorded by him under S. 139-A, Cr. P. Code, as evidence under S. 137, Cr. P. Code, when the parties so wish it. 222 Ind. Cas. 532=1946 A.W.R. (C.C.) 55=1946 O.A. (C.C.) 55=1946 O.W.N. 57=1946 A.L.W. (C.C.) 57=47 Cr.L.J. 306=1946 A. Cr.C. 12=A.I.R. 1946 Oudh 108.

6. Finding against denial of right.

——Ss. 137 and 138—Finding against denial of right—Procedure.

Where, the Magistrate, finds under S. 139-A, Criminal P.C., that there was no reliable evidence in support of the denial of right of way, he cannot make the rule absolute, without proceeding under S. 137 or 138. A.I.R. 1934 Pat. 145 (1)=14 P.L.T. 778=35 Cr. L.J. 488=147 Ind. Cas. 804.

7. Final order.

——S. 137—Final order—Civil suit, if barred.

There is no bar to an order absolute of a Magistrate under S. 137, Cr.P.Code, being questioned in a Civil Court. The bar enacted in S. 133 (2) and S. 140 (3), Cr.P.Code, does not apply to an order passed under S. 137. 15 C. 460 (F.B.), 121 Ind.Cas. 560, 14 C. 60, 10 W.R. 409, 1940 Oudh 75 and 19 W.R. 345, referred to. 51 P.L.R. 176.

——S. 137—Final order—Jurisdiction to pass.

Though a Magistrate of the second class is not competent to make a conditional order under S. 133, he may pass the final order under S. 137 if the case is transferred to him by the Magistrate making the conditional order. The jurisdiction of the Magistrate of the second class to pass the final order is derived from S. 133 and not from the conditional order which, in effect, does no more than transfer the case to him. His jurisdiction to pass the final order remains the same, whether the case is transferred to him by the conditional order itself or at a later stage. A.I.R. 1945 Pat. 334= 24 Pat. 16=47 Cr. L.J. 29=221 Ind. Cas. 183.

——S. 137—Final order—Legality.

In determining whether final order under S. 137 is legal, the Court is concerned only with evidence given at enquiry. A.I.R. 1939 Bom. 92=41 Bom. L.R. 84= 40 Cr. L.J. 444=180 Ind. Cas. 511.

——S. 137—Final order—Power to make.

A Magistrate passing an order under S. 142, Criminal P.C., not only is not precluded from making a final order under S. 137, but Ss. 133, 137 and 143 taken together mean that the Magistrate, in spite of making an order under S. 142, is entitled to proceed with the case and make a final order under S. 137. A.I.R. 1936 Cal. 692=63 C. L. J. 5=38 Cr. L. J. 173=166 Ind. Cas. 221.

8. S. 137: Local inspection—order absolute if can be based on. See Cr. P. Code Ss. 133—Local inspection.

9. 137—Local investigation—order on—Legality. See Cr.P.Code. S. 133—Local inspection.

10. S. 137—Magistrate if can make order absolute merely on his personal opinion. See Cr.P.Code—Ss. 133, 137—Magistrates' powers.

11. Magistrate sitting alone with out jury cannot modify order.

——Ss. 137 and 139—Magistrate sitting alone cannot modify original order.

A Magistrate sitting alone under S. 137, Cr.P.C., has no jurisdiction to modify the order before making it absolute. It is only when sitting with a jury that he has power to modify the order before making it absolute. A.I.R. 1943 Mad. 335=(1943) 1 M.L.J. 165=56 L.W. 108=1943 M.W.N. 128 (1)=44 Cr. L. J. 545=206 Ind. Cas. 573.

12. Order not good on abatement of nuisance—order should be set aside.

——S. 137—Order under S. 137 (3) not good by reason of nuisance having abated—Order must be set aside by appellate authority.

A.I.R. 1936 Pat. 577=3 B.R. 69=37 Cr. L. J. 1159=165 Ind. Cas. 542.

13. Order made without enquiry under, S. 139-A.

——Ss. 137, 139-A, 133—Order under S. 137 passed without inquiry enjoined under S. 139-A (1)—Propriety of.

In an application under S. 133, Criminal P.C., the opposite party claimed the existence of a public right. The Magistrate visited the spot and examined the witnesses for the party who had set the law in motion and then examined the remaining witneses twelve days later. Then an **amin** was deputed to examine the alleged encroachment after comparison with the survey map and Record of Rights. The order was made absolute without any further proceedings:

Held, that the order under S. 137 having been passed without making the inquiry enjoined under S. 139-A (1), could not stand. A.I.R. 1936 Pat. 360=17 P.L.T. 399=2 B.R. 595 (2)=37 Cr. L. J. 846 (1)=163 Ind. Cas. 402.

14. Power of High Court.

——S. 137—Power of High Court.

—The High Court which has power to confirm the order under S. 137 has also power to modify that order to such extent as may seem fit. 116 Ind. Cas. 786=1929 A. L. J. 385=10 L. R. A. (Cr.) 49=11 A. I. Cr. R. 350=30 Cr. L J. 670=A. I. R. 1929 All. 220.

——S. 137—Power of High Court.

Where the conditional order under S. 133 of the Code is bad, the High Court is right in not sending the case back. 11 C.L.J. 114=11 Cr. L.J. 213=5 Ind. Cas. 722.

15. Procedure.

——S. 137—Procedure.

—Before passing order under S. 137, Cr. P. C., the Magistrate must make an enquiry under S. 139-A. A.I.R. 1941 Oudh 271=42 Cr L.J 241=1941 O.W.N. 54=1941 A.W.R. 90=192 Ind. Cas. 70.

——Ss. 137 and 138—Procedure—Where an accused is hauled up under S. 133, Cr. P. C., the Magistrate shall question him whether he denies the existence of the public right. If he does so, the Magistrate shall before proceedings under S. 137 or S. 138 enquire in the matter, and if he finds any reliable support of such denial, he shall stay the proceedings. 42 P.L.R. 80.

——Ss. 137, 138—Procedure:—Where a conditional order under S. 133, Cr. P. C, for the removal of an encroachment on a public way is passed by a Magistrate and a person who was served with a notice of this order appears before the Magistrate under S. 139-A and produces evidence to show that he has not committed any encroachment, the Magistrate cannot proceed to make his order absolute but must either stay the proceedings, or proceed under S. 137 or 138, according as he finds the evidence reliable or unreliable. A.I.R. 1939 All. 116=(1938) A.L.J. 1145=1938 A.W.R. (H. C.) 841=40 Cr. L.J. 286=179 Ind. Cas. 970.

——S. 137—Procedure—Where a conditional order under S. 133, Cr. P. C., is passed against a person for obstructing a public way and in an enquiry, such a person denies the public right of way, proceedings under S. 139-A should be taken before the proceedings under S. 137. A.I.R. 1937 Lah. 676 =39 P.L.R. 484=38 Cr.L.J. 1056=171 Ind. Cas. 279.

——Ss. 137, 139-A (2)—Procedure.

Under S. 139-A (2), Criminal P. C., which was added by the Amending Act XVIII of 1923, proceedings under Chap. X, Criminal P. C. are to be taken in two distinct stages. Where obstruction to the use by the public of any way is alleged and denied, the question to be decided at the threshold of the case is whether the denial of the existence of public right claimed is well founded. It is generally desirable that the Magistrate should record a definite finding in terms of S. 139-A (2), though if the record otherwise indicates that he did find that the denial of the public right was well founded, the requirements of S. 139-A (2) would be made out. It is obvious that the Court and the parties should distinctly understand when the case enters on the second stage of the proceedings provided by S. 137, Criminal P. C., so that the evidence, not of the preliminary character contemplated by S. 139-A (2) but such as is contemplated by S. 139, be produced. A. I. R. 1936 All. 150 =(1936) A.L.J. 116=1936 A.W.R. (H. C.) 127=37 Cr. L.J. 422=161 Ind. Cas. 309.

——S. 137 (2)—Procedure:—If the person who alleges that a public pathway has been obstructed, is unable to show that a public path way exists, the Magistrate is certainly neither required nor entitled to act as if it had been found that a public pathway did exist; and in the absence of the evidence of actual dedication, the person defending the case under S. 133, Criminal P. C., has merely to adduce reliable evidence to show that the use of the path by the public has not been sufficiently long to establish a prescriptive right. The fact that the pathway may have been used for $2\frac{1}{2}$ years would not warrant the Magistrate enforcing its use as public path against the wishes of the owner who is perfectly entitled to close it if he pleases. A.I.R. 1934 Pat. 438=15 P.L.T. 386=1 B.R. 199=36 Cr. L.J. 367=153 Ind. Cas. 471.

——Ss. 13,, 139-A—Procedure.—Where a Magistrate passed a conditional order under S. 133, Criminal P. C., requiring the persons aginst whom a complaint had been made to remove certain wire fencing from the road or to show cause and they appeared and denied the existence of the road and of the right of the public over it by user, and the Magistrate considered the evidence produced by either side and came to the conclusion that the public had acquired a right over the strip of land alleged to be the road and made his conditional order for the removal of the wire fencing absolute:

Held, that the Magistrate's procedure was irregular as the persons against whom the conditional order was passed appeared in Court and denied the existence of the road or of the right of the public in respect of it; the Magistrate ought to have proceeded under S. 139-A instead of S. 137, as he did. A.I R. 1933 Nag. 267=35 Cr. L. J. 145=29 N.L.R. 361=146 Ind. Cas. 601.

——**S.137—Procedure**:—In a proceeding under S. 133, Criminal P. C. upon the opposite party's appearance, the Magistrate should forthwith ask him as to whether he denies the existence of any public right in respect of the way etc., and it is only after the question contained in S. 139-A of the Code has been decided that the Magistrate should, if he desires to go on with the case at all, proceed under S. 137 to take evidence. A.I.R. 1932 All. 366=(1932) A.L.J. 339=33 Cr. L.J. 618=138 Ind. Cas. 556.

——**S. 137—Procedure.**
—Where the accused is alleged to have obstructed a public pathway, and on receipt of notice of the proceedings under 133, he appears in Court, the first duty of the Magistrate is to question him whether he denied the existence of public right in the pathway. If instead of doing so the Magistrate proceeds to enquire into the matter whether there was any obstruction, the procedure is wrong in law. 127 Ind. Cas. 762=1930 Cr. C. 798=57 Cal. 368= A.I.R. 1930 Cal. 486.

——**Ss. 137 and 537—Procedure—Failure to follow procedure under S. 137 (1), is not a mere irregularity.**

S. 537 applies only to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law, and that section does not apply to cases of disregard or disobedienee of mandatory provisions of the Code. The section has not the effect of curing material irregularities and absolute illeglities.

The failure of a Magistrate to follow the procedure enjoined by S. 137 (1) vitiates his order, and is not a mere irregularity of the nature contemplated by S. 537 (a); 25 Mad. 61, Foll. 100 Ind. Cas. 371=49 All. 475=25 A.L. J. 377=28 Cr.L. J. 291=8 L.R.A. Cr. 59=7 A.I. Cr. R. 391=A.I.R. 1927 All. 350.

——**S. 137—Procedure.**
—When the accused person appears and shows cause why no order should be made against him, the Magistrate should hear evidence in support of the order against him before calling on him for his defence.

Where, on the day fixed for the production of evidence, neither party produced any evidence and the Magistrate made the order absolute,

Held, that the order must be quashed. 86 Ind. Cas. 969=47 All 341=26 Cr. L. J. 905=6 L.R.A. Cr. 183 =6 L.R.A. Cr. 8=A.I.R. 1925 All. 614.

——**S. 137—Procedure.**
—Magistrate can only make a notice under S. 133, absolute if the person against whom the order is made does not appear under section 135 and protest against it. If the person appears and puts in a written statement it is then the duty of the Magistrate to proceed under S. 137 as if the case were smmons case. 76 Ind. Cas. 826=25 Cr. L. J. 266=20 All. L. J. 692= A.I.R. 1922 All. 335.

——**S. 137—Procedure—In conditional order, evidence taken by one and final decision by another Magistrate is irregular.**

A conditional order was made under S. 133 by a Magistrate whereby the petitioner was required to appear before the said Magistrate to show cause against the order. When the parties appeared before him the papers were forwarded to another Magistrate for inquiry and report. After evidence having been recorded and a report made by that Magistrate the first Magistrate made his final order. **Held**, that the procedure followed in this case is irregular and the order should be set aside on that ground. After the conditional order was made in the terms aleady stated, it was incumbent upon the Magistrate under S. 137 to take evidence as in a summons case, if the final order was to be made by him. 68 Ind. Cas. 619=24 Bom. L.R. 807=47 Bom. 89=23 Cr. L.J. 587=A.I.R. 1922 Bom. 384.

——**Ss. 137 (3) and 133—Procedure.**
In proceedings under S. 137 the Magistrate should proceed as in a summons case. 147 P.L.R. 1901 ; 24 C. 395; 31 A. 453 ; 11 B. 375. 32 P.R. Cr. 1917=18 Cr. L.J. 888=43 P.W.R. Cr. 1917=41 Ind. Cas. 1000.

16. Public Nuisance.

——**S. 137—Public nuisance—Procedure.**
In an inquiry under Chap **X** a Magistrate should proceed to take evidence in support of the order before the counter-petitioner is called on to produce his evidence to meet it. 31 A. 453; 27 Ind. Cas. 767, Foll. 18 Cr.L.J. 848=41 Ind. Cas. 672.

17. Scope.

——**S. 137—Scope—Judicial decision is necessary.**
Where it was complained that the applicants had built a wall and had thereby obstructed a public road and the Court passed the following order:— "The Tahsildar has inspected the spot and reports that the wall built is the cause of the trouble. Notice to issue under S. 140."

Held, that the order was not legal and valid order, in as much as the provisions of S. 137 (1) of the Cr. P. Code were not complied with. Under that section it was thus clearly intended by the Legislature that the Court should itself go into evidence before making the preliminary order final and should give a judicial decision in the matter. 95 Ind. Cas. 944=20 A.L.J. 657=27 Cr. L.J. 864=A.I.R. 1922 All. 265.

——**137—Scope—Mandatory.**
——S. 137 is imperative and a Magistrate in a case of public nuisance must record evidence as in a summons case. 32 P.R. Cr. 1917 and 42 Cal. 702, Foll. 99 Ind. Cas. 92=8 L.L.J. 557=27 P.L.R. 764=28 Cr.L.J. 60.

——**S. 137—Scope.**
The provisions of S. 137 are imperative. Before a Magistrate can make an order under clause (2) of that section dropping a proceeding started under S. 138 of the Code, he must take evidence in the matter as directed by clause (1) of S. 137. 42 C. 702, 10 C.L.J. 482, Ref. 60 Ind. Cas. 431=22 Cr. L.J. 239 (Cal).

——**S. 137, 138 and 141—Scope of.**
Both Ss. 137 and 138 are imperative in their terms and the Magistrate is bound to act in accordance therewith according to circumstances. Where a jury appointed under S. 138 failed to perform their duty and the petitioners did not ask the Magistrate to take any further action or to examine further witnesses, the Magistrate is justified in passing the order absolute under S. 141 without taking evidence under S. 137. 13 C.W.N. 367=10 Cr. L.J. 494=4 Ind. Cas. 72.

18. Transfer to another Magistrate.

——**S. 137—Transfer of enquiry under S. 137 to another Magistrate.**

There is nothing in the Cr. P.C., to prevent a Magistrate, who passed the conditional order under S. 133 of

the Code from transferring the case to some other Magistrate for making inquiry under S. 137. A.I.R. 1943 Pat. 115=21 Pat. 729=9 B.R. 217=44 Cr. L.J. 364=205 Ind. Cas. 302.

——**S. 138—Jury**—See Cr. P. Code Ss. 133, 138—**Jury.**

——**S. 138—Ci il suit—If bar to proceedings under S. 138.**

The fact that a civil suit has been instituted on the matter in dispute, is no bar to proceedings under S. 138 Criminal P.C. A.I.R. 1933 Cal. 318=56 C.L.J. 249=34Cr. L.J. 532=143 Ind. Cas. 178.

——**S. 138—"Forthwith."**

The word 'forthwith' merely means that the Magistrate shall appoint a jury as soon as he reasonably can. 72 Ind. Cas. 617=24 Cr. L.J. 457=4 Lah. 224=5 L.L.J. 420=A.I.R. 1923 Lah. 525.

——**S. 139(1)—Building on a public highway—Order under S. 139 (1)—No finding whether the claim to build was** bona fide **or not—Effect of:**— Where a person erects a building encroaching upon a public way a Magistrate has jurisdiction to pass an order under S. 139; and such jurisdiction is not ousted by any claim of that person, however **bona fide**, to make such encroachments. 15 C. 564, 17 C. 562 and 25 C. 278 dist. 6 C.W.N. 886.

——**S. 139—Jury. See Cr. P. Code S. 133—jury.**

——**Ss. 139, 133—Petition for removal of latrine near public well—No denial of public right—Inquiry under S. 139, if feasible—S. 133, if applies. See: Cr. P. Code, S. 133—Nuisance—Latrine.**

——**S. 139—Powers under—Magistrate cannot compel a party to go to Civil Court and specially party in whose favour he is inclined.**

The provisions of S. 140 (1) do not apply to a stay under S. 139 (2) and the Magistrate cannot compel either party to go to the Civil Court. If the defendant denies the claim and the denial is proved, the Criminal Court holds its hand and it will be the business of the plaintiff to bring a civil suit if he likes. If he does not, the denial is maintained. If he does bring a suit and succeeds, the Magistrate may proceed to pass an order absolute under S. 140 (1). 1930 A.L.J. 815=125 Ind. Cas. 452=1930 Cr. C. 907=31 Cr. L. J. 839 (1)=A.I.R. 1930 All. 658.

——**S. 139—Scope.**

A Magistrate sitting alone under S. 137, Criminal P.C, has no jurisdiction to modify the original order before making it absolute. It is only when sitting with a jury that he has power to modify the order before making it absolute. A.I.R. 1943 Mad. 335=56 M.L.W. 108=44 Cr. L.J. 545=(1943) 1 M.L.J. 165=1943 M.W.N. 128 (1)=206 Ind. Cas. 573.

——**S. 139—Scope.**

In a case under S. 133, Criminal P.C., for removal of obstruction all that the Courts have to see is whether the opposite party has acquired by adverse possession a right in the plot wherein the alleged obstruction to the public right existed. A.I.R. 1943 Pat. 32=43 Cr. L.J. 903=9 B.R. 55=202 Ind. Cas. 783.

——**Ss. 139 and 140—Scope.**

Where the order under S. 133, Criminal P. C. was not made absolute under S. 139 (1) and further proceedings had to be dropped as provided in S. 139 (2), S. 140, Criminal P.C., cannot apply to the case. A.I.R. 1942 Mad. 113=1941 M.W.N. 813=43 Cr. L.J. 314=198 Ind. Cas. 131.

——**Ss. 139 and 140—**Ultra vires **order.**

The recommendations of a jury directing parties to do a certain thing can only be enforced under Cl. (2) of S. 139. The report of a jury cannot of itself constitute a contract between the parties. An order of a Magistrate cancelling an order previously made absolute is not **ultra vires** and cannot be called in question in a Civil Court. An order absolute under S. 139 can only be enforced in manner provided by S. 140. 18 Cr. L. J. 305=38 Ind. Cas. 417.

—**S. 139-A.**

Synopsis.

1. **Applicability and scope**
2. **Delegation**
3. **Dismissal of application**
4. **Evidence**
5. **Inquiry**
6. **Jurisdiction**
7. **Jury**
8. **Non-Compliance with**
9. **Object of**
10. **Powers and duties under**
11. **Procedure**
12. **Question of title**
13. **Revision**
14. **Waiver.**

1. Applicability and Scope.

——**S. 139-A—Applicability and scope—"Whether he denies the existence of any public right etc." meaning of.**

S. 139-A directs that as soon as the person against whom the preliminary order under S. 133 is made, puts in an appearance, the Magistrate shall question him as to whether he "denies the existence of any public right in respect of the way." If he does, then the Magistrate must enquire into the matter before making any final order.

Sub-s. (2) then sets out the scope of the inquiry. The Magistrate cannot try and determine the question. All he can do is to see whether there is any reliable evidence in support of the denial. If there is, then he is bound to stay the proceedings until the matter of the existence of such a right has been determined by a Civil Court.

S. 139-A says nothing about a claim to do what one likes on one's own property. It speaks about a denial of assertion that a public right exists in respect of the way etc. There can be no doubt that this denial must be made in good faith and if it is only made a pretext to oust the jurisdiction of the Magistrate, then S. 139-A will not apply. But a **bona fide** claim to exercise the right cannot oust the Magistrate's powers once the public character of the way is conceded or is not denied and the obstruction is found to lie in this way.

The words "whether he denies the the existence of any public right etc.," in S. 139-A relate to the public right which is said to have been obstructed and not to the obstruction or cause of it. A.I.R. 1945 Nag. 226=1945 N.L.J. 243=I.L.R. (1945) Nag. 461=47 Cr.L.J. 217=221 Ind. Cas. 581.

——**S. 139-A—Applicability and scope.**

It is the duty of the Magistrate after issuing notice under S. 133, Criminal P.C, on the date of hearing to question the accused under S, 139-A as to whether he denied the existence of any public right in respect of the way alleged to have been obstructed. Where the Magistrate does not so question, his order may be set aside and he may be directed to rehear the proceedings from the stage where the accused should have been questioned. A.I.R. 1943 Pat. 3=9 B.R. 56=43 Cr.L.J. 923=203 Ind. Cas. 70.

——S. 139-A—Applicability and scope.

—Any person complaining of construction, if can compel Magistrate to hold inquiry into rights of parties.

The provisions that an inquiry should be held under S. 139-A Cr.P.C., are intended to protect the right of a person against whom it is proposed to pass an order under S. 133, Cr. P. C. They are not intended to enable any person complaining of a construction to compel the Magistrate to hold an inquiry into the rights of the parties concerned. A.I.R. 1937 All. 785=(1937) A. L. J. 903=39 Cr. L. J. 148=1937 A.W.R. (H.C.) 866=172 Ind. Cas. 642.

——S. 139-A—Applicability and scope.

The section applies only in a case where a party wants determination of the public character of the river or way obstructed. The object with which the section was enacted seems to be that where the existence of the public right is denied, the Magistrate has to make an enquiry. If it is not denied, then the section hardly seems to apply. 93 C. W. N. 748=A. I. R. 1929 Cal. 507.

——S. 139-A—Applicability and scope.

—When the public right of way is limited the case falls under S. 139-A.

Where a right of way over an uncultivated field was in dispute between villagers and the owner closed that way on bringing the field under cultivation, relying on the revenue records which made no mention of any public path,

Held, in proceedings against the owner under S. 133, Cr. P. Code, that this case was exactly one which S. 139-A, was designed to meet. Rights of way are obviously matters to be decided by the Civil Courts. It is in the interest of the public policy that Criminal Courts should not deal with matters which it is compulsory to leave to Civil Courts. 28 Cr. L. J. 247=100 Ind. Cas. 119=A.I.R. 1927 Lah. 745.

——S. 139-A—Applicability and scope.

Where there is a question of the existence of public right to the place over which nuisance is sought, the best method in the case to follow is that under the provisions of S. 139-A (2), the proceedings should be stayed until the matter of existence of the right has been decided by a competent Civil Court. 5 O.W.N. 78=A.I.R. 1927 Oudh 632.

2. Delegation.

—S. 139—A—Delegation.

——A Magistrate in proceedings under S. 133 has no jurisdiction to make over the enquiry under S. 139-A to any magistrate subordinate to him, and omission to conduct it himself is an irregularity incurable by S. 537. The reason for the above proposition is that the Magistrate has to decide upon either staying the proceedings or further proceedings under S. 137 or 138 and this decision necessitates his considering the reliability of the evidence and proper valuation of it, which he is better fitted to do if he himself undertakes it. Mere reading of the enquiry as made by a Subordinate Magistrate and acting upon it does not enable him to do this work efficiently. 50 C.L.J. 291=34 C.W.N. 228=1929 Cr.C. 600=57 Cal. 666=A.I.R. 1929 Cal. 813.

3. Dismissal of application.

—S. 139-A—Dismissal of application.

—Where in proceedings under S. 133 there is evidence to support the plea that the road is a private road, the most that the Magistrate can do is to stay proceedings under the provisions of S. 139-A of the Code and, if the magistrate dismisses the application and refers the complainant to Civil Court, the course taken by the magistrate would be correct. 42 Cal. 158, Rel. on, 5 O.W.N. 1131=30 Cr.L.J. 360=114 Ind. Cas. 782=A.I.R. 1929 Oudh 85.

4. Evidence.

—Ss. 139-A, 133—Evidence—Person appearing not tendering any evidence—Magistrate finding cause unsatisfactory and complying with request to form jury.

The words, "enquire into the matter" in S. 139-A Cr. P. C., merely mean that the Magistrate is to hear any evidence that the person on whom a conditional order under S. 133 is served wants him to hear before proceeding further. If there is no evidence, there is nothing for the Magistrate to enquire into.

Where the person neither tendered any evidence in support of the cause which he showed against the conditional order, nor asked the Magistrate to give him an opportunity of producing such evidence and the Magistrate found that the cause shown was not satisfactory and complied with the person's request that the jury should be appointed:

Held, that the provisions of law were substantially complied with. A.I.R. 1942 Pat. 468=43 Cr. L.J. 423=8 B.R. 462=198 Ind. Cas. 724.

—S. 139-A—Evidence—"Reliabe evidence".

Reliable evidence, in the sense in which the term is used in S. 139-A, means evidence on which it is possible for a competent Court to place reliance. It does not mean evidence which definitely establishes the title to the land because if that was the meaning of the term, it would be unnecessary in any case to refer the matter to the Civil Court at all. A.I.R. 1937 All. 12=(1936) A.L.J. 1285=38 Cr.L.J. 200=166 Ind. Cas. 376.

—S. 139-A—Evidence—Nature of evidence required.

——Under S. 139-A, Cr.P.C., which was added by the amending Act XVIII of 1923, proceedings under Chap. 10, Cr.P.C., are to be taken in two distinct stages. Where obstruction to the use by the public of any way is alleged and denied, the question to be decided at the threshold of the case is whether the denial of the existence of the puplic right claimed is well-founded. It is generally desirable that the Magistrate should record a definite finding in terms of S. 139-A (2) though, if the record otherwise indicates that he did find that the denial of the puplic right was well-founded, the requirements of S. 139-A (2) would be made out. It is obvious that the Court and the parties should distinctly understand when the case enters on the second stage of the proceedings provided by S. 137, Cr.P.C., so that the evidence not of the primary character contemplated by S. 139-A (2), but such as is contemplated by S. 137 be produced. A.I.R. 1936 All. 150=(1936) A.L.J. 116=37 Cr.L.J. 422=1936 A.W.R. (H.C.) 127=161 Ind. Cas. 309.

—Ss. 139-A, 133—Evidence—Nature of evidence required.

Where the petitioner prayed to take proceedings under S. 133, Cr.P.C, for the removal of the obstruction and the opposite party denied the title of the petitioner and claimed that it was entirely his and in

support of this produced extracts from Record of Rights and partition proceedings:

Held, that this was enough for the disposal of the case under S. 139-A, Cr.P.C., and the Magistrate need not have taken any further evidence. A.I.R. 1935 Pat. 218 (2)=16 P.L.T. 179=1 B.R. 678 =36 Cr.L.J. 1051=156 Ind. Cas. 1006.

—S. 139-A — Evidence—Reliable evidence—Record of rights.

The record of rights is a very valuable piece of evidence which raises the presumption of correctness of the entries there in; and if it happens to be in favour of the second party the Magistrate is perfectly justified in considering it as "reliable evidence" in support of the denial. 34 C.W.N. 957= 1931 Cr.C. 34=128 Ind. Cas. 810=A.I.R. 1931 Cal. 2=32 Cr.L.J. 189.

—S. 139-A—Evidence.

—The Court has not to consider whether a denial is bona fide or not but only whether there is reliable evidence in support of it. 116 Ind. Cas. 786=30 Cr.L.J. 670=1929 A.L.J. 385=10 L.R.A.Cr. 49=11 A.I.Cr.R. 350=A.I.R. 1929 All. 220.

5. Inquiry.

—S. 139-A—Inquiry—Power to pass final order.

The Code makes it perfectly clear that after holding an enquiry under S. 139-A and holding that there is no evidence in support of the denial of the existence of a public right, the magistrate shall proceed under S. 137 or S. 138 of the Code. He is not entitled merely as a result of the enquiry under S. 139-A to pass final orders in the case. 52 C.W.N. 12=A.I.R. 1949 Cal. 57=49 Cr.L.J. 608.

—S. 139-A—Inquiry.

—Where in a proceeding under S. 133, Ciriminal P.C., alleging obstruction to a public right, the opposite party denies the existence of any puplic right in respect of the land, the Magistrate should hold an inquiry under S. 139-A, Criminal P.C., with a view to ascertaining whether there was any reliable evidence in support of the denial on the part of the opposite party of the existence of any public right in respect of the land in question and to record a clear finding on the point before proceeding further. A.I.R. 1933 Cal. 790=37 C.W.N. 823= 35 Cr.L.J. 89=146 Ind. Cas. 558.

—S. 139-A—Inquiry.

—Where an enquiry is held under S. 137, Cr.P.C., before the Magistrate decides the question contained in S. 189-A, this irregularity is not immaterial, for, while dealing with the matter as if he was acting under S. 137, the Magistrate would direct his mind to arriving at a final determination of a question while if he had considered the terms of S. 139-A, he would have only had to consider whether there was any reliable evidence in support of the other party's denial that there was any public right of way.

The object of S. 139-A was to substitute a test of whether there was any reliable evidence in support of the opposite parties' claim for the test which the Courts had gradually come to impose, whether the accused's claim was bona fide. A.I.R. 1932 All. 366=(1932) A.L.J. 339=33 Cr.L.J. 618= 138 Ind. Cas. 556.

—S. 139-A—Inquiry.

——What the Magistrate is required to do under S. 139-A is to ask the party required to show cause as to whether he admitted the existence of any public right. On his denying the existence of such right he has to enquire and if he is satisfied that there is any reliable evidence in support of such denial he will stay proceedings. 34 C.W.W. 957. 1931 Cr.C. 34=128 Ind. Cas. 810=A.I.R. 1931 Cal. 2=32 Cr.L.J. 189.

—S. 139-A—Inquiry.

——The section does not say who is to have existence of right decided by Civil Court or what order Magistrate has to pass or ought to have the power of dismissing the application on the right not being decided by a Civil Court on motion by a particular party within a certain time. 10 L.R.A.Cr. 104=1929 Cr.C. 293=12 A.I.Cr.R. 102=51 All. 890 =A.I.R. 1929 All. 709.

—S. 139-A—Inquiry—Magistrate if can delegate to subordinate Magistrate.

——S. 139-A contemplates an enquiry by the Magistrate himself. It is not open to him to delegate an enquiry such as regarding the existence of a public way to a Subordinate Magistrate. Where the Magistrate so delegates the procedure is not merely irregular but illegal. 34 C.W.N. 228=50 C.L.J. 291=57 Cal. 666=1929 Cr. C. 600=A.I.R. 1929 Cal. 813.

—S. 139-A—Inquiry.

——The Magistrate is not to see the sufficiency but reliability of evidence in support of the denial.

Where there is any reliable evidence the Magistrate must stay proceedings. If he finds, however, that there is no such evidence he can then proceed under S. 137. It is not the duty of the Magistrate to come to a finding whether the evidence is in his opinion sufficient to support the case. All he has to see is whether there is any reliable evidence in support of the denial of any public right. If there is, the Magistrate must stay his hand till the other side has gone to a Civil Court. 10 A.I.Cr. R. 398=110 Ind. Cas. 330=29 Cr.L.J. 698=30 P.L.R. 687=10 Lah. 151=A.I.R. 1928 Lah. 856.

—S. 139-A—Inquiry—The Magistrate should only find whether the evidence is reliable as it stands.

Where a right of public way is denied and the person denying as well as the person complaining produce evidence the Magistrate should take the evidence as it stands and see whether, on the face of it, he could come to the conclusion that the evidence was false and was, therefore, unreliable. It is not a correct procedure that he should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers. A.I.R. 1926 Pat. 170, Rel. on. 9 A.I.Cr.R. 540=29 Cr.L.J. 254=107 Ind. Cas. 485=A.I.R. 1928 Lah. 664.

—S. 139-A— Inquiry.

——The intent of S. 139-A (2) is that the Magistrate should neither encroach on the jurisdiction of the Civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence to support the denial which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction. 4 Pat. 783=7 P.L.T. 136=27 Cr. L.J. 9= 91 Ind. Cas. 41=A.I.R. 1926 Pat. 170.

—S. 139-A—Inquiry.

——When there is a denial of the existence of the public right, it is the duty of the Magistrate to

inquire into the matter and come to a conclusion under the provisions of S. 139-A and on the result of this conclusion would depend the question whether he should stay proceedings or should proceed under S. 137 or 138. 96 Ind. Cas. 126=30 C.W.N. 618=27 Cr.L J. 878.

—S. 139-A—Inquiry.

——The Magistrate must proceed according to the section without waiting for objection.

It is the duty of a Magistrate to proceed in accordance with the provisions of S. 139-A without waiting for the objection to be raised by one of the parties to the proceeding. Under that section on the appearance before him of the person against whom the order is made, the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river, channel or place and if he does so the Magistrate shall before proceeding under S. 137 or S. 138 inquire into the matter. The Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case. 88 Ind. Cas. 528=29 C.W.N. 649=26 Cr. L. J. 1168=A.I.R. 1925 Cal. 736.

——S. 139-A — Inquiry— Magistrate hearing evidence tendered on behalf of the complainant also.

It cannot be said that the mere fact that the Magistrate holding an enquiry under S. 139-A, Cr. P. Code, did not confine his enquiry to hearing the statements of the applicants but also heard the evidence tendered on behalf of the complainant would, irrespective of other circumstances, render the procedure contrary to law. I.L.R. (1947) All. 748=A.I.R. 1948 All. 115=1947 A.L.W. 541=49 Cr. L. J. 23=1947 A.L. J. 558=1947 A.W.R. (H.C.) 334.

——S. 139-A—Inquiry—Evidence of complainant —if can be allowed.

——All the a Magistrate is required to do under S. 139-A, Criminal P. C., is to hold an enquiry merely to the satisfy himself that there is or is not some prima facie evidence in support of the denial of the public right by the person on whom the conditional order is served. In dealing with this part of the inquiry, it is no doubt open to him to allow the witnesses, if any, produced by the person denying the public right to be cross-examined, but he cannot allow the opposite party to produce definite evidence to the contrary, and then proceed to weigh the evidence on both sides, in order to decide finally whether the alleged public right does or does not exist. A.I.R. 1938 All. 653=(1938) A.L. J. 1013=40 Cr. L. J. 143=1933 A.W.R. (H.C.) 640=178 Ind. Cas. 742.

——Ss. 139-A, 540—Inquiry—Cross-examination of witnesses—Permissibility.

The Magistrate is to find whether there is reliable evidence in support of the second party's denial of the existence of the public right. In doing so, he may allow cross-examination of the witnesses adduced by the second party in support of such denial, for the enquiry being of a summary character, it is not intended that the first party should be required to adduce evidence to contradict the case sought to be made out by the second party.

There is nothing in S, 139-A, Cr. P C., which excludes the exercise of the Court's inherent powers under S. 540 of the Code. A.I.R. 1931 Cal. 527=58 Cal. 461=32 Cr. L. J. 1187=134 Ind. Cas. 574 (1).

6. Jurisdiction.

——Ss 133, 139-A, 529 (f) and 537—Jurisdiction —Party appearing and showing Cause—Case transferred to Subordinate Magistrate — order under S. 139-A by such Magistrate, if within jurisdiction—Irregularity, if curable.

Where the conditional order is made by the Sub-Divisional Magistrate requiring the person against whom it is made to appear before himself and he subsequently, when the person appears before him and shows cause, transfers the case for disposal to a competent Magistrate subordinate to him, the latter will have jurisdiction to deal with the case and the order under S. 139-A passed by him will not be without jurisdiction. The transfer order would be a mere irregularity curable under S. 529 (f) and S. 537. A.I.R. 1945 Pat. 316=24 Pat. 23=12 B.R. 134=47 Cr.L.J. 179=221 Ind. Cas. 418.

——S.139-A—Jurisdiction.

——The inquiry under S. 139-A, no doubt precedes the stage of inquiry under S. 137 or S. 138 of the Code, but the Magistrate holding inquiry under S. 139-A need not himself dispose of the case. A.I.R. 1943 Pat. 115=21 Pat. 759=9 B.R 217=44 Cr. L. J. 364=205 Ind. Cas. 302.

——S. 139-A—Jurisdiction.

——Provisions of S. 139-A, Criminal P. C., are designed to ensure that where there is reliable evidence in support of the denial of the existence of the public right, the Magistrate shall have no jurisdiction to pronounce on the cogency of that evidence but must refer the matter to a Civil Court. When the Magistrate does not direct his mind at all to ascertaining whether there is any evidence in support of the denial of the existence of the public right and takes upon himself to decide the question whether a public right exists or not, he usurps the function of a Civil Court and deprives the party concerned of the right to have the matter decided by that Court. A. I. R. 1941 Pat. 38=21 P.L.T. 843=7 B.R. 36=42 Cr. L. J. 34=190 Ind. Cas. 879.

——S. 139-A—Jurisdiction.

——Application that certain person blocked public right of way by erecting building—Such person producing evidence under S. 139-A to prove that no right of way existed—Magistrate cannot proceed with the case but must leave matter to decision of competent Civil Court A.I.R. 1939 All. 187=40 Cr. L.J. 375 (1)=1939 A.W.R. (H.C.) 71=180 Ind. Cas. 495.

——Ss. 139-A, 133, 137—Jurisdiction—Magistrate taking proceedings under S. 139-A, if should be First Class Magistrate.

The Magistrate mentioned in S. 139-A, Criminal P. C., must be the Magistrate before whom a person is ordered to appear under the last sentence of S. 133 (1). He need not be a First Class Magistrate. A.I.R. 1937 Lah. 676=39 P.L.R. 484=38 Cr. L. J. 1056=171 Ind. Cas. 279.

——S. 139-A—Jurisdiction to make order absolute.

It is only in cases where the Magistrate finds that there is no reliable evidence in support of the denial of the existence of the public right, that he is empowered by S. 139-A, Sub-S (2),

Criminal P. C., to proceed further in the matter. Where the Magistrate's order, while stating that certain witnesses were examined on behalf of one party does not state whether such evidence is reliable, and does not contain a finding as to the existence of the alleged public right:

Held, that without finding either that a public right existed, or that there was no evidence in support of the denial of existence of such a right, the Magistrate had no jurisdiction to make the order. A.I.R. 1935 Pat. 138 =1 B.R. 354=16 P.L.T. 218=36 Cr. L.J. 588=154 Ind. Cas. 871.

7. Jury.

——S. 139-A—Jury—If can be appointed after decision under S. 139-A.

——After the decision under S. 139-A, Criminal P.C., a Magistrate can entertain an application for the appointment of a jury from the party against whom the decision is made. A.I.R. 1941 Pat. 370= 22 P.L.T. 312=7 B.R. 954=42 Cr. L.J. 784=195 Ind. Cas. 602.

——S. 139-A—Jury—if can be appointed after decision under S. 139-A.

——It is open to a person, against whom an order under S. 133, Cr. P.C., has been made absolute, to elect to have the matter tried by a jury even after the enquiry under S. 139-A, has been finished by the Magistrate. A. I. R. 1933 Cal. 318=56 C. L. J. 249=34 Cr. L. J, 532=143 Ind. Cas. 178.

——S. 139-A—Jury—If competent to decide the existence of a Public highway.

Under S. 139-A, the Jury is not competent to decide the existence of a public highway. A. I. R. 1933 Pat. 676=35 Cr. L.J. 54=146 Ind. Cas. 406.

8. Non-Compliance with.

——Ss. 139-A and 537—Non-compliance with the provisions of S. 139-A—Only one enquiry held —Curability under S. 537.

The language of S. 139-A, Cr. P. Code, requires evidence at two stages; once in the enquiry under S. 139-A and again in the proceedings under S. 137. A deprivation of this right of producing evidence at the two stages, is a prejudice to the party and cannot be said to be a mere irregularity which can be cured by invoking the aid of S. 537, Cr. P. Code. 22 Luck. 294=A. I. R. 1948 Oudh 19=231 Ind. Cas. 42=1947 O. A. (C.C.) 132=48 Cr. L. J. 666=1947 A. W. R. (C. C.) 132=1947 A. Cr. C. 123=1947 O.W. N. 229.

——S. 139-A—Non-complied with—Effect.

In a case in which S. 139-A has not been complied with, the order of the Magistrate should be set aside. 193 Ind. Cas. 371=21 P. L. T. 852=7 B. R. 601=42 Cr. L. J. 413.

——S. 139-A—Non-compliance with—Effect.

——Where the provisions of S. 139-A, Cr. P.C., are ignored proceedings that follow are ultra vires. 42 P. L. R. 80.

——S. 139-A—Non-compliance with—Effect.

Where the Magistrate has not complied with the provisions of S. 139-A, Cr. P. C., by not holding an inquiry into the correctness of the denial of the public right before proceeding under S. 137 or S. 138, Cr. P.C., and has not asked the person against whom the proceedings are taken whether he wanted to adduce any evidence in support of his denial, the order under S. 133 for removal of encroachment is illegal and must be set aside. A. I. R. 1939 Lah. 452=41 P. L. R. 515=40 Cr. L. J. 933=184 Ind. Cas. 352.

——S. 139-A—Non-compliance with—Effect.

——In a proceeding under S. 133, Cr. P. C., an order passed under S. 137 of the Code, without inquiry enjoined under S. 139-A of the Code, could not stand. A. I. R. 1936 Pat. 360=17 P. L. T. 399=2 B. R. 595 (2)=37 Cr. L. J. 846 (1)=163 Ind. Cas. 402.

——S. 139-A—Non-compliance with—Effect.

——Where the accused appears to show cause against a notice under S. 133, Cr. P. C., the Magistrate should take evidence as in a summons case. Where he omitted to do so, and did not even record the statement of the accused or question him as required by S. 139-A, and passed a confirmatory order on a mere inspection of the locality:

Held, that the order was wholly illegal and could not be upheld. A. I. R. 1931 Oudh. 397=8 O. W. N. 651=32 Cr. L. J. 1165=132 Ind. Cas. 800.

——S. 139-A—Non-compliance—Effect.

Where in a proceeding under S. 133 the accused denies the alleged right of way the Magistrate cannot continue the proceeding without adopting the procedure prescribed by S. 139-A. 1930 Cr. C. 1222=129 Ind. Cas. 222=A. I. R. 1930 Lah. 1046.

——S. 139-A—Non-compliance with.

——In enquiry under S. 137 provisions of S. 139-A ought to be complied with. The Magistrate's duty is to find whether there is reliable evidence in support of the denial. When the Magistrate does not apply his mind to the question and does not come to any finding on the point, he does not follow the correct course. 1930 Cr. C. 144=124 Ind. Cas. 832=31 Cr. L. J. 767=A. I. R. 1930 Cal. 144.

——S. 139-A — Non-compliance — Irregularity cured under S. 537.

Where a Magistrate issued a notice under S. 133 on a person to show cause why he should not remove an obstruction on a public river and the person filed a written statement, admitting the public character of the river but claiming that the obstruction was on his zamindar's khas land and not on the river and the Magistrate proceeding under S. 137 and having come to the conclusion that the obstruction was on the bed of the river, made the order absolute and passed orders for removal of the obstruction,

Held, that S. 139-A ought not to apply to such a case, but the language of the section is so general that even in such a case the Magistrate should exercise a good discretion in following the direction of the law and omission to do it does not vitiate the proceeding but is an irregularity covered by S. 537. 57 C. 252=126 Ind. Cas. 205= 31 Cr. L.J. 973=33 C.W.N. 748=A.I.R. 1929 Cal. 507.

9. Object of

——S. 139-A—Object.

The object with which S. 139-A is enacted is to prevent the Magistrate in enquiring into matters under Chapter X arrogating to himself the functions of a Civil Court and instituting an elaborate enquiry with regard to the rights of the parties. 34 C.W.N. 957=1931 Cr. C. 34=128 Ind. Cas. 810= 32 Cr. L.J. 189=A.I.R. 1931 Cal. 2.

10. Powers and duties under.

——S. 139-A—Powers and duties under—Magistrate taking some evidence and being satisfied of encroachment—Decision to proceed further with recording of evidence to determine whether preliminary order should be made absolute—If irregular.

S. 139-A, Cr. P. Code, does not prescribe the mode of inquiry that a Magistrate has to adopt, nor does it require that he should record an order that he is satisfied that there was a case against the party against whom a preliminary order under S. 133 has been made. Where after the examination of some witness the Magistrate is satisfied that there has been an encroachment and decides to proceed further with the recording of evidence in order to satisfy himself whether the preliminary order made by him should be made absolute, it cannot be said that the entire evidence including the further evidence taken is in connection with the preliminary inquiry under S. 139-A. Where on the further evidence taken by the Magistrate, he makes the preliminary order absolute, it cannot be said that the order is irregular for non-compliance with S. 139-A. 16 Cut. L. T. 130=A.I.R. 1950 Orissa 203=51 Cr. L.J. 1498.

——S. 139-A—Powers and duties under—Person served, appearing and producing evidence to show there was no encroachment — Magistrate. if can proceed to make order absolute without either staying case or following procedure under S. 137 or S. 138.

Where, a conditional order under S. 133, for the removal of an encroachment on a public way is passed by a Magistrate and a person who was served with a notice of this order appears before the Magistrate under S. 139-A, and produces evidence to show that he has not committed any encroachment, the Magistrate cannot proceed to make his order absolute but must either stay the proceedings or proceed under S. 137 or S. 138, according as he finds the evidence reliable or unreliable. A.I.R. 1939 All. 116=(1938) A.L.J. 1145=40 Cr. L.J. 286=1938 A.W.R. (H.C.) 841=179 Ind. Cas. 970.

——S. 139-A—Powers and duties under.

Where a conditional order under S. 133 is passed against a person for obstructing a public way, and in an enquiry such a person denies the public right of way, proceedings under S. 139-A should be taken before the proceedings under S. 137. A.I.R. 1937 Lah. 676=39 P.L.R.484=38 Cr. L.J. 1056=171 Ind. Cas. 279.

——S. 139-A—Powers and duties under.

If the Magistrate, on enquiry, finds that there is any reliable evidence in support of the non-applicant's denial of the existence of a public right, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court. The Magistrate is not empowered to order either side to bring a civil suit. A.I.R 1938 Nag. 512=1938 N.L.J. 295=39 Cr. L.J. 791(1)=I.L.R. (1939) Nag. 600=176 Ind. Cas. 755.

——Ss. 139-(A), 133—Powers and duties under.

There is no obligation on the Magistrate to force the opposite party or any particular party into the Civil Court. It is clearly within its inherent jurisdiction to stay proceedings until the matter has been decided by a competent Civil Court on such conditions as may, to it, seem fit in the varying circumstances of each case. It is not within the competence of the Magistrate to direct any particular party to obtain a declaration from the Civil Court. A.I.R. 1935 All. 79=36 Cr. L.J. 144=(1935) A.L.J. 18=4 A.W.R. (H.C.) 935=152 Ind. Cas. 737.

——Ss. 139-A, 133—Powers and duties under.

Under S. 139-A, Cr. P.C., what has to be seen is whether the denial of public right by the second party is supported by any reliable evidence. If it is, the Magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent Civil Court. Under the law as it is at present, it is the party moving for proceedings under S. 133 or somebody interested in asserting such right, who has got to go to the Civil Court to establish its existence. The Magistrate's order directing the second party to go to Civil Court is not one which can any longer be made under the law. A.I.R. 1934 Cal. 545=61 C. 390=59 C.L.J. 290=38 C.W.N. 391=35 Cr L.J.1374=151 Ind. Cas. 691 (2).

——S. 139-A—Powers and duties under.

In a proceeding under S. 133, Criminal P. C., the Magistrate, after finding under S. 139-A, Criminal P.C., that there was no reliable evidence in support of the petitioner's denial of right of way cannot make the rule absolute without proceeding under S. 137 or 138 of the Code.

He can stay the proceedings only if he found affirmatively that there was reliable evidence it support of the petitioner's denial. A.I.R. 1934 Pat. 145 (1)=14 P.L.T. 778=35 Cr. L.J. 488=147 Ind. Cas. 804.

——S. 139-A—Powers and duties under.

—Under S. 139-A, Cr. P.C., the Magistrate has first to determine whether the claim put forward by the persons against whom a conditional order was made is bona fide or a mere pretence and it is only when the Magistrate is of opinion that the claim is not bona fide but a pretence, that he should proceed to pass final order. A.I.R. 1933 Nag. 267=35 Cr. L.J. 145=29 N.L.R. 361=146 Ind. Cas. 601.

——S. 139-A—Powers and duties under—Denial of existence of public right—Production of reliable evidence—Reference to Civil Court—Duty of Magistrate.

In a case under Chap. X, Criminal P.C., where the defendant denies the existence of the disputed public rights and it is impossible to say that there was no bona fide claim put forward by the defendant or that there was no reliable evidence in support of his denial, the Magistrate should not proceed to decide intricate questions of title and easement but should stay proceedings until the matter is decided by the Civil Court as required by the provisions of S. 139-A (2), Criminal P.C. A.I.R. 1932 Oudh 118=9 O.W.N. (C.C) 141=33 Cr. L.J. 809=7 Luck. 583=139 Ind. Cas. 737.

——S. 139-A—Powers and duties under.

Under S. 139-A, Criminal P. C., when an order is made under S. 133, Criminal P.C., for the purpose of preventing obstruction to the public in the use of the way, the Magistrate shall question the respondent as to whether he denies the existence of a public right in respect of the way. And if the respondent does so, the Magistrate

shall, before proceeding under S. 137 or 138 of the Code, enquire into the matter, and if in such enquiry, the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court. A.I.R. 1931 Lah. 62=32 P.L.R. 11=32 Cr.L.J. 621=130 Ind. Cas. 834.

——S. 139-A—Powers and duties under.

Where accused is alleged to have obstructed a public pathway and there is some evidence on record indicating that the path was private, it is incumbent on a Magistrate under S. 139-A to stay his hands immediately until the matter of the existence of the public right was decided by a competent Civil Court. 57 Cal. 368=127 Ind. Cas. 762=A.I.R. 1930 Cal. 486.

——S. 139-A—Powers of and duties under.

If under S. 139-A (ii) the Magistrate stays his proceedings, those proceedings remain stayed until there is a decision by a competent Civil Court, and there is nothing in the new sect on which entitles the Magistrate to say which party should file suit. 28 Cr.L.J. 363=100 Ind. Cas. 971=7 A.I. Cr.R. 561=A.I.R. 1927 Lah. 227.

——S. 139-A—Powers and duties under.

A Magistrate has absolute discretion to decide whether materials are sufficient for not deciding question in Criminal Court. 116 Ind Cas. 786= 1929 A.L.J. 385=10 L.R.A.Cr. 49=11 A.I.Cr.R. 350=30 Cr.L.J. 670=A.I.R. 1929 All. 220.

——S. 139-A—Powers and duties under—Party directly upon appearance denying existence of public right—Magistrate need not question the party about denial.

When a party directly, upon appearance, puts in a statement denying the existence of any public right, it is not necessary for the Magistrate to question the party as to whether he denies the existence of any public right as required by S. 139-A. A.I.R. 1945 Pat. 309=24 Pat. 104= 26 P.L.T. 208.

——S. 139-A—Powers and duties under—Before passing order under S. 137, the Magistrate must proceed under S. 139-A.

Before proceeding under S. 137, Criminal P.C., the Magistrate must make an enquiry under S. 139-A. The mere fact that he considered the written statement of the party, on the question of the denial of the public right, is not sufficient. When provision is made for an enquiry by a Magistrate, it is not contemplated merely that there shall be an examination of such evidence as may be adduced by the parties; a Magistrate is expected to exercise his common sense and call for such further evidence, if any, as may appear necessary. A.I.R. 1941 Oudh 271=42 Cr.L.J. 241=1941 O.W.N. (C.C.) 54=1941 A.W.R. (C. C.) 90=192 Ind. Cas. 70.

11. Procedure.

——Ss. 139-A, 133, 135, 137—Procedure—Complaint as to obstruction of alleged pathway—Application under S. 133—Procedure.

When an application is filed under S. 133, Criminal P.C. on the ground that a certain person has put up some turnstiles on his property, thus obstructing a route or path that passed over her land to a temple, the Magistrate should first send notice to the counter petitioner and when he or his representative appears, the Magistrate should question him as to whether he denied the existence of the public way and if he did, the Magistrate has to inquire into the matter and if he finds a reliable evidence is support of the denial, he should stay the proceedings until the question is decided by a competent Civil Court. If, on the other hand, he finds that there is no reliable evidence in support of denial, he has to proceed under S. 137, Criminal P.C., and pass order accordingly. Where this procedure is not followed, the order of the Magistrate is not according to law, and being ultra vires, should be set aside. A.I.R. 1933 All. 615=35 Cr.L.J. 4=55 All. 866=146 Ind. Cas. 327.

12. Question of title.

——S. 139-A (2)—Question of title—Finding that there is no reliable evidence—Title of party can be established in Civil Court.

The finding of the Magistrate under S. 139-A (2) that there is no reliable evidence in support of the denial of the public right does not affect the title of the party which he will be at liberty to establish in a Civil Court. A.I.R. 1946 Oudh. 108 =1946 O.W.N. (C.C.) 57=222 Ind. Cas. 532.

——S. 139-A—Question of title—Duty of Magistrate in proceedings under Chap X.

It is not the duty of a Magistrate when acting in accordance with the provisions of Chap. X, Criminal P.C., to decide questions of title. Under the provisions of S. 139-A, it is his duty merely to see that any claim to a piece of land alleged to be a public place or a public way is not frivolous. A.I.R. 1937 All. 12=(1936) A.L.J. 1285=38 Cr.L.J. 200=166 Ind. Cas. 376.

——S. 139-A—Question of title—Inquiry under—Decision on question of title, whether can be given—Scope.

Questions of title are not intended to be decided in summary enquiries under S. 139-A, Criminal P.C., before a Magistrate. These are matters which should be left to the decision of the Civil Court where the case can be properly fought out. The duty of a Magistrate under S. 139-A, Criminal P.C., is merely to see whether the denial of the right is frivolous or not. If the person who denies that right is able to produce some evidence which prima facie, there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision. A.I.R. 1936 All. 356 =(1936) A. L. J. 75=37 Cr. L. J. 343=1936 A.W.R. (H. C.) 182=58 All. 739=160 Ind. Cas. 854.

——S. 139-A—Question of title—Proceedings for removal of public nuisance — Reliable evidence adduced—Duty to stay proceedings.

Where, in a proceeding for removal of a dwelling house from the land in dispute, it appeared that a question of title was involved and there was reliable evidence to support the title of the person against whom the proceedings were instituted, the proceedings should be stayed under S. 139-A, Criminal P. C., until the matter of the existence of the right in question was decided by a competent Civil Court. A.I.R. 1932 Oudh 120= 9 O.W.N. (C. C.) 115=33 Cr.. L. J. 384=136 Ind. Cas. 839 (2).

——S. 139-A—Questions of title.

S. 139-A is imperative. It does not authorize a Magistrate to look into the question of title and decide for himself whether the accused's case is or is not true. All that the Magistrate is to see is whether there is any reliable evidence in support of such denial. If there is some reliable evidence in support of the denial then the proceedings under the Code have to be stayed. In such a case no order under S. 140 can be passed without first proceeding under S. 139-A. 24 A. L. J. 361=7 L.R. A.Cr. 73=27 Cr. L. J. 473=93 Ind. Cas. 697=A.I.R. 1926 All. 390.

13. Revision.

——Ss. 139-A and 439—Revision—Finding of Magistrate—Interference.

Under S. 139-A, Cr. P. Code, it is the function of the Magistrate to make an enquiry and to decide whether there is reliable evidence or not and when the Magistrate has, in fact, made such enquiry and has, in fact, come to the conclusion that there is no reliable evidence in support of the denial, it is not for the High Court to interfere in revision. 222 Ind. Cas. 528=47 Cr. L. J. 820= A.I.R. 1946 Cal. 302.

——Ss. 139-A (2), 438 and 439—Revision—The question of reliability of evidence has initially to be decided by Magistrate himself before staying proceedings—Finding of Magistrate not perverse—High Court will not interfere. A,I.R. 1946 Oudh 108=1946 O.W.N. (C.C.) 57= 222 Ind. Cas. 532.

——S. 139-A—Revision.

——A District Magistrate has no jurisdiction to revise or set aside an order of the Taluq Magistrate passed under S. 139-A. He can only submit the records to the High Court. 1933 M.W.N. 735.

——S. 139-A (2)—Revision—Encroachment on public way — Old encroachment—Order for removal, legality of.

When a Magistrate hears evidence as to an alleged encroachment on a public way in accordance with the provisions of S. 139-A (2), Criminal P. C., and orders the removal, his order is in accordance with the law and cannot be set aside merely because the encroachment was in existence for some years. A.I.R. 1931 Lah. 159= 32 Cr. L.J. 1234=134 Ind. Cas. 783.

14. Waiver.

——S. 139-A—Waiver.

Quoere: Whether there can be a waiver of mandatory provision such as is contained in S. 139-A. 120 Ind. Cas. 289=31 Cr. L.J. 53=A.I.R. 1930 Pat. 199.

——S. 140—Applicability—Order under S. 133 not made absolute under S. 139 (1)—Further proceedings dropped under S. 139 (2)—S. 140 does not apply.

Where the order under S. 133, Cr. P. C., was not made absolute under S. 139 (1) and further proceedings had to be dropped as provided in S. 139 (2), S. 140 cannot apply to the case. A.I.R. 1942 Mad. 113=1941 M.W.N. 813=43 Cr. L.J. 314=198 Ind. Cas. 131.

——S. 140—Applicability—Removal of obstruction, order of—Cannot be passed against person not party to proceedings.

An order to remove an obstruction cannot be issued against a person who is not a party to the proceedings though it is found to be an obstruction to the clear right of user of the petitioner of the water. A.I.R. 1941 Mad. 939=43 Cr.L.J. 136=1941 M.W.N. 764=197 Ind. Cas. 134.

——S. 140—Civil suit to prevent Magistrate from carrying his order into effect if maintainable.

If a Magistrate causes the act ordered to be performed, then that order cannot be questioned in the Civil Court, and no suit can be maintained in the Civil Court, to prevent the Magistrate from carrying his order into effect. A.I.R. 1940 Oudh 75=1939 A.W.R. (C.C.) 252=41 Cr. L.J. 99= 15 Luck. 140=1939 O. W. N. 966=184 Ind. Cas. 754.

—S. 140—Effect of death.

——As soon as a person against whom an order has been made under Ch. X, Cr. P. Code, dies, the order ceases to have further effect and a Magistrate is not entitled to act under S. 140 (2). 26 A.L.J. 405=9 L.R.A.Cr. 64=108 Ind. Cas. 565= 29 Cr.L.J. 445=9 A.I.Cr.R. 434=A.I.R. 1928 All. 300.

—S. 140—Procedure—Magistrate is not authorised to decide question of title.

If there is some reliable evidence in support of the denial then the proceedings under the Code have to be stayed. In such a case no order under S. 140 can be passed without first proceeding under S. 139-A. 24 A.L.J. 361=7 L.R.A.Cr. 73= 27 Cr.L.J. 473=93 Ind. Cas. 697=A.I.R. 1926 All. 390.

—S. 140—Scope.

——A question as to the validity of the final order made in proceedings under S. 133, Cr. P. C., cannot be raised at the trial of the accused for an offence under S. 188, I. P. C., for disobedience of the order. Where in the proceedings, no objection has been raised that a co-sharer was not made a party, it cannot be raised in subsequent proceedings, under S. 188, I. P. C. A.I.R. 1934 Cal. 242 (1)=60 Cal. 1336=35 Cr.L.J. 778 =148 Ind. Cas. 808.

——S. 140—Scope—Jury holding conditional order to be reasonable—Duty of Magistrate—Notice under S. 140 (1)—Powers under S. 140 (2)—Institution of civil suit, effect of.

Where a conditional order is made under S. 133, Cr. P. C., directing the removal of a certain obstruction and the opposite party having shown cause, the Jury is empanelled and they report that the order is reasonable and proper and the order is made absolute, the Magistrate is bound to issue notice under S. 140 (1) even though a civil suit has been instituted, provided no further proceedings are taken under S. 140 (2).

Under S. 140 (2), the Magistrate is given a discretion whether he should give directions to someone else to carry the order under S. 140 into execution and whether he should make the opposite party pay the costs of the proceedings. The Magistrate can take into consideration the whole of the circumstances and decide whether he ought to be given the direction referred to in Sub. S. (2) or whether he thinks it expedient to leave the

matter where it is until the conclusion of the civil suit. It is, however, open to the opposite party to come to the High Court and say that such an order is not expedient and proper. A.I.R. 1931 Cal. 787=58 Cal. 1088=35 C.W.N. 571=32 Cr.L. J. 1240=134 Ind. Cas. 918.

——S. 141—Order under—Legality.

It cannot be said that although a Magistrate has found that there is an absence of reliable evidence in support of the existence of a public right, the fact that he has, admittedly wrongly, held that the public right exists, necessarily results in the absence of other circumstances, in his order under S. 141, being rendered a nullity. I.L.R. (1947) All. 748=A.I.R. 1948 All. 115=1947 A.L.W. 541=49 Cr.L. J. 23=1947 A.L J. 558=1947 A.W.R. (H.C.) 334.

——Ss. 141, 135—Persons choosing to be heard by jury—Failure of Jury to function—Further inquiry is not necessary if there is material for passing reasonable order under S. 141 — Failure of jury to try case through no fault of persons choosing jury trial—If can claim that their case should be heard as summons case under S. 137 (1).

In S. 141, Criminal P.C., the word "discretion" is used in relation to the extension of time within which the jury is to give their verdict. It is not used in relation to the order passed by the Magistrate. The Magistrate has a discretion under S. 141 as to the order he shoud pass and that discretion means a judicial discretion. The Magistrate cannot, under that section, pass an arbitrary or capricious or whimsical order. The order passed must be reasoned order. Where the persons against whom an order under S. 133 is passed have chosen to be heard by a jury, on failure of the jury to function, the Magistrate is not required to hold a further inquiry if he has before him material upon which he can pass a resonable order under S. 141.

Where persons have in good faith chosen a trial by jury, and through no fault of their own, their chosen tribunal fails to hear and try their case, they cannot claim, then, that they are entitled that their case should be heard by the Magistrate as a summons case under S. 137 (1) but the Magistrate would clearly desire in such circumstances that they should be given an opportunity briefly to state their case. A.I.R. 1940 Sind. 24=I.L.R. (1939) Kar. 179=41 Cr.L.J. 364=186 Ind. Cas. 723.

——Ss. 141, 133, 139-A, 135-B—Proceedings under S. 133—Enquiry under S. 139-A—Local inspection—Jury under S. 135-B—Applicants against whom proceedings started and their jurors absenting on date fixed and also on adjourned date—Provisional order confirmed without notice to applicants—Legality.

Where during the proceedings under S. 133, Criminal P. C., the City Magistrate made two local inspections and started an enquiry under S. 139-A Criminal P. C., and a jury was appointed by him in accordance with S. 135-B, Criminal P.C., but the applicants against whom the proceedings were started and their jurors absented themselves, both on the date fixed, and on adjourned date, and the Magistrate without issuing notice to the applicants, confirmed his provisional order passed under S. 133, Criminal P.C:-

Held, that the applicants had been negligent or obstructive and had wilfully abstained from appearing before the jury, which had been appointed at their instance to settle the dispute, and hence there was no obligation whatsoever on the Court to issue notice to them before confirming the provisional order which had been passed under S. 133. A.I.R. 1936 All. 65=(1935) A.L.J. 1089=36 Cr L.J. 1472=1935 A.W.R. (H.C.) 1134 =158 Ind. Cas. 759.

——S. 141—Verdict of four out of five jurors is no verdict of jury—In such case, Magistrate can pass order provided by S. 141—Limitation on powers of Magistrate.

The verdict of four out of five jurors is not the verdict of the jury. The jury, by law, consist of five persons and although it is not necessary that the jurors shall return a unanimous verdict, they must all take part in the deliberations of the jury and unless they do so, there can be no verdict of the jury. Where, therefore there is no verdict of the jury, the Magistrate is entitled to pass such order as he thinks fit, as provided by S. 141. He may proceed to appoint a fresh jury or, to hear the evidence and, on that evidence, come to a decision whether the conditional order should be made absolute. The only limitation on his power is that he should hear the parties. A.I.R. 1942 Pat. 468=8 B.R. 462=43 Cr. L.J. 423=198 Ind. Cas. 724.

——S. 141—Verdict, omission of.

—A jury was appointed at the instance of defendant, but jury failed to return a verdict as required by S. 139. The Court then inspected the locality and fixed a date for parties to adduce evidence, who however, adduced no evidence on the date, and the Court made the order against the defendant absolute.

Held, the procedure was not illegal. 6 A.L.J. 685; 20 A.L J. 657, not Foll. 24 A.L.J. 165=7 L.R. A. Cr. 5=27 Cr L.J. 981=96 Ind. Cas. 645=A.I.R. 1926 All. 658.

——S. 141—Verdict of jury—Failure to return.

—If the jury failed to return their verdict within the time fixed, the Magistrate has jurisdiction to make the order absolute. Where the jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, the person should be allowed to revert to the other alternative given him by S. 135. 72 Ind. Cas. 956=4 P.L.T. 15=1 Pat. L.R. Cr. 164=24 Cr. L.J. 492=A.I.R. 1923 Pat. 229.

——S. 141—Verdict of jury—Omission of to return.

The words "If the jury appointed does not return its verdict within the time fixed, the Magistrate may pass such order as he thinks fit" mean that if the jury for any reason does not return its verdict the Magistrate must inquire into the matter before he passes an order. 73 Ind. Cas. 327 =4 P.L.T. 13=1 Pat. L.R.Cr. 22=24 Cr.L.J. 583= A.I.R. 1923 Pat. 131.

——S. 142—Order under—When proper.

S. 142 is controlled by S. 133. An order under S. 142 can be passed only if an injury or danger specified under S. 133 of the Code was apprehended and not otherwise. A.I.R. 1937 Lah. 101=39 P.L.R. 863=I.L.R. (1937) Lah. 303=39 Cr. L.J. 13=171 Ind. Cas. 941.

——Ss. 142, 133, 137—Magistrate making order under S. 142—Whether can proceed with case and make final order under S. 137.

A Magistrate passing an order under S. 142, Criminal P. C., not only is not precluded from making a final order under S. 137, but Ss. 133, 137 and 142 taken together mean that the Magistrate, in spite of making an order under S. 142, is entitled to proceed with the case and make a final order under S. 137. A.I.R. 1936 Cal. 692=63 C.L.J. 5=38 Cr. L.J. 173=166 Ind. Cas. 221.

——Ss. 142 and 133—Scope of injunction—Jurisdiction of Magistrate.

An injunction under S. 142, Cr. P. Code, must be restricted to the checking of the particular nuisance which was prohibited by the conditional order under S. 133 of the Code. The Magistrate has no jurisdiction to go beyond tbe scope of that nuisance. 53 C.W.N. 907.

——S. 142 (2)—Action under—When may be taken.

Action under S. 142 (2), Cr. P. Code, cannot be taken unless an injunction of the kind required by sub-S. (1) of that section has been issued. 52 C.W.N. 757.

—Ss. 143, 133—Scope—S. 143 is supplementary to sections preceding it—It applies to proceedings subsequent to actions under S. 133 and not to "original proceedings"

In order that action can be taken under S. 143, Criminal P. C., the nuisance must be "a public nuisance, as defined in the I. P. C., or any special or local law," but that does not exclude the conclusion that the nuisance, repetition of which may be forbidden under S. 143, Criminal P. C., must be a nuisance which has been made a subject of action under S. 133 and the following sections. In short, S. 143, Criminal P. C., does not apply, to what may be called "original proceedings", but applies only to subsequent proceedings when a nuisance has been made the subject of inquiry and adjudication under the sections which precede it. Therefore, S. 143, Criminal P. C., does not stand alone but is supplementary to the sections which precede it. A.I.R. 1940 Sind 124=41 Cr.L.J. 727=I.L.R. (1940) Kar. 425=189 Ind. Cas. 353.

——S. 143—Scope.

S. 143, Criminal P. C., contemplates the prevention of a repetition, or the continuance of a public nuisance by the party against whom an order under S. 133, Criminal P. C., has already been passed. An order under S. 133 binds the person against whom the order is passed and no body else. Therefore, no order can be passed under S. 143, Criminal P. C., against a person who was not a party in any eariler proceedings when orders under S. 133, Criminal P. C., were passed. A.I.R. 1935 All. 79=36 Cr.L.J. 144=4 A.W.R. 935 =(1935) A.L.J. 18=152 Ind. Cas. 737.

——S. 143—Scope.

The order passed by the Magistrate under S. 143, Criminal P. C., without drawing up a proceeding, without taking evidence, and without giving an opportunity to the petitioners to substantiate their case is wholly without jurisdiction and illegal; and further the order made by the Magistrate under S. 143, Criminal P. C., without an adjudication about the existence of the public nuisance as contemplated in the section by a competent Court is bad in law and illegal. A.I.R. 1935 Cal. 108 (2)=36 Cr.L.J. 591 (2)=38 C.W.N. 1070=154 Ind. Cas. 663.

——S. 143—Scope—Party complained against must have a right of defence on merits.

The object of S. 143, Criminal P. C., is to give the Magistrate summary powers to issue an order against a person who is repeating or continuing a public nuisance, that is to say, who has repeated an act which has already been forbidden by a competent tribunal. It is not for original use. Party who is alleged to have committed the nuisance must have the right to set up a defence on the merits and the summary order should not be made without giving him an opportunity of being heard under the other sections of Chap. X of the Criminal P. C., which provides the procedure for that purpose. A.I.R. 1934 Pat. 305=15 P.L.T. 253=36 Cr.L.J. 187=152 Ind. Cas. 708.

——S. 144.

See also Cr.P.C. (1), S. 107, (2), S. 145.

——S. 144.

1. Applicability
2. Burden of proof
3. Discretion
4. Disobedience of order
5. Dispute about land
6. Duration of order. See also Cr. P. Code S. 144—Temporary orders
7. Duty of authorities
8. Duty of Court
9. Ex-parte order
10. General order
11. "Hats"
12. Indefinite Order
13. Interpretation
14. Jurisdiction
15. Mandatory orders
16. Nature of proceedings
17. Order to abstain from doing certain acts
18. Order under—Requisites
19. Powers of Court
20. Procedure
21. Processions
22. "Promulgated"
23. Public meeting
24. Rescission and extension
25. Revision
26. Scope
27. Successive orders
28. Temporary order
29. Validity of order
30. Miscellaneous

1. Applicability.

—S. 144—Applicability—Order by Corporation on landlord to pull down dilapidated premises—Tenants refusing to vacate—Landlord applying for order under S. 144 against tenants to vacate—Propriety—Proper procedure.

S. 144, Cr. P. Code, cannot be availed of by a landlord to go to a Criminal Court and ask for an order calling upon his tenants to vacate his premises, even though the landlord has been called upon by the Corporation authorities to pull down the premises on their being in a dilapidated condition and the tenants refuse to vacate. The proper course for the landlord is to terminate the tenancy

and to seek a legal order of eviction. Proceedings under S. 144 Cr. P. Code, in such a case are misconceived. A. I. R. 1948 Cal. 192=49 Cr.L.J. 289.

——S. 144—Applicability.
—Right to receive light across another's land—Right not acquired as easement—Obstruction—Action, if can be taken under S. 144.

It cannot be said that S. 144, Criminal P. C, contemplates only acts which, when allowed to be completed will constitute an offence. In view of the definition of "injury" in S. 44 and of the definition of "illegal" in S. 43 of the I.P.C., which are adopted by the Criminal P. C., by its S. 4 (2) for its own purposes, whenever "a certain act" or certain measure "taken with certain property in possession" of the offender is such as may amount to 'injury or risk of injury' to any person, such person is entitled to have the protection of S. 144. So even if the act or the measure complained of be not such as would amount to an offence when allowed to be completed, if these are only such, as, when completed, would furnish grounds for a civil action only, the protection of the section will extend to the person. Where the act complained of is one of obstruction of ancient light and air by raising a structure, the act is not "obstruction to any person" within the meaning of S. 144. Such obstruction, if allowed, may amount to "an injury to the person" with in the meaning of the section, if it infringes any right of easement or any natural incident of property right apart from any acquired easement. The right to receive light across another's land is not a natural incident of property but can only be acquired as an easement either by grant or prescription. Unless and until such a right has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. Hence the obstruction of such right cannot furnish ground for action under S. 144. A.I.R. 1943 Cal. 35=I.L.R. (1942) 1 Cal. 488=46 C.W.N. 136=44 Cr.L.J. 288=204 Ind. Cas. 370.

——Ss. 144 and 147—Applicability—One party's right to drain off surplus water enclosed by alang of other party—Other party having right of irrigation — Dispute — Magistrate issuing notice under S. 144—Held, case fell within S. 147 and not S. 144.

The points which appeared to arise for inquiry on the report of the Sub-Inspector were whether one party had the right to drain off surplus water by cutting the alang erected by the other party and if so, whether the other party having a right of irrigation were entitled to require that the cutting should be limited in depth so as not to allow the escape of all the water, and damage to the bandh and thus affect their irrigation. On receipt of the Sub-Inspector's report the Sub-Divisional Officer issued notices under S. 144, Criminal P. C., to both parties in order to prevent immediate breach of the peace:

Held, that this was a case falling exactly within the provisions of S. 147, Criminal P. C., under which the Magistrate should have proceeded to make a judicial determination of the dispute.

Held, also that the notices issued should be considered equivalent to the notices to be issued under S. 147 (1), Criminal P. C: A.I.R. 1936 Pat. 59=17 P.L.T. 22=2 B.R. 263 (2)=37 Cr.L.J. 378=60 Ind. Cas. 945.

——S. 144 Applicability—The section does not apply to disputes of a civil nature of private individuals.

The applicant was for some time an agent of the Asiatic Petroleum Co., but his agency was terminated. Notwithstanding the termination of his agency, he refused to deliver back the register and goods of the Company. The opposite party then filed an application, under S. 144 praying that the applicant be directed to deliver to the opposite party the register and goods in his possession. The Magistrate, after following the necessary procedure, ordered the applicant to deliver all things belonging to the Company to it. The applicant challenged the decision.

Held, that the Magistrate's order was illegal as proceedings under the section may be taken only in urgent cases of nuisance or apprehended danger, and the existence of these circumstances of a condition precedent to an action under the section. The section is not intended to vest a Magistrate to decide disputes of a civil nature between private individuals and to usurp the functions of a civil court, 105 Ind. Cas. 815=50 All. 414=26 A.L.J. 83=28 Cr. L.J. 991=8 L.R. A. Cr. 149=8 A.I. Cr. R. 362= A.I.R. 1928 All. 14.

——S. 144 and 145—Applicability.
—Questions of title, fraud, etc., cannot be tried in proceedings under S. 145 or 144. 84 Ind. Cas. 332=3 Pat. 809=26 Cr. L. J. 268=A.I.R. 1925 Pat. 33.

——S. 144—Applicability.
—S. 144 is applicable only to temporary orders in urgent cases of nuisance or apprehended danger; it is not applicable in cases where there is a dispute as to land for the settlement of which S. 145 provides the proper remedy. 32 C. 936 and 48 Ind. Cas. 342 Ref. 75 Ind. Cas. 531=5 P.L.T. 90=1 Pat. L.R. Cr. 223=24 Cr. L. J. 947=A. I. R. 1924 Pat. 145.

——S. 144 — Applicability — Prevention of pecuniary loss to another:—S. 144, Cr. P. C., cannot apply to a case where the object of the order appears to be merely to prevent pecuniary loss to the opposite party. 9 C. 103, 8 C.W.N. 373 foll. The proper remedy in such cases is a civil suit and an interlocutory injunction. 13 C.W.N. 188 =4 Ind. Cas. 577.

2. Burden of Proof.

——S. 144—Burden of proof—Accused violating order under S. 144 denying knowledge of order--Duty of prosecution—Onus, shifting of.

Where the accused who is prosecuted for violating an order under S. 144, denies knowledge of the order, all that can reasonably be demanded of the prosecution is proof of circumstances from which it may be inferred that the accused had knowledge of the order. If such proof is forthcoming, the onus is on the accused to prove ignorance of the order despite publication A.I.R. 1941 All. 70=(1940) A.L.J. 885=I.L.R. (1941) All. 186=1940 A.W.R. (H.C.) 642=42 Cr. L.J. 298=192. Ind. Cas. 466 (F. B.)

——S. 144—Burden of proof—Knowledge of order—Question of evidence — Prosecution, nature of proof required.

The question of whether a person has knowledge of an order promulgated under S. 144 is a

matter of evidence. Where it appears that the order had been promulgated for several weeks, that there had been disturbances in the city, and that notices containing the order had been posted up at various places in the city and none of the accused persons pleaded ignorance of the order when making statements in the Magistrate's Court, it is scarcely conceivable that they had no knowledge of the order passed.

In such cases, the prosecution cannot be expected to prove everything that takes place in the minds of the accused. They can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that the accused did not know of it. A.I.R. 1935 All. 552=36 Cr. L. J. 639=1935 A. W. R. (H. C.) 590=155 Ind. Cas. 185.

——**S. 144—Burden of proof—Order under S. 144—Presumption of service of order—Onus of proof of ex parte nature.**

If a person takes the trouble to go to a Magistrate and gets an order upon another person restraining him from doing something prima facie, it is very unlikely for him not to take steps so that the other person may know of the restraint imposed upon him and the burden of proving that the order was not served upon him and that the proceedings were conducted behind his back is on the person against whom the order was made. A. I. R. 1931 Cal. 262=53 C.L.J. 64=32 Cr. L. J. 680=131 Ind. Cas. 271.

3. iscretion.

——**Ss.144,145—Discretion—Magistrate's discretion to adopt any proper method to meet emergency.**

It is always enough that the Magistrate adopts any proper method to meet the emergency if there happen to be several mothods to choose from; his choice is not to be considered in the light of the fact that a later stage when the emergency can be viewed on a different basis, another method may be adjudged to have been a more proper or the most proper or rather the most satisfactory method in the circumstances.

The Magistrate must maintain the peace of his District as between the warring parties until the forth coming decision of the Civil Court by the means at his disposal which he shall adjudge most appropriate to and most effective in the circumstances. A.I.R. 1934 Pat. 308=13 Pat. 76=35 Cr. L.J. 1009=149 Ind. Cas. 959 (1).

4. Disobedience of order.

—S. 144—Disobedience of order.

——Where an offence under S. 188, I.P.C., is committed by disobedience of orders of the Sub-Magistrate issued under S. 144 Cr. P.C., no cognizance can be taken of this case without a proper complaint by that Magistrate as enacted by S. 195, Cr. P.C., and in any case, the very Sub-Magistrate cannot hear and decide the case himself. A. I. R. 1939 Mad. 496=49 M. L. W. 474=1939 M.W.N. 340=(1939) 1 M.L.J. 573=40 Cr. L.J. 752=183 Ind. Cas. 240.

——**Ss. 144, 195, 487—Disobedience of order—Magistrate passing order under S. 144, Criminal P.C., if can take cognizance of offence under S 188, Penal Code—Proper procedure—** Penal Code (Act XLV of 1860), S. 188.

A Magistrate passing an order under S. 144, Criminal P.C., cannot take cognizance of an offence under S. 188, I.P.C., for disobedience of his own order; he must make a complaint under S. 195; S. 487 of the Criminal P.C., prohibits the trial of the case under S. 188 in these circumstances by the Magistrate. 164 Ind. Cas. 434 (2)=61 C.L.J. 579=39 C.W.N. 1053=37 Cr. L.J. 936.

—S. 144—Disobedience of order—charge under Penal Code S. 188—Magistrate arguing from the general to the particular—Legality—'Promulgated', meaning of.

Where the accused, on being served with a notice under S. 144, Criminal P.C., to abstain from constructing or proceeding with the construction of a certain work, disobeyed the order and was charged under S. 188, I. P. C., and the Magistrate, in convicting him, condemned such conduct of the accused as to tending to cause an affray:

Held, that the Magistrate erred in arguing from the general to the particular whereas he ought to have come to the conclusion from the actual facts of this case as to whether or not there was a tendency for an affray to be caused.

Quoere.—Whether the order made on an ex-parte application and privately served on the accused under S. 144, Criminal P. C., can be rightly described as an order 'promulgated', by a public servant lawfully empowered to promulgate such order. A.I.R. 1932 Cal. 868=33 Cr. L. J. 829=36 C.W.N. 792=139 Ind. Cas. 739.

—S. 144—Disobedience of order—Legality and disobedience distinct.

The question whether an order was a legal order is an entirely distinct question from the question whether an offence has been committed in disobeying it. If the order promulgated was a legal order, the Court has only to see whether the accused disobeyed that order and whether, if so, such disobeyed caused or tended to cause the effects specified in the second or third paragraphs of S. 188. 73 Ind. Cas. 801=45 All. 526=24 Cr. L. J. 689=A.I.R. 1923 All. 606.

——**S. 144—Disobedience—Order under.**

A prosecution for disobedience of an order under S. 144, where there is no suggestion that the petitioners were in any sense creating a disturbance must prove infructuous and an order directing such prosecution must be set aside. 19 Cr. L. J. 739=22 C.W.N. 599=46 Ind. Cas. 515.

——**Ss. 144 and 195—Disobedience—Prohibition order passed without evidence—Prosecution** for disobedience of order not properly passed —Cognizance of case under S. 188 Penal code by the same Magistrate who passed the order disobeyed.

A servant of the first party filed a complaint before the Sub-Divisional Magistrate stating that the second party was about to construct a drain and if the party opposed the other there was a likelihood of a breach of the peace; on this the Magistrate without taking any evidence issued an injunction under S. 144, Cr. P. Code against the second party. On the next day of the complaint of the same man the Magistrate summoned the second party under S.188, I.P.C. Subsequently he transferred the case to a Magistrate with second class

powers and again withdrew it from his file and sent it to the additional District Magistrate. Held, that the order under S. 144, should never have been passed that the proceedings were wholly irregular, that in summoning the second party under S. 188 the Sub-Divisional Magistrate was taking cognizance of the offence under S. 476, Cr. P.C., or an applciation for sanction under S. 195. Cr.R.C., was necessary. The proceedings under S. 188, I.P.C. were also set aside and also the order under S. 144, which was the basis of those proceedings although that order was not in force. 20 C. W.N. 981=17 Cr. L. J. 464=36 Ind. Cas. 144.

——S. 144.

5. Dispute about land.

Synopsis.

a. Action under S. 145 more appropriate.
b. Application of Ss. 107, 144 and 145.
c. Breach of peace.
d. If can be assumed to exist from institution of proceedings under S. 144.
e. If can be dealt with under S. 144.
f. Inquiry.
g. Jurisdiction of Criminal Court.
h. No real dispute as to possession.
i. Order under S. 144—Effect of.
j. Order under S. 144—Evidentiary value.
k. Possession.
l. Power of Magistrate.
m. Proceedings under S. 144 and S. 145—Distinction.
n. S. 144—When applies.

——S. 144—Dispute about land—Action under—S. 145 is more appropriate than under S. 144.

The rent-decree is to some extent evidence under S. 13 of Evidence Act as to the landlord having recognized the holding as being in possession of the 1st party (deft.) but that evidence is not conclusive as against the 2nd party in proceedings under S. 144 (who was not party to rent proceeding). The order of the Magistrate under S. 144 based on the rent-decree is good inasmuch as passed with a view to prevent a breach of the peace which is then imminent. The more appropriate action however would be for the Magistrate after hearing the parties to convert his order under S. 144 into a proceeding under S. 145 so as to, once for all, determine the right of the contending parties to the possession of the land in question, unless it has been already determined by a Civil Court. 1 P.L.T. 81; 1 P.L T. 44, Ref. 65 Ind. Cas. 856=3 Pat. L. T. 570=23 Cr.L.J. 200=A.I.R. 1922 Pat. 557.

——Ss. 144 and 145—Dispute about land—Action under S. 145 should be preferred to that under S. 144.

A.I.R. 1935 Pat. 224=1 B.R. 387=36 Cr. L. J. 655=155 Ind. Cas. 88.

——Ss. 144, 145—Dispute about land—Action under S. 145, when should be taken.

When, in the course of a proceeding under S. 144, Criminal P. C., the Magistrate finds that there is a bona fide dispute as to possession of land likely to cause a breach of the peace, he is bound immediately to take action under S. 145. A.I.R. 1940 Sind 158=41 Cr.L.J. 952=I.L.R. (1940) Kar. 508=190 Ind. Cas. 618.

——Ss. 144 and 145—Dispute about land—Action under S. 145 is more appropriate.

Where the dispute concerns a plot of land the only effective way in which it can be settled so far as the Criminal Court is concerned, is by instituting a proceeding under S. 145, Cr. P. Code. The practice of resorting to proceedings under S. 144, Cr.P.Code in cases of disputes concerning lands has been all along condemned. The order under S. 144 was therefore set aside. 1 Pat.L.T. 72=21 Cr.L.J. 241=55 Ind. Cas. 193.

——Ss. 144 and 145—Dispute about land—Action under S. 145 appropriate.

S. 144 of the Cr. P. Code is applicable only to temporary orders in urgent cases of nuisance or apprehended danger and not to cases where there is a dispute as to land for the settlement of which S. 145 provides the appropriate remedy. 19 Cr.L. J. 1002=48 Ind. Cas. 342.

——Ss. 144 and 145—Dispute about land—Application of Ss. 107, 144 & 145.

In a dispute relating to property, where the first party claim to be in exclusive possession and the second party claim to be in joint possession, if the property is found to be in joint possession of both the parties, then no order under S. 145 can be passed and the danger to a breach of the peace by the contending parties can only be averted or avoided by binding both the parties under S. 107, for none of them has a right to exclude the other from joint possession. If, on the order hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the exclusive possession of the other party, and if possible by binding him down. It is only when after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint, an order under S. 144 or 107 against one of the parties will not be justifiable. Such an order will prejudice the other party and will exclude him from the possession of the property whether exclusive or joint. No Court by its proceeding or order can allow such an advantage to one of the parties. Therefore in a dispute of this kind the danger to a breach of the peace can be averted by issuing a temporary order upon both the parties under S. 144 if the case is of urgency and holding an enquiry into the possession of the parties before confirming the order. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 by attaching the property in dispute pending the enquiry. A.I.R. 1922 Pat. 228.

——Ss. 144 and 145—Dispute about land—Breach of the peace.

——A temporary order under S. 144 might be proper when the right of a party is clear and there is a threatening invasion of that right by another party. But where there is a doubt as to the right of the parties to be in possession of immovable property, the proper procedure is under S. 145 of the Cr.P.Code or under S. 146. It is inequitable by an order under S. 144 to usurp the functions of the Civil Court and restrain one of the parties when the matter in dispute admits of reasonable doubt. 1 Pat. L.T. 44=20 Cr.L.J. 829=53 Ind. Cas. 829.

——S. 144—Dispute about land—If can be assumed to exist from the Institution of proceedings under S. 144.

It is hardly justifiable to assume that there is a genuine dispute between landlord and tenant, merely because proceedings under S. 144 have been instituted. 11 B.R. 118 (Rev.).

——Ss. 144, 145—Dispute about land—If can be dealt with under S. 144.

On an application alleging that there was a dispute likely to lead to a breach of the peace about the possession of a certain plot of land, proceedings under S. 145, Criminal P. C., should be instituted. An **ex parte** order under S. 144, is ill-advised and an order to the Police to reap the paddy standing on the land is absolutely illegal. When the order under S. 144 has been set aside and no further proceedings under Ss. 145 or 146 are taken, it is illegal to direct the Police to thrash the paddy, to sell it and to deposit the money in Court to lie there indefinitely. A.I.R. 1942 Cal. 66 (1)=45 C.W. N. 1090=43 Cr. L. J. 396=198 Ind. Cas. 559.

——S. 144—Dispute about land—If can be dealt with under S. 144.

Dispute regarding land can also be dealt with under S. 144 provided that in the opinion of an authorised Magistrate, "there is sufficient ground for proceedings under this section and immediate apprehension or speedy remedy is desirable". Orders passed under this section, however, are merely "temporary orders in urgent cases of apprehended danger" and cannot remain in force for more than two months (unless in certain cases, the Provincial Govt., by notification in the Official **Gazette** otherwise directs). They are further not always passed in strict conformity with the legal rights of private parties, but may in proper cases constitute an interference with private rights required in a temporary emergency. Nor is it to be expected, having regard to their temporary and urgent character, that they would be passed after taking evidence of possession in the manner laid down in S. 145 (4) so as to entitle the Magistrate judicially to pronounce on the fact or possession. This is the reason why such orders are often said to decide nothing about the respective rights of parties. A.I.R. 1942 Pat. 331=23 P.L.T. 243=43 Cr.L.J. 637=8 B.R. 670=200 Ind. Cas. 316.

——Ss. 144, 145—Dispute about land—If can be dealt with under S. 144.

If there is a dispute regarding possession of land likely to cause a breach of the peace and requiring a definite decision regarding the possession of land, the normal procedure for the Magistrate to follow is that laid down in S. 145, Criminal P. C. unless the claim of one party is on the face of it a mere pretence so that it can be said that there is no real dispute. Though a Magistrate's powers under S. 144 are very wide, the Court must deprecate the habitual and unjustifiable use of S. 144, as a substitute for Ss. 107 and 145. A summary procedure under S. 144, should not be substituted in cases in which without possible doubt proceedings under S. 145 can be taken. A.I.R. 1940 Pat. 382=7 B.R. 54=41 Cr.L.J. 907=190 Ind. Cas. 425.

——Ss. 144, 145—Dispute about land—If can be dealt with under S. 144.

There is no justification for periodical recourse to S. 144, Criminal P. C., on the plea of emergency in cases where emergency exists only by reason of neglect of the authorities to take proper order when the facts first came to their notice. What the Court deprecates is the habitual and unjustifiable use of S. 144, as a substitute for Ss. 107 and 145. A.I.R. 1940 Sind 158 =41 Cr. L.J. 952 =I.L.R. (1940) Kar. 508 =190 Ind. Cas. 618.

——Ss. 144, 107, 145—Dispute about land—If can be dealt with under S. 144.

It cannot be laid down as a general proposition that an order under S. 144, Criminal P.C., cannot be passed without taking evidence nor can it be said that in every case of dispute regarding land, S. 144 is inappropriate and proceedings ought to be had under S. 107 or S. 145, Criminal P. C. S. 144 is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of **bona fide** disputes as to possession of land. But where S. 107 or S. 145 will meet the requirements of the case, S. 144 is not an appropriate remedy and if it is found that the danger was not so imminent that it could not be otherwise averted, an order under S. 144 will generally be held to have been made without jurisdiction. What the Court deprecates is the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145. Where it can be shown that upon the information before the Magistrate the conditions required by S. 144 had not been established so that the use of S. 144 instead of S. 107 or S. 145 was a mere abuse of process of the Court, or, that though made with jurisdiction, the order had resulted in something akin to the denial of the right of fair trial, then the High Court will certainly interfere in exercise of their powers of superintendence.

Though a Magistrate can pass an order under S. 144 in a case where one party not in good faith is merely setting up a pretence of claim and not a **bona fide** dispute but it cannot be considered to be a good practice habitually to prejudge without evidence both the merits of the dispute and the question whether it is **bona fide**. Magistrates are entrusted with wide powers to enable them to discharge their important duty of providing for the prevention of a breach of the peace; but such powers are not intended to be habitually used for the settling of disputed points which call for a decision on evidence. 159 Ind. Cas. 455=2 B.R. 83=37 Cr.L.J. 95.

——S. 144—Dispute about land—If can be dealt with under S. 144.

——Where a person simply wants to enforce his right to possession of property, the criminal courts ought not to lend him their aid under S. 144. 119 Ind. Cas. 166=2 M. Cr. C. 302=30 Cr. L. J. 1010=1929 Cr. C. 613=A. I. R. 1929 Mad. 845.

——S. 144—Dispute about land—Inquiry.

——A Magistrate can rely on the documentary evidence as to title to corroborate the oral evidence as to possession, even if the oral evidence were not quite satisfactory. 65 Ind. Cas. 853=1922 M. W. N. 12=15 M. L. W. 62=23 Cr. L. J. 197=A. I. R. 1922 Mad. 188.

——S. 144—Dispute about land—Jurisdiction of Criminal Court—The decree of a Civil Court and delivery of possession cannot be opened by a Criminal Court.

The Criminal Court is bound to maintain the auction purchaser in possession of the property purchased by him after the passing of a decree by a Civil Court and the service of the writ of the delivery of possession. The Criminal Court cannot re-open the question of possession and investigate it under Ss. 107, 144 and 145 or in an enquiry of an offence under the Penal Code. The Magistrate has power under S. 145, to investigate into the actual service of the writ of delivery of possession. But

as soon as it is proved that the dakhaldahani has been effected, it is his duty to maintain the possession of the auction-purchaser. 66 Ind. Cas. 817=3 P. L. T. 335=23 Cr. L. J. 321=A. I. R. 1922 Pat. 197.

——S. 144—Dispute about land—Jurisdiction of Criminal Court. Where under a writ of Civil Court, possession of certain immovable properties was taken from one party and given to another, but the former party disputes the factum of the delivery itself, no order under S. 144 can be passed until that is decided. 71 Ind. Cas. 785=3 Pat. L. T. 826=24 Cr. L. J. 241=A. I. R. 1922 Pat. 13.

——Ss. 144, 145—Dispute about land—No real dispute as to possession—Imminent danger of breach of peace—Order under S. 145, when becomes necessary.

It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to S. 145, Cr. P. C., becomes necessary and for this purpose, the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. Where there is no such real dispute orders under S. 144 are not improper. There may even be occasions where an order is first appropriately passed under S. 144 and the proceeding is afterwards converted into one under S. 145, in order to pass an even more appropriate and permanent order.

Where A is in possession of the land and continuing it and B is trying to take the possession of the same land and the police report that there is imminent danger of a breach of the peace, an order under S. 144 is proper one as there is no real dispute about possession at all. A. I. R. 1940 Pat. 492=6 B. R. 428=41 Cr. L. J. 417=187 Ind. Cas. 139.

——S. 144—Dispute about land—No real dispute.

——Where a Magistrate on the materials before him finds that there was no bona fide dispute as to actual possession, but the opponent was merely trying to get into possession, order under S. 144 is warranted and is the best means of preventing the imminent breach of the peace. Even in bona fide dispute as to possession of land S. 144 may be legally and properly utilized. 115 Ind. Cas. 683=30 Cr. L. J. 510=10 P. L. T. 512=12 A. I. Cr. R. 309=1929 Cr. C. 198=A.I.R. 1929 Pat. 415.

——Ss. 144 and 145—Dispute about land—Order under S. 144—Effect of.

The existence of an order under S. 144 against the landlord does not preclude the Court from finding in a proceeding under S. 145 that the landlords were in possession through the tenants. 36. Cal. 370=13 C. W. N. 530=9 Cr. L. J. 399=1 Ind. Cas. 817.

——S. 144—Dispute about land—Order under S. 144—Evidentiary value.

The decision in a proceeding under S. 144, Cr., P. Code, is not by itself evidence of possession; but it is a circumstance supporting the inference that the party in whose favour the proceeding terminated would not be likely to allow his possession to be disturbed from any part of the property and that is a factor which may be considered. 4 A. I.Cr. D. 395.

——S. 144—Dispute about land—Order under—Evidentiary value.

The judgment under S. 144, is not the evidence of possession of the party in whose favour the proceeding may have terminated even though the Magistrate may have restrained the opposite party from going upon the land as a result of his decision that the other party was in possession. A.I.R. 1945 Pat. 453=24 Pat. 379.

—S. 144—Dispute about land—Order under—Evidentiary value.

An order under S. 144, should not be treated as sub-stantive evidence of possession in a case of rioting. No importance should be attached to a temporary injunction under S. 144, which is intended for emergencies. The judgment in such a case is certainly not admissible as a judgment. The fact of the order may be admissible under S. 13 of the Indian Evidence Act but having regard to the peculiar jurisdiction conferred by S. 144, no inference can be drawn from it as to the possession. 81 Ind. Cas. 535=3 Pat. L.R.Cr. 27=5 P.L.T. 656=1924 P.H.C.C. 29=25 Cr.L.J. 919=A.I.R. 1925 Pat. 17.

—S. 144—Dispute about land—Possession.

——If a person in possession of property is temporarily dispossessed by an ex parte order under S. 144 and his application to set aside that order is dismissed only on ground that time for which order was in force expired, re-entry into possession by person so dispossessed cannot be wrongful dispossession of person who obtained temporary possession on account of ex parte order. A.I.R. 1943 Mad 402=(1943) 1 M.L.J. 259=1943 M.W.N. 178=56 M.L.W. 220=44 Cr.L.J. 557=206 Ind. Cas. 630.

—Ss. 144 and 145— Dispute about land—Possession—Bona fide dispute as to—proper way is to proceed under S. 145 and not under S. 144, Cr.P.C. A.I.R. 1940 Pat. 471=21 P.L.T. 326=6 B.R. 464=41 Cr.L.J. 451=187 Ind. Cas. 349.

—Ss. 144 and 145—Dispute about land—possession—Dispute as to—Decision on documents.

Unless the possession of a party is undisputed, S. 144 Cr. P. Code can have no application and a Magistrate has no jurisdiction to pass final orders under S. 144. Where the dispute related to the possession of lands and the Magistrate upon a perusal of certain documents, by which other lessees had relinquished their possession in favour of the opposite party, passed orders under S. 144 against the petitioners who were lessees of the disputed lands. Held, that the magistrate, ought to have instituted proceedings under S. 145 Cr.P. Code and after taking evidence as to actual possession in respect of the disputed land, decided the case effectively and conclusively, so far as the Criminal Courts are concerned. 1 Pat. L. T. 377=21 Cr.L J. 646=57 Ind. Cas. 662.

—Ss. 144 and 145—Dispute about land—Possession—Dispute as to—Procedure.

Where the questions of possession is in dispute the proper procedure is to act under S. 145 but in cases of great emergency a Magistrate can act under S. 144. (1917) U.B.R. 17=18 Cr L.J. 967=32 Ind. Cas. 327.

—Ss. 144,145—Dispute about land—Possession—Dispute as to—Procedure:—In a dispute regarding land when the question of possession is disput-

ed between the parties, the proper procedure to be adopted by the Magistrate is to pass an order in a proceeding under S. 145, Cr.P.C., deciding the question of possession on evidence, and not an order in a proceeding under S. 144 Cr.P.C. Where in a proceeding under S. 145, Cr.P.C., the Sub-Divisional Magistrate holding that the 1st party were in possession, directed the 2nd party to refrain from interfering with that possession, but the District Magistrate in revision, hold ng that the 2nd party were entitled to possession, directed them to continue in possession and prohibited the 1st party from interfering with their possession:—Held, that both orders were bad in law:—11 C.W.N. 271.

—S. 144—Dispute about land—Possession—Expression of opinion as to—Value of.

Any expression of opinion on the question of possession in favour of one party or the other under S. 144, Criminal P.C., is not of a permanent nature. Such an order is passed in summary proceedings and cannot affect the real rights of the parties on the question of possession. A.I.R. 1940 Pat. 364=41 Cr.L.J. 384=6 B.R. 396=186 Ind. Cas. 806.

——S. 144—Dispute about land—Possession—observations as to.

——Where a Magistrate while making an order under S. 144 makes an incidental observation as to possession of the property, the observation cannot have the force of an order under S. 145. 88 Ind. Cas. 845=6 P.L.T. 746=3 Pat. L.R.Cr. 70=26 Cr.L.J. 1229=A.I.R. 1925 Pat. 514.

—S. 144—Dispute about land—Power of Magistrate.

——The Magistrate, without any enquiry as to who actually grew the crop, has absolutely no right to direct a particular person to take possession of the land and to arm that person with the police force in order to cut and remove tbe crops from land which, according to the previous history of the litigation, was full of complication, 61 Ind. Cas. 794=2 P.L.T. 455=22 Cr.L.J. 442=A.I.R. 1921 Pat. 415.

—Ss. 144 and 155—Dispute about land—Proceedings under Ss. 144 and 145—Distinction.

Where a probability of breach of peace exists, over a dispute concerning immovable property a proceeding under S. 145 is proper. A proceeding under S. 144 relates only to a temporary order in emergent cases of apprehended danger. 1 Pat. L.T. 369=21 Cr.L.J. 625=57 Ind. Cas. 449.

—S. 144—Dispute about land—S. 144, when applies.

——It is only when the possession is either undisputed or clear beyond any shadow of doubt that S. 144 of the Code applies. Where the possession is disputed, S. 144 of the Code has no application. The effective and the proper section is S. 145 of the Code. A Magistrate has no jurisdiction to pass an order which is virtually one of ejectment in a civil suit. 63 Ind. Cas. 621=2 P.L.T. 484=22 Cr.L.J. 685=A.I.R. 1921 Pat. 392.

—Ss. 144 and 145—Dispute about land—S. 144, when applies.

A District Magistrate cannot set aside an order of a Magistrate against one party and substitute a similar order against the opposite party. If it is clear from a perusal of the police report that the claim of the disturber of the peace is a mere pretence, a Magistrate is justified in acting under S. 444. The party entitled to possession should not be harassed by proceedings under S. 145. 3 Pat. L.J. 287=4 Pat. L.W. 357=19 Cr.L.J. 880=47 Ind. Cas. 76.

6. Duration of order.

——S. 144—Duration of order.

An order under S. 144, Criminal P. C., can at the most be effective for two months. A.I.R. 1941 Mad 498=I.L.R. (1941) Mad. 544=1941 M.W.N. 250=(1941) 1 M.L.J. 322=53 M.L.W. 315=43 Cr. L.J. 433=198 Ind. Cas. 793.

——S. 144—Duration of order—Order under S. 144—Breach of—Order withdrawn—Person if can be charged and tried for breach, subsequently.

An order made under S. 144, Criminal P. C., cannot operate for more than two months unless Govt. otherwise directs. When such an order is withdrawn on a particular date, the position is exactly the same as if the original order had been restricted to that date, and a person can, therefore, be charged with committing an offence against the order at the time when it was in operation. The fact that he was tried after the order had ceased to be in operation is entirely irrelevant. A.I.R. 1940 Bom. 195=42 Bom.L.R. 356=41 Cr.L.J. 675=188 Ind. Cas. 744.

——S. 144—Duration of order.

——Where an order under S. 144 has expired, the Local Govt. cannot resuscitate it by extension under S. 144 (6). A.I.R 1940 Lah. 459=42 P.L.R. 786=42 Cr.L.J. 90=191 Ind. Cas. 162.

——S. 144—Duration of order—Permanent injunction not provided by law—Revision.

S. 144 authorizes the passing of provisional order to get over temporary emergencies and does not authorise Magistrates to grant a permanent injunction prohibiting processions for an indefinite period. The High Court could interfere under S. 107 of the Government of India Act with an improper order. 25 M.L.J. 370=14 Cr.L.J. 589=21 Ind. Cas. 381.

——S. 144—Duration of order—Persons to whom addressed—Presumption.

If an order under S. 144 specifies no time during which it is so be in force, the reasonable presumption is that it would operate for two months and not indefinitely. An order under S. 144 (3) may be addressed to the public generally when visiting a particular place but not to the public indefinitely. (1919) M.W.N. 872=10 L.W. 480=20 Cr. L.J. 755=53. Ind. Cas. 483.

——S. 144—Duration of order—Starting point.

It is settled law that the period of two months during which the order under S. 144, Criminal P.C., remains in force runs not from the date the Magistrate passes his order but from the date on which the first notice is issued. A.I.R. 1942 Pat. 414=8 B.R. 722=43 Cr.L.J. 722=23 P.L.T. 644=200 Ind. Cas. 776.

——Ss 144, 145—Duration of order—Starting point—Dispute as to possession of immovable property—proceeding under S. 145 should be preferred to that under S. 144.

The period of sixty days referred to in S. 144, Criminal P. C., begins to run from the date on which the notices are issued;

Held, on the materials before the Court, that it would not interfere after the order had spent itself.

Where the dispute is with regard to possession of immovable property, a proceeding under S. 144 of the Criminal P.C., is a poor substitute for a proceeding under S. 145 which settles once for all so far as the Criminal Courts are concerned, the question of possession with regard to a particular piece of immovable property. Such cases should be decided under S. 145. A.I.R. 1935 Pat. 224=1 B.R. 387=36 Cr. L.J. 655=155 Ind. Cas. 88.

——S. 144—Duration of order—Order issuing notice under S. 144—Subsequent confirmation of the order on cause shown whether extends the period of operation of the first order:— Where the Magistrate made an order issuing notice under S. 144, Cr. P.C., against a person not to do a certain thing and directed him to show cause on a subsequent day against the order and on such cause being shown he refused to withdraw the order: Held, that the order issuing the notice was an order under S. 144, Cr. P. C., and as such could remain in force for two months from its date and the confirmation of the said order on a subsequent day on cause being shown could not extend the period of its operation beyond these two months. 13 C.W.N. 195=4 Ind. Cas. 590=11 Cr. L.J. 12.

—Ss. 144, 555—Duration of order — Time for which prohibitory order to remain in force, not specified — Legality—S. 144 (5):— Where an order was passed under S. 144, C. P. C, without specifying the time for which the order should remain in force: Held: That the order is not bad merely because it does not state that its operation is confined to two months or some shorter period from the making thereof. Under the provisions of Cl. (5), S. 144, Cr. P.C., an order under S. 144 only enures for a period of two months and, therefore, unless there is something to the contrary in the order it must be presumed that the order is to be limited to the period of two months specified in the code. Brett, Stephen, Woodroffe, Mookerjee. 11 C.W.N. 942=34 C. 897=6 C.L.J. 186 (F.B.)

7. Duty of authorities.

——S. 144—Duty of authorities—Performance of festival in the public road before a temple—Rival claims by parties—Danger to public peace -Interference by authorities—Exercise of rights under a Civil Court decree—Whether can be restrained.

It is not the duty of the authorities who are responsible for the preservation of the public peace to enforce a Civil Court decree or carry out the observations of the Court in all circumstances and at all costs. The preservation of the public peace is the function of the authorities and the magistracy and in the performance of that function it may be necessary for them to override temporarily private rights and where there is conflict between the public interest and a private right the former must prevail. The authorities are the proper Judges on the question whether civil rights can be allowed to be exercised without danger to public peace. This rule is applicable equally to cases where there are competing and rival claims by two parties to the exercise of a right such as the performance of a festival in the public road before a temple. 1948 M.W.N. 685=61 M.L.W. 797=A.I.R. 1949 Mad. 212=50 Cr. L.J. 235=(1948) 2 M.L.J. 458.

8. Duty of Court.

——S. 144—Duty of Court—Duty of Magistrate to ascertain possession.

An order under S. 144, Cr. P. Code, should not be made without an investigation as to the true facts of the case. The Magistrate must ascertain upon evidence who is in possession and if it is necessary he then can issue an order restraining other persons from interfering with such possession. 53 C.W.N. 487=3 A.I. Cr. D. 390.

——S. 144—Duty of Court—Order under S. 144 interfering with liberty of press, when should be passed.

The right of the public to have news published is common to all countries where there is liberty of the press and it is the right of all newespapers equally to publish news provided it does not offend against any existing law. It is obvious, therefore, that the powers given to a Magistrate under S. 144, Criminal P. C., to interfere with the liberty of the press should be used very sparingly and only for good cause shown. It is for this reason that S. 144 itself makes it obligatory for the Magistrate in any such order to indicate the material facts which justify such an order. Not only is it necessary to state the material facts but that there must be urgency in the matter. A.I.R. 1942 Lah. 171=44 P.L.R. 297=43 Cr. L.J. 747=I.L.R. (1942) Lah. 510=201 Ind. Cas. 572 (F. B.).

——S. 144—Duty of Court—Order under S. 144—Jurisdiction to pass—"Material available"—Source of.

If on the material available to him, the Sub-Divisional Magistrate thinks that an order under S. 144, of the Criminal P. C. is necessary, it is his duty to pass such an order. Whether the material is gathered by himself or by the Sub-Magistrate is irrelevant. A.I.R. 1942 Mad. 20 =1941 M.W.N. 867 (1)=43 Cr. L. J. 372=198 Ind. Cas. 109.

——S. 144—Duty of Court—Magistrate should have regard to exact statutory provisions.

It would be well if in issuing orders under S. 144, District Officers have regard to the exact terms of the statutory provisions under which they purport to act. A.I.R. 1941 All. 70=(1940) A.L.J. 885=42 Cr. L.J. 298=1940 A.W.R. (H. C.) 642=I.L.R.(1941) All. 186=192 Ind. Cas. 466. (F.B.).

——Ss. 144, 145—Duty of Court—Exercise of powers under S. 144.

It is true that S. 144, Criminal P. C., gives wide powers to the Magistrate and that imminent danger to the public peace justifies the subordination of private interests. At the same time care should be taken to see that use of this section is not invoked by one party to a dispute in order to obtain material advantage over the other. A.I.R. 1940 Sind 158=41 Cr. L.J. 952=I.L.R. (1940) Kar. 508=190 Ind. Cas. 618.

---S. 144—Duty of Court—Order under S. 144 should be in clear terms.

As S. 144, Criminal P. C., empowers a Magistrate to interfere materially with the liberty of the subject, it is necessary that he should promulgate his order in terms sufficiently clear

to enable the public, or persons affected by it to know exactly what it is which they are prohibited from doing. A.I.R. 1935 Bom. 33=36 Bom. L. R. 1129=36 Cr. L.J. 547=154 Ind. Cas. 637.

——S. 144—Duty of Court—Locality to which order is applied should be clearly defined.

An order under S. 144, Criminal P. C., especially when it is directed aginst the public generally, involves a considerable infringement upon the rights of the public and very often a considerable interference with the legitimate activities of the public. It is necessary, therefore, that the operation of such orders s ould be kept within the narrowest possible limits, and that the place or locality to which they are applied should be so clearly defined as to enable the public to know at once what the prohibited area is and to obviate the possibility of people disobeying the order through ignorance of the place to which it is applied. A.I.R. 1934 Bom. 375=36 Bom. L. R. 733=36 Cr. L. J. 130=59 Bom. 27=152 Ind. Cas. 701.

——S. 144—Duty of Court.

—It is the duty of Criminal Court to respect, maintain and preserve the possession given by the Civil Court. It is the duty of the Criminal Court to give all the help provided by law to the man who has been put in possession of a property by the Civil Court. A.I.R. 1934 Pat. 565=1 B.R. 65=36 Cr. L. J. 146=15 P.L.T. 819 =152 Ind. Cas. 591.

——S. 144—Duty of Court—Protection of lawful rights.

Where a Magistrate passed three ex parte orders in the space of six months which, in effect, banned all processions along all the streets of a town and at the same time refused to enquire into the rights set up by the parties:

Held, that when the Magistrate acted under S. 144, Criminal P. C., it was his duty to give an early opportunity to any person or persons aggrieved by that order to show cause against it to see if that order has to be rescinded or altered, and that he had, for that purpose, to consider whether the claims advanced by one or other of the parties are within or in excess of their legal and natural rights and whether any alterations or restrictions to the order already passed are reasonably necessary in order to obviate undue hardship to one or the other of the parties and to see that protection is given to the persons who act within the bounds of their legal and natural rights without being molested by the breakers of law, having at the same time due regard to the paramount necessity of preserving public tranquillity.

Although a Magistrate acting under S. 144 is not to usurp the functions of a Civil Court, he has to take into consideration the nature of the claims set up by the parties to see if it is possible to afford protection to those who seek only the lawful exercise of any legal and natural rights. A.I.R. 1932 Mad. 294=(1932) M.W. N. 144=62 M.L.J. 392=35 M.L.W. 366=33 Cr. L. J. 605=138 Ind. Cas. 354.

——Ss. 144, 145—Duty of Court—Order prohibiting people joining 'Morning Rounds'—Objection by public—Duty of Magistrate to record evidence under S. 144. whether administrative or judicial.

An order by a District Magistrate under S. 144 prohibiting the holding of Prabhat Pheris (Morning Rounds) by the public within a local area is a judicial and not an administrative order.

In such a case, the Magistrate must keep an open mind and record at least a reasonable portion of the evidence essential for the judicial determination of the objections raised by the members of the public under S. 144 (5).

An order under S. 144, Criminal P. C., addressed to the public generally must be limited under Sub-S. (3) to the public when frequenting or visiting a particular place. A.I.R. 1931 Bom. 325= 33 Bom. L. R. 673=32 Cr. L.J. 1144=134 Ind. Cas. 344.

——S. 144—Duty of Court.

——Where a District Magistrate is formulating an order under S. 144, it is incumbent upon him to show two things quite plainly. The first of all, the thing which is prohibited and secondly, the persons who are prohibited. It is not fair to leave people in doubt as to whether they are prohibited from doing a thing or not. To include among the class of persons prohibited "any other persons who are or may be concerned in the project" is too vague. A.I.R. 1931 Bom. 135=32 Cr. L.J. 507=33 Bom. L.R. 59=55 Bom. 322=130 Ind. Cas. 396.

—S. 144—Duty of Court.

——The preservation of the public peace is a function of the Government and in the performance of that function, it may be necessary for them to override temporarily private rights. Where there is a conflict between the public interest and a private right, the former must prevail. 6 Mad. 203, Rel. on. 11 A.I.Cr.R. 385=112 Ind. Cas. 863=51 Mad. 1006=1 M.Cr.C. 50=30 Cr.L. J. 31=1928 M.W.N. 615=28 M.L.W. 406= A.I.R. 1928 Mad. 1049=55 M.L.J. 442 (F.B.).

—S. 144—Duty of Court.

——It is the duty of the executive to uphold the civil rights declared by Civil Courts by all means available before resorting to S. 144. 100 Ind. Cas. 709=25 M.L.W. 375=28 Cr.L. J. 325=7 A.I.Cr. R. 53=A.I.R. 1927 Mad. 368=52 M.L.J. 298.

—S. 144—Duty of Court—Civil Courts' opinion must be given effect to by Criminal Courts—Extension of order is void.

Where the Civil Court has passed an order of temporary injunction against one party, implying that in its opinion, the petitioner had a prima facie right, it is the duty of Criminal Courts to respect the opinions of Civil Courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others. The High Court views with disapproval the use of S. 144 for anything of the nature of a permanent expedient. The word 'alter' in S. 144 (4), does not justify the substitution for an addition to the party against whom the original order is directed. Orders under S. 144 are void as mere extensions and can be valid only as fresh orders. 27 M.L.J. 628; 3 Pat. L.J. 130, Foll. 69 Ind. Cas. 369=16 M.L.W. 452=1922 M.W.N. 612= 23 Cr.L.J. 689=A.I.R. 1923 Mad. 15.

——S. 144—Duty of Court—Duty to preserve rights under civil court's decree:—An order under S. 144, Cr. P.C., made or affirmed contrary to an existing decree of the civil court

in respect of the same lands, is illegal where the dispute was between a landlord and a tenant and the landlord obtained a decree for khas possession in respect of such lands as had been leased to the tenant. The fact that the landlord was unable to point out the particular lands of which he had obtained possession under the decree does not justify an order under S. 144, Cr. P. C., to keep the landlord out of such possession, it being on the tenant to show under the circumstances what lands he held from the landlord—6 C.W.N. 466.

9. Ex parte order.

——S. 144 (4)— Ex parte order—Refusal to hold enquiry and confirming of ex parte order—Legality.

When an application under S. 144 (4), Cr. P. Code, is made and when the applicant offers evidence to show cause against the continuance of the ex parte order against him, it is the obvious duty of the Magistrate to hold an enquiry and he cannot without holding that enquiry anticipate what the nature of the evidence would be and confirm his ex parte order. 1947 M.W.N. 483=60 L.W. 488 (2) =A.I.R. 1948 Mad. 117=49 Cr.L.J. 93=(1947) 2 M.L.J. 191.

——S. 144—Ex parte order under—Right of aggrieved party.

Under the law, an ex parte order under S. 144 of the Criminal P. C., may be made in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed. But when such an order is made under Cl. (4) of S. 144, a party aggrieved might appear before the Magistrate who had made the order ex parte and ask him to rescind or alter the order and Cl. (5) of the section says that where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him whether in person or by Pleader and showing cause against the order. A.I.R. 1934 Cal. 393=35 Cr.L.J. 881=38 C.W.N. 556=148 Ind. Cas. 773.

——Ss. 144 (2), (4), 439—Ex parte order under S. 144 (2)—Remedy of aggrieved party—Application to High Court—Propriety of.

Under S. 144 (2), Cr. P. C. the Magistrate may proceed only when immediate prevention or speedy remedy is desirable and he must be satisfied, among other things, that there is danger to human life or a disturbance of public tranquillity or a riot or an affray. Where an order under S. 144 (2) is passed ex parte the proper procedure is to apply under S. 144 (4) to the District Magistrate who has power to set aside the prohibitory order. Where the matter has to be disposed of expeditiously and the Magistrate adjourns the case, the High Court may be approached direct under S. 439, Cr. P. C. A.I.R. 1934 Cal. 139=35 Cr.L.J. 541=37 C.W.N. 962=147 Ind. Cas. 1090.

—S. 144—Ex-parte order.

——When an ex-parte order under S. 144 is called in question under cl. (4) of that section, the normal procedure should be for evidence to be recorded in the usual way by examination and cross examination of witnesses in open Court. The proceedings being a judicial one it is desirable whenever ppssible to adopt the normal procedure. A.I.R. 1931 Mad. 236=60 M.L.J. 378=1930 M.W.N. 841=32 Cr.L.J. 744=33 Mad. L.W. 632=131 Ind. Cas. 449 (2).

—S. 144—Ex parte order.

——S. 144 provides speedy remedy in cases of emergency and under sub-S. (2) a Magistrate can pass an ex parte order immediately on receiving a police report that he is satisfied that immediate action is necessary. Rescission or alteration of the said order can be sought by the aggrieved party under sub-sec (4). 77 Ind. Cas. 721=11 O.L.J. 54=25 Cr.L.J. 433=A.I.R. 1924 Oudh. 338.

—S. 144—Ex parte order.

——It is not proper for a Magistrate who has passed an ex parte order under S. 144, the propriety or legality of which is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject. 71 Ind. Cas. 516=35 C.L.J. 397=26 C.W.N. 663=24 Cr.L.J. 164=A.I.R. 1922 Cal. 569.

——S. 144—Ex parte order—When can be passed.

A Magistrate can pass an ex parte order under S. 144 only in cases of emergency or when there is no time to serve the notice. (1910) M.W.N. 354=8 M.L.T. 180=11 Cr.L.J. 449=7 Ind. Cas. 343.

10. General Order.

——S. 144 (3)—General order—Order to public at large—"Particular place," meaning of.

Under Sub-s. (3) of S. 144, Criminal P. C., an order can be directed to a particular individual or to the general public when frequenting or visiting a particular place. The power of the Magistrate under this section is confined to the direction to a particular person to abstain from acts of a certain character or to the public generally to abstain from similar acts when frequenting a particular place. When because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual, he can issue an order to the public generally, including besides residents, persons who may frequent or visit a particular place, and such order will be effective against each individual to whose knowledge it has come. The act of residing in a place includes the acts of frequenting or visting it. S. 144 (3) contemplates prohibition of some act on the occasion the particular place referred to in the order is frequented or visited. A "particular place," referred to in Subs. (3) may be a large area, and all that is necessary is that the place should be so sufficiently defined that the public is reasonably notified of its extent.

An order under S. 144 by the District Magistrate was as follows; "I hereby prohibit within the areas administered by the Cawnpore Municipality, the Cawnpore Cantonment Authority and the Juhi Notified Area Committee, any person from printing or publishing in any way any article, leaflet or pamphlet, etc., likely to increase a communal tension or to excite inter-communal feeling and lead to a breach of the public peace."

Held, that though the areas referred to in the order might have been more clearly defined, the description was sufficiently detailed as to leave no doubt in the minds of the residents therein. Consequently, the order was perfectly valid under S. 144 (3). A.I.R 1941 All. 70=(1940) A.L.J. 885=1940 A.W.R. (C.C.) 642=42 Cr. L.J. 298= I.L.R. (1941) All. 186=192 Ind. Cas. 466 (F.B).

——**S. 144 (3)—General Order—Words, "or to public generally when frequenting or visiting a particular place" meaning of—"Frequenting" whether excludes member of public occupying house within defined area from category of those who frequent that area.**

It would be putting a somewhat narrow construction on the word "frequenting" in S. 144 (3), Criminal P. C., to exclude a member of the public who occupies a house within a defined area from the category of those who frequent that area. The words "or to the public generally when frequenting or visiting a particular place" are wide enough to include all members of the public when within the defined area or at the defined place, whether he or she is present there 'frequently' e.g., as a resident—or merely casually or occasionally, e. g., as a "visitor."

An order under S. 144 must specify the place or area of its operation with such certainty that, in the minds of those to be affected by it. there can be no reasonable room for mistake. When the Act says that a "particular place" has to be defined, it means what it says, namely, that the public must be informed with certainty of the exact place in, at or within which the prescribed acts are forbidden to them. It must not be a matter of doubt, inference, calculation or inquiry. The order itself must define with particularity the place to which the prohibition extends. A.I.R. 1940 All. 465=(1940) A.L.J. 547=42 Cr. L.J. 120=1940 A.W R. (C.C.) 449=I.L·R. (1940) All. 662=191 Ind. Cas. 360.

——**S. 144—General order—Expression "particular place" in S. 144 (3), includes district within Magistrate's jurisdiction—Frequenting of "particular place", whether prohibited.**

The expression 'a particular place' is sufficiently wide to include the whole district over which a Magistrate may have jurisdiction.

But the public who can be affected by a prohibitory order of this nature must consist of those who ordinarily frequent or visit or have occasion to frequent or visit the district as a whole or some place within the district. The law does not contemplate the prohibition of the frequenting or visiting of the 'particular place' to which reference is made in Sub. s. (3) but the prohibition of some act on an occasion on which such place is frequented or visited. It would not, therefore, be reasonable to suppose that it could have been the intention of the Legislature to empower a Magistrate by means of an order under S. 144, Criminal P. C., to restrain the movements of the members of the public before they had occasion to frequent or visit the district over which he had jurisdiction, by forbidding them to frequent or visit the district at all. A.I.R. 1940 Cal. 358=44 C.W.N. 641=41 Cr.L.J. 864=I.L.R. (1940) 2 Cal. 110=190 Ind. Cas. 228.

——**S. 144—General order—Order prohibiting holding of meeting within certain area—Validity of.**

An order under, S. 144, addressed to the public forbidding them to hold meeting within a certain area is a definite order and does not contravene the provisions of S. 144. A distinction should not be drawn between a particular place and an area. A.I.R. 1939 Cal. 703=43 C.WN. 1061=41 Cr. .L.J. 105=I.L.R. (1939) 2 Cal. 507=184 Ind. Cas. 856.

——**S. 144 (3)—General order—Order under—Cl. (3), when can be issued to general public.**

It is clear from the terms of Sub-Cl. (3) of S. 144, that no order under S. 144, can be issued to the public generally except when "frequenting or visiting a particular place" and any order which ignores this limitation must be held to be bad in law. A.I.R. 1939 All. 746=1939 A.W.R. (H.C.) 711=(1939) A.L.J. 1011=41 Cr. L. J. 121=I.L.R. (1939) All. 934= 185 Ind. Cas. 172.

——**S. 144—General order—Operation of orders under S. 144 should be kept within the narrowest possible limits—Locality to which the orders are applied should be clearly defined—'Particular place, meaning' of.**

It is necessary that the operation of orders under S. 144, Criminal P. C., should be kept within the narrowest possible limits, and that the place or locality to which they are applied should be so clearly defined as to enable the public to know at once what the prohibited area is and to obviate the posssibility of the people disobeying the order through ignorance of the place to which it is applied. The words "particular place" should not be confined to a restricted area but should be construed as meaning a well-defined area regarding the boundaries of which the public can be in no doubt.

Where an order under S. 144 was passed forbidding "public meetings or public assemblies of more than five persons within the small town and the revenue estate of Qadian and any revenue estate immediately contiguous with them during the next two months except meetings for purposes of religion held in recognised places of worship":

Held, that the order was too vague to be effective in so far as it related to the revenue estates contiguous to Qadian and that the expression "the revenue estate of Qadian" was also vague as ordinarily, the boundaries of revenue estatees are not so clearly marked as to be apparent to the general public and hence the order as far as it related to the revenue estate of Qadian and the revenue estates contiguous thereto, was too vague to be effective. A.I.R. 1935 Lah. 679=36 Cr.L.J. 951 =37 P.L.R. 515=156 Ind. Cas. 526.

—**S. 144—General order—Meetings prohibited on roads, &c., situate within specified limits—Order, if prohibits meetings in public places.**

An order directed to the public when frequenting public or private streets in a particular city is sufficiently definite as to place to comply with requirements of S. 144.

Where an order under S. 144, Criminal P.C. directs the public to refrain from organising or taking part in meeting on any road, thoroughfare or street situate within certain specified limits, the order cannot be construed as prohibiting the doing of those acts in a public place like a temple or a graveyard. A.I.R. 1935 Bom. 33=36 Bom. L.R. 1129=36 Cr.L.J. 547=154 Ind. Cas. 637.

—S. 144—General order—Order directing public in general to abstain from attending a "hat"—Propriety of.

Although it is open to a Magistrate to make the order in such terms as holding a hat at or near a place in order that it may not be possible for the party against whom such an order is made to evade the terms of the order by removing the hat the holding of which is sought to be prevented, to a short distance, yet at the same time before a notice containing such terms is issued, there must be a proper determination of the question as regards the limits within which the order is to be operative.

An order under S. 144 of the Code, in so far as it directs the public in general to abstain from attending the hat is not warranted by the terms of Cl. (3) of S. 144 because such an order can only be against the public in general within the limitation imposed by that clause, namely, that it can be made against them only when frequenting or visiting a particular place. A.I.R. 1934 Cal. 393=35 Cr.L.J. 881=38 C.W.N. 556=148 Ind. Cas. 73.

—S. 144—General order.

An order under S. 144, Criminal P.C., may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place, namely, that it must be one, whether publicly or privately owned, which at the time, when the prohibition operates, the public frequent or visit. The public cannot, therefore, be prohibited from putting up national flags in private houses. A.I.R. 1931 Mad. 242=1930 M.W.N. 849=60 M.L.J. 370=33 M.L.W. 640=32 Cr.L.J. 763=131 Ind. Cas. 649.

—S. 144—General order—Legality.

Before a Magistrate can take action under S. 144, Criminal P.C., he must be of the opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order.

An order under S. 144, Criminal P.C., can be directed to the public generally only "when frequenting or visiting a particular place", such, for instance, as a market or a park or other place within a specified boundary. There is no power to direct the public generally simpliciter.

An order prohibiting the public generally from taking part in processios within the whole of the Municipal limits and all public places within such limits is illegal. A.I.R. 1931 Bom. 513=33 Bom. L.R. 1178=33 Cr.L.J. 75=134 Ind. Cas. 1237.

—S. 144—General order.

——An order can only be issued to the public generally when frequenting or visiting a particular place. An order which directs the public in general to abstain from attending Hat is bad since it is not until the public attends the Hat that the order can be binding on them. 86 Ind. Cas. 810=26 Cr.L.J. 874=29 C.W.N. 411=A.I.R. 1925 Cal. 625.

—S. 144—General order.

——Although a general order under S. 141 restraining the holding of a hat or market is not permissible, an order, prohibiting the holding of the market on the same days as the old market with a view to prevent a breach of the peace, is legal. 18 W.R.Cr. 47 and 23 C.W.N. 141, Foll. 67 Ind. Cas. 205=1922 P.H.C.C. 204=3 Pat. L.T. 268=23 Cr.L.J. 381=A.I.R. 1922 Pat. 84.

—S. 144—General order—Cow sacrifice—Legality.

Under S. 144, Cr.P.C, the Dt. Magistrate has power to issue an order to the public generally when under particular circumstances they cannot be individually addressed. Sub-s. (3) is intended to extend rather than limit the scope of frequent visitors to the locality. The Dt. Magistrate can validly issue a general order that no person should sacrifice or cause to be sacrificed any cow or bullock within a specified boundary and period. 16 Cr.L.J. 190=18 O.C. 70=27 Ind. Cas. 670.

—S. 144—General order—Order to public at large—Jurisdiction.

An order under S. 144, is without jurisdiction if it is not confined to a particular individual or to the public generally when frequenting or visiting a particular place. 16 Bom. L.R. 684=16 Cr.L.J. 98=27 Ind. Cas. 146. See also—(1919) M.W.N. 872=10 Mad. L.W. 480=20 Cr.L.J. 755=53 Ind. Cas. 483.

11. "Hats".

—S. 144—"Hat"—Holding of new "hat" on different days from those on which old hat is held—Interference—Propriety.

An order under S. 144, Cr. P. Code., interfering with the right of a person to hold a new hat on his own land on different days from those on which an old-established hat is held nearby, is improper. If such person commits oppression on people seeking to attend the old hat, other more appropriate proceedings should be taken against him. 50 C.W.N. 615.

—S. 144—"Hat"—Prohibition of holding.

A Magistrate as an emergency measure has power to stop by an order under S. 144 Criminal P.C., the holding of a hat, or the exercise of his rights by a man on his own land. But a man who holds a hat on his own land is perfectly entitled to do so and that by itself is not a wrongful act. A.I.R. 1940 Pat. 185=6 B.R. 480=41 Cr.L.J. 463=5 Cut. L.T. 54=187 Ind. Cas. 511.

—Ss. 144, 107—"Hat"—Prohibiting party from holding hat on particular days—Legality—Which party causing disturbance, difficult to know—Proper procedure.

A Magistrate's power extends to the passing of an order restraining individuals from doing acts perfectly lawful in themselves. Consequently, a Magistrate can legally issue an order prohibiting a land-holder from holding a hat on a particular spot in his own estate on particular days on the ground that such an order is likely to prevent a riot or affray.

Where the difficulty is to say which of the parties to the dispute is the party who is creating a disturbance, the proper procedure is under S. 107 and not under S. 144, Criminal P.C. The real disadvantage of passing an order under S. 144 without going into the merits of the dispute is that on the expiry of the period which is the limit of the duration of such an order, the whole dispute is left to break out again. The party who, on the previous occasion was successful in getting a S. 144 order in his favour will probably try to use the order to prejudice the mind of the Court against his opponent in the subsequent proceedings; but such an order is no evidence of right or of possession antecedent to the date of the order. Therefore to pass an order under S. 144 and to leave it as if that order disposed of the dispute finally is merely postponing trouble and inviting its recurrence in an aggravated and more complicated form at a later date. A.I.R. 1935 Pat. 461=1 B.R. 812=16 P.L.T. 624=36 Cr.L.J. 1268=157 Ind. Cas. 760.

——S. 144—'Hat'—Order which directs public in general to abstain from attending 'hat' is bad since it is not until the public attend the 'hat' that the order can be binding on them.

86 Ind. Cas. 810=26 Cr. L.J. 874=29 Cal. W.N. 411=A.I.R. 1925 Cal. 625.

——S. 144—'Hat'—Order prohibiting party from holding a 'hat' on his property is illegal.

There is a clear distinction between interfering with the rights of private proprietors to do acts which they have a right to do, and the perpetration of wrongful acts by such proprietors. The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership when such exercise in its ulterior consequences being directed primarily against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace. An order prohibiting a party from holding a hat on any day of the week at any place on his own property is not competant under S. 144. 71 Ind. Cas. 516=35 C.L.J. 397=26 C.W.N. 663=24 Cr.L.J. 164=A.I.R. 1922 Cal. 569.

——Ss. 144, and 195 — 'Hat'—Rival 'hat'—Order prohibiting — Disobedience of order — Penal Code, S. 188.

An order prohibiting the holding of a rival hat on certain days near an old hat is not ultra vires and disobedience to such an order is punishable under S. 188, I.P.C. on sanction being given under S. 195 of the Cr. P. Code. 23 C.W.N. 141=20 Cr.L.J. 113=49 Ind. Cas. 97.

—See also: 67 Ind. Cas. 205=1922 P.H.C.C. 204 =3 Pat. L.T. 268=23 Cr. L.J. 381= A.I.R. 1922. Pat. 84.

——S. 144 (1) — 'Hat' — Order restraining the holding of—Doing of lawful act on one's land.

The only ground for the issue of an order under S. 144 restraining the holding of a rival Hat was, that the Magistrate was satisfied from the report of the police that by opening a new Hat within ½ a mile from the old and long established Hat the petitioners were about to disturb the public tranquillity. Held, that an injunction could not be issued to prevent a lawful act upon a man's own property. The order in the form in which it was issued was without jurisdiction. The holding of a Hat on a man's own property is not in itself a wrongful act and therefore any ulterior consequence which may arise from it, cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless those ulterior consequences are made the basis of the proceedings. The law as regards preservation of public peace is based on an apprehension that either a certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace. 19 C.W. N. 248=13 Cr. L.J. 511=15 Ind. Cas. 655.

——Ss. 144 and 107—'Hat'.

The most appropriate section of the Code to deal with cases of rival hats which may cause a breach of the peace is S. 107 Cr.P. Code. 11 C. W. N. 79. See also, 11 C. W. N. 223.

12. Indefinite Order.

——S. 144—Indefinite order—Order of injunction—Must be clear and definite.

An order in the nature of an injunction under S. 144, Criminal P. C., should be clear and definite and free from any kind of ambiguity and if it is indefinite, it would not be right to prosecute anybody for disobeying it. A. I. R. 1932 Cal. 288= 36 C. W. N. 248=33 Cr. L. J. 518=137 Ind. Cas. 816.

——S. 144—Indefinite order:—Where an order purporting to be made under S. 144, Cr. P. C., directed the petitioners "not to commit any act that may likely induce a breach of the peace and not to take forcible possession,"—Held:—That the order was indefinite and not in accordance with the terms of the section. 11 Cal. W. N. 121.

13. Interpretation.

——S. 144—Interpretation—"Annoyance" —Meaning.

——The word 'annoyance' in S. 144, Criminal P. C., is not confined to physical annoyance. It may either be physical or mental. A. I. R. 1931 Bom. 135=32 Cr. L. J. 507=33 Bom. L. R. 59= 55 Bom. 322=130 Ind. Cas. 396.

—S. 144 (3)—Interpretation—"Public generally" whether include members of public who are already in locality as residents or means only visitors from outside.

It was intended by Sub-S. (3) to S. 144, Criminal P. C., to include members of the public who were already in the locality as residents, as well as visitors from outside. The proper interpretation of S. 144 (3) is that the order may be directed to a particular individual and that when, because of the number of particular individuals, it is impracticable for the Magistrate to issue notice to each one of them, he can issue a general order to the whole number of such particular individuals, here designated as "the public generally," and such order, in respect of each particular individual, will have the same effect as a separate order served upon him, provided, of course, that it has been so promulgated that it has come to his knowledge. The word "public" here does not only mean the corporate body pursuing its public avocation, but also means the whole number of particular individuals who in the circumstances cannot be particularly addressed. The order will have effect to control either the private or public actions of every such individual according to its tenor. The intention of the subsection is to extend rather than to limit the scope of the orders so as to include therein even casual or frequent visitors from outside the limits of the particular locality within which the order is to have application. A. I. R. 1942 Oudh 39=1941 O. W. N. (C. C.) 1087=42 Cr. L. J. 884=1941 A. W. R. (C. C.) 306=17 Luck. 52=196 Ind. Cas. 488.

[Overrules A. I. R. 1940 Oudh 241=1940 A. W. R. (C. C.) 50=1940 O. W. N. (C. C.) 118= 15 Luck. 344=185 Ind. Cas. 745.]

——S. 144—Interpretation—'To make certain order'— Irrevocable order — Jurisdiction of Magistrate to find on title when the parties have been referred to a regular suit:—An order for division of crops between the tenants and a rival landlord does not come within the purview of S. 144. The Magistrate will not be justified in adjudicating upon rights of parties and assuming the functions of a civil court. An order under the section is of an irrevocable nature instead of its being made to have force for two months only is ultra vires. 32 C. 154.

——S. 144—Interpretation— "To take certain orders", "to abstain from certain acts".

The words "to take certain order etc." must, no less than the previous expression "to abstain from a certain act" be interpreted in the light of the provisions of Sub-S. (6) which limit the operation of the order to a maximum of two months and by necessary implication exclude an order, such as an order demolishing a wall, which is irrevocable in its nature. A. I. R. 1942 Pat. 414=8 B. R. 722=43 Cr. L. J. 722=23 P. L. T. 644=200 Ind. Cas. 776.

——S. 144 (3) — Interpretation — 'Particular place' in S. 144 (3), meaning of.

The expression "particular place" in Sub-S. (3) of S. 144, Criminal P. C., implies that the place to which the restriction applies should be sufficiently particularised, i., e., specified in the order, so that the public might feel no vagueness or uncertainty about it. It has not so much to do with the area of the place as to its description. A. I. R. 1934 Bom. 375=36 Bom. L. R. 733=36 Cr. L. J. 130=59 Bom. 27=152 Ind. Cas. 701.

14. Jurisdiction.

——S. 144—Jurisdiction—Proceeding cancelled as defective—Subsequent valid proceeding and order—Legality—If without jurisdiction.

There is no warrant for holding that if a proceeding under S. 144, Cr. P. Code, is cancelled as being defective that will prevent the magistrate from initiating a valid proceeding and passing therein an effective order to enure in its operation for the statutory period of two months. The subsequent order cannot be attacked on the ground that it is without jurisdiction for the reason that there cannot be successive orders under the section having the effect of extending the duration for more than two months. 1946 P. W. N. 169=13 B. R. 201=228 Ind. Cas. 378=48 Cr. L. J. 93=A. I. R. 1947 Pat. 290.

——S. 144 — Jurisdiction — Magistrate cannot usurp function of Civil Court.

The Magistrate's jurisdiction under S. 144, is not a jurisdiction to assume the functions of the Civil Court though he can decide questions of possession and of rights of user by appropriate proceedings under Chap. XII of the Criminal P.C. A.I.R. 1942 Pat. 414=8 B.R. 722=43 Cr.L.J. 722=23 P.L.T. 644=200 Ind. Cas. 776.

——S. 144—Jurisdiction—Delegation of discretion by Magistrate.

In a country which enjoys liberty of the press, a person is entitled in his newspaper to publish any news, and make any comments, which he chooses, provided that he does not infringe any provision of law. A Magistrate acting under S. 144 may no doubt restrict that liberty. But he should only do so if the facts clearly make such restriction necessary in the public interest and he should not impose any restriction which goes beyond the requirements of the case.

Magistrate forbidding under S. 144, a newspaper from publishing certain news, must say in precise and definite language what it is that he is directing the person to abstain from doing by the order made under S. 144, and to say that he is to refrain from doing something which a third party does not approve is not an order which complies with the section. It is for the Magistrate himself, and not for the Public Relations Officer to say what is the character of the publication which is forbidden. The delegation of his discretion to another officer is illegal. A.I.R. 1940 Bom. 42=41 Bom. L.R. 1253=41 Cr.L.J. 319=186 Ind. Cas. 477.

——S. 144—Jurisdiction under—Requisites.

To give the Magistrate jurisdiction under S. 144 all that is required is that there is sufficient ground to proceed under S. 144 and immediate prevention or speedy remedy is desirable. In such circumstances private rights must give way whatever be the subject-matter of dispute; in particular it is immaterial that the dispute relates to land. Given the necessary conditions an order cannot be impugned as without jurisdiction merely because it was arbitrary. 123 Ind. Cas. 73=31 Cr.L.J. 466=1929 Cr. C. 586=A.I.R. 1929 Pat. 714.

——S. 144—Jurisdiction under—Requisites:—Before a Magistrate can take action under S. 144, Cr.P.C., he must be of opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in his order. 9 C.W.N. 864=1 C.L.J. 216=32 C. 935.

——S. 144—Jurisdiction to take property in dispute in custody—Revision:—Where disputes and differences having arisen between head members of a Church and its Secretary, the Magistrate drew up a proceeding under S. 144, Cr.P.C., and passed an order forbidding anything that might tend to disturb public tranquillity and at the same time directed with the consent of both parties that certain articles concerning which the parties were in dispute be removed into the custody of the court and should remain there for two months or until the decision of a civil suit regarding the same which was then pending before the High Court. Held:— That the court's custody of the articles was wholly without jurisdiction and the High Court has power to order that matters should be restored to exactly the same condition as the Magistrate found them in before he passed the order removing them into court's custody. 12 C.W.N. 1044.

——S. 144—Jurisdiction of Magistrate—Interlocutory orders—Rule issued by High Court—Seisin of case—Extension of time — Rival 'hats'—A Magistrate cannot, by passing successive orders under S. 144, Cr. P. C., extend the operation of an order indirectly beyond the time limited by Sub-s. (5) of S. 144. Where the first and initial order passed by a Magistrate was in substance and form an order under Sub-s. (2) and forbade certain persons from establishing hats at a certain place and gave a vague direction to them forbidding interference with the trade of another hat: Held,—The order was irregular and vague and could not stand. As long as an order under S. 144 has legal operation no intermediate or interlocutory order not contemplated by Sub-s. (4) can be passed. When the High Court has issued a rule in any case it takes full seisin of the case and it is the High Court alone that can pass interim orders in the case. The Magistrate against whose order the rule is issued has no such jurisdiction. The most appropriate section of the Code to deal with cases of rival hats which may cause a breach of the peace is S. 107, Cr. P. C. 11 C.W.N. 79.

——Ss. 144, 435 (3)—Jurisdiction—Order restraining ryots from reaping crops for securing payment of rent to Government or landlord—Breach of the peace, apprehension of, owing to interference with lawful rights—Revisional

power of the High Court:—S 144, Cr. P. C., does not give jurisdiction to a Magistrate to pass an order preventing ryots from reaping the crops they have sown from an apprehension that if they are allowed to reap, Government or other landlord might lose rent and the latter in attempting to prevent the ryots from reaping might cause a breach of the peace. Such an order being clearly outside the scope of S. 144, it is competent to the High Court to reverse such order notwithstanding S. 435 (3) of the Code. 8 C.W.N. 373.

——**S. 144—Jurisdiction of Magistrate to order who shall perform puja in a temple:**—A Magistrate, acting under S. 144 passed the following order: "I direct the following persons ..... Shevadhars, Pujaris and the public generally to abstain from interfering with the Badves in the performance of the daily puja of the god Vithoba at Pandhurpur, and I direct that the Badves alone perform the same pujas. **Held,** that the Magistrate had jurisdiction to pass the order and that under Cl. (3) of S. 435 of the Code the High Court had no power to interfere in revision. 4 Bom. L. R. 582.

15. Mandatory orders.

——S. 144—Mandatory order, if can be passed under S. 144.

S. 144, Criminal P. C., clearly empowers a Magistrate to pass a mandatory order on persons in possession of property if it is necessary in the opinion of the Magistrate that such action should be taken for the purposes enumerated in the section. A.I.R. 1940 Pat. 57=6 B.R. 79=20 P.L.T. 850=41 Cr.L.J. 98=184 Ind. Cas. 723.

——S. 144—Mandatory order—If can be passed.

No doubt S. 144, Criminal P.C., gives a Magistrate the power to pass an order to prevent an immediate breach of peace but that section, by its terms, does not authorize him to pass any mandatory order. All that the Magistrate can do under that section is to direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management. In other words, the section empowers a Magistrate to pass a restrictive order..

Hence the Magistrate cannot, under S. 144, direct the person who has taken possession of the disputed land and erected fence round it to remove the fence. A.I.R. 1938 Pat. 610=19 P.L.T. 620=5 B.R. 169=40 Cr. L.J. 144=178 Ind. Cas. 945.

——S. 144—Mandatory order—If can be passed.

A Magistrate passed an order under S. 144, Criminal P.C. directing the petitioner to cut a **bundh** or to show cause against the order. The petitioner appeared and showed cause. The Magistrate was not satisfied with the explanation and declined to cancel the order. The petitioner failed to comply with it, and was prosecuted under S. 188, I.P.C:

Held, that though such an order must, to some extent, be infructuous, inasmuch as a failure to comply with it before the time for showing cause had elapsed would not be punishable, it could not be said that the order was made without jurisdiction. By its very terms, S. 144 empowers the Magistrate to direct a person to take certain order with certain property in his possession. In the present case, the Magistrate had jurisdiction to direct the petitioner to cut the **bundh**. A.I.R. 1937 Cal. 406=41 C.W.N. 897=38 Cr. L.J. 915=65 C. L.J. 460=I.L.R. (1937) 2 Cal. 475=170 Ind. Cas 499.

——S. 144—Mandatory order—If can be passed.

The words "to abstain from a certain act" in S. 144 of the Criminal P.C., do not empower Magistrate to make a positive order requiring a person to do a particular thing. This order being without jurisdiction, the subsequent order summoning the person under S. 188, I.P.C., for disobeying the order under S. 144, Criminal P.C., is without jurisdiction. 164 Ind. Cas. 434=61 C.L.J. 579=39 C.W.N. 1053=37 Cr. L.J. 936.

——S. 144—Mandatory order—If can be passed—Disobedience of order—Conviction, if justifiable.

In proceedings under S. 144, Criminal P.C., a Magistrate is only entitled to make a restrictive order preventing the opposite party from doing an act, but it does not enable him to make a mandatory order directing the opposite party to do some act. When such a mandatory order is passed, it is beyond the Magistrate's powers and the opposite party is under no obligation to obey it. Consequently, disobedience of such order is not punishable under S. 188, Penal Code. A.I.R. 1933 Cal. 724=34 Cr.L.J. 1192=38 C.W.N. 115=63 Cal. 11=146 Ind. Cas. 169.

——S. 144—Mandatory orders—If can be issued.

S 144, Criminal P.C., is not intended to empower Magistrate to make positive orders requiring people to do particular things. A Magistrate cannot, therefore, make an order under S. 144, which in effect is not a direction to abstain from doing anything but a direction upon a person to remove himself from the district and to do so by the next available train. A.I.R. 1931 Cal. 263=32 Cr. L.J. 592=53 C.L.J. 175=58 Cal. 1037=130 Ind. Cas. 872.

——S. 144 (2)—Mandatory order—if can be passed.

An order of a Magistrate under S. 144 (2) of the code directing a party to open up a channel in his own land is without jurisdiction. The Magistrate should not interfere under S. 144 (2) of the Code in a case which is likely to be settled by a Civil Court and where there is no immediate apprehension of a breach of peace. 15 Cr. L.J. 291=23 Ind. Cas. 499.

16. Nature of Proceedings.

——S. 144—Nature of proceedings—Orders cannot be taken as decisive of rights of the parties.

Order in proceedings under S. 144, Cr.P.C., cannot be taken as decisive of the rights of either of the parties but the nature of the proceeding and its conclusion may be referred to when the history of the property is in question. A.I.R. 1938 Pat. 455=39 Cr. L.J. 721=4 B.R. 690=176 Ind. Cas. 260.

——S. 144—Nature of Proceedings.

A person who applies to a Magistrate for an order S. 144, against another, institutes a criminal proceeding within the meaning of S. 211, I.P.C. 1933 M.W.N. 1263.

——S. 144—Nature of proceedings.

A Magistrate directed a notice to be issued under S. 144, and called upon the parties to show cause, if any. The parties showed cause, produced documents and argued upon it and the judgment was reserved. The Magistrate then examined some witnesses on the spot **ex parte** behind the back of the parties and without giving any notice to them of the local inspection passed an order based solely on the statements made by these witnesses without referring to documentary evidence and arguments submitted by the parties.

Held, that the Magistrate was bound to consider the evidence and arguments submitted under S. 144 (5) and the order based on the **ex parte** evidence is illegal as a proceeding under S. 144 is judicial proce-

ding. A.I.R. 1927 Pat. 301, Foll. 114 Ind. Cas. 466 =7 Pat. 269=30 Cr. L.J. 302=11 P.L.T. 134=A.I.R. 1929 Pat. 46.

——**S. 144—Nature of proceedings.**

—Order of the Magistrates acting under S. 146 is not the order of a Court. No revision, therefore, lies against such order under S. 435, in spite of omission of Cl. (3) from the Code of 1898. A.I.R. 1923 Mad. 473, Foll.

Magistrates are not always Courts. S. 6 is not inconsistent with the idea that Magistrates may sometimes act in executive and administrative capacity and not as Courts. 39 Cal. 953 (P.C.) Dist. A.I.R. 1924 Pat. 703, Not Appr. 113 Ind. Cas. 279=30 Cr. L.J. 119=12 A.I. Cr. R. 17=52 Mad. 69=1 M. Cr. C. 304=28 M.L.W. 506=1928 M.W.N. 779=A.I.R. 1928 Mad. 1108=55 M.L.J. 621.

——**S. 144—Nature of proceedings—Magistrate passing order, under is not a Court.**

A Magistrate passing an order under S. 144, is not acting as a "Court" and sub-sec. (7) of S. 195 is inapplicable to such a case. 6 M. 208 (F.B.); 14 W.R. Cr. 46, Foll. and 35 M.L.J. 454, Diss.

Obiter. It is impossible that while securing orders under S. 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate, the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it. 72 Ind. Cas. 536=24 Cr. L.J. 424=47 Mad. 56=17 M.L.W. 409=1923 M.W.N. 240=32 M. L. T. 214= A.I.R. 1923 Mad. 473=44 M.L.J. 328.

17. Order to abstain from doing certain acts.

——**S. 144—Order to abstain from doing particular act or acts—Legality.**

S. 144, Cr. P. Code gives the Commissioner of Police, power to issue an order under the section, directing any person to abstain from forming a procession or gathering in any street or public place, or directed to the public generally, directing them to abstain from forming a procession or gathering or assembly when they frequent any street or public place. 231 Ind. Cas. 224=48 Cr. L. J. 747.

——**S. 144—Order to 'abstain from a certain act'.**

A magistrate, under S. 144, Cr.P.C., ordered that two rival sects of Mahomedans can each enter a mośque only at stated times. **Held,** that though the order was not in terms one to 'abstain from a certain act' it was in substance such an order, and was hence legal under S. 144, Cr.P.C. 24 M. 262.

——**S. 144—Order to "abstain from certain act"—Order to abstain from interfering with the management of a temple till the eviction of another—Legality of order.**

An order under S. 144 directed a person not to interfere with the management of a certain temple till another was evicted from management by due course of law. **Held,** that the first portion of the order was a direction to 'abstain from a certain act' within the meaning of S. 144 of the Code; but that the latter portion contravened S. 144 and was without jurisdiction. 24 M. 45.

——**S. 144—Order directing or forbidding removal of idol and celebration of a festival at a certain place—Jurisdiction of criminal court—Revision.**

Where one party applied to a Magistrate for an order directing the other party to take some idols which were in their possession and custody to the residence of the applicant for worship during a certain festival in accordance with an alleged custom and usage of long standing:—**Held** that a criminal court has no power to decide the question of any such right as claimed by the applicant, much less to assume it, and proceed to make an order thereon under S. 144, Cr.P.C. 8. C.W. N. 376.

——**S. 144—Order against Melvaramdar exercising his rights—Validity.**

An order prohibiting a **Melvaramdar** from exercising certain acts as Melvaramdar is valid under S. 144. But where such order interferes with the rights of tenants, it would not affect them unless the order is specific on the point and addressed to them. The words "any person to abstain from certain acts" in S.144 (1) are given a liberal construction in Madras so as to enlarge the jurisdiction of the Magistrate. (1914) M. W.N. 169=15 Cr. L. J. 145=28 M. L.J. 132=22 Ind. Cas. 721.

——**S. 144—Order prohibiting collection of rent:—** An order cannot be passed under S. 144, Cr.P.C., prohibiting a person from collecting rents from tenants. 9 C.W.N. 392.

——**Ss. 144, 107—Order prohibiting holding of hat within a certain area—Proper procedure:—** Where an order under S. 144, Cr.P.C., enjoined the petitioner not to establish a rival market within a quarter of a mile of a certain market place:—**Held,** that it was not a proper order under S. 144, Cr.P.C., as it did not mention any limit of time. and there was nothing in the order to indicate whether the petitioner would be entitled to hold any market at any time within a quarter of mile. The object of S. 144, Cr.P.C., is not that orders should be made prescribing the holding of **hats** indefinitely within a certain area for two months. The proper way of preventing a breach of the peace is to proceed under S. 107, Cr. P. C. 11 C.W.N. 223.

18. Order under—Requisites.

——**S. 144—Order under—Requisites.**

The urgency of a case of nuisance or apprehended danger is essential to its treatment under S. 144, and the orders to be passed under the section must be of a temporary nature, as is shown clearly by Sub-S. (6) of the section unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Provincial Govt. by notification in the **Official Gazette** otherwise directs. Such orders are passed in the general interests of society and may validly interfere within the limitations laid down with private rights of enjoyment of property. There is, therefore, all the more reason why the jurisdiction under S. 144 ought to be exercised carefully and interference with private rights reduced to a minimum and regulated by a full observance of the limitation imposed by the section itself.

The Magistrate is authorised by S. 144, in proper cases to "direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management." The abstention from certain acts must obviously not be carried too far. A.I.R. 1942 Pat. 414=8 B. R. 722=43 Cr. L. J. 722= 23 P.L.T. 644=200 Ind. Cas. 776.

——**S. 144—Order under S. 144** — Requisites of— Order should state in clear and precise form what the public are prohibited from doing.

The Magistrate must satisfy himself that there is sufficient ground for proceeding under S. 144, and when he is so satisfied, he must set out the material facts of the case in his order. The reason for this is that the public should know why it is necessary that their lawful rights should be suspended. The failure to set out the material facts of the case in the order is fatal to its validity. Merely because the order has been

drawn up on the lines of Form No. 21 of Sch. V, Criminal P.C., it cannot be said to be a good and valid one. The order should not be vague and indefinite but must state in clear and precise terms what it is which the public are prohibited from doing. It should not be vague and indefinite. A.I.R. 1939 Rang. 181=40 Cr.L. J. 645=1939 Rang. L.R. 294=182 Ind. Cas. 23.

——**S. 144—Order under—Requisites**—Likelihood of breach of peace—Merely speculative and distant likelihood, whether sufficient.

It is quite legal to prohibit the wearing of Gandhi caps or the carrying of any other symbols if they amount to participation in or encouragement of revolutionary propaganda of any movement such as the civil disobedience movement calculated to paralyze the administration. But before such an order is passed, it should be shown by evidence which a reasonable mind may accept as satisfactory, that it was necessary to pass such an order in the interests of the public peace.

An act prohibited under S. 144 must only be so prohibited if it is likely to prevent obstruction, etc., or disturbance of the public tranquillity, etc., and this likelihood or tendency must be a reasonable or proximate one. It is not enough to say that by stretching several possibilities one after the other it is possible to establish a connection of cause and effect between the act prohibited and disturbance of the public tranquillity. That connection must not be merely speculative or distant. The question whether in each particular case the case falls on one side or the other is one eminently of sound judgment and no rules can be laid down for its exercise. Where there are special facts relating to a particular locality as to which the local authority is the best judge, the opinion of that authority will not easily be disturbed; but where there are no special circumstances and the matter is one of general impression, the absence of any near or reasonable connection between the prohibited act and the supposed danger to public tranquillity will be a ground upon which the High Court is bound to act. A.I.R. 1931 Mad. 236=60 M. L. J. 378=1930 M.W.N. 841=32 Cr. L. J. 744=33 M.L.W. 632=131 Ind. Cas. 449 (2).

19. Powers of Court.

——**S. 144—Powers of Court**—Exercise of—Duty of Magistrate.

The power which S. 144, Cr. P. Code, gives to the Magistrates mentioned therein are very wide powers, and that is all the more reason that they should be exercised with discretion and discrimination. Magistrates ought to remember that arbitrary use of these powers is not only unfair to the parties concerned, but is very often calculated to defeat the purpose for which the orders are passed.

When **A** is doing some work which may cause annoyance a direction to **B** not to do that work cannot have the effect of preventing **A**, who is not by any means under the control of **B**, to stop doing such work. In such circumstances, a direction to **B** under S. 144, Cr. P. Code, not to do that work, is therefore wrong and without jurisdiction. 53 C.W.N. 344.

——**S. 144—Powers of Court**—Renewal of original order—Sub-S. (6) cannot be evaded by repeating orders.

It is not open to a Magistrate to evade Sub-S. (6) of S. 144, by repeating orders under S. 144. Renewal of the original order is without jurisdiction.

Where without considering the allegations of the petitioners that they had only rebuilt the wall on the foundations of the old wall and that the civil suit filed by the opposite party to decide the issue of encroachment was pending, the Magistrate makes use of S. 144 to give effect to his view of the title by requiring the petitioner to demolish the wall on pain of prosecution, the order is unjustified and amounts to usurpation of the jurisdiction of the Civil Court. A.I.R. 1942 Pat. 414=8 B.R. 722=43 Cr. L. J. 722=23 P.L.T. 644=200 Ind. Cas. 776.

——**Ss. 144, 145—Powers of Court**—Repetition of order under S. 144 on ground of maintaining **status quo** against successful party—Propriety—Order spending itself—If can be set aside.

To repeat an order under S. 144, Cr.P.C., on the ground of maintaining the **status quo** is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court might have done nothing to look into the rights of the parties, and further, indirectly to prolong the effect of the original order beyond the period of two months fixed in Sub-S. (6) of the section. Such a use of the section was altogether unwarrantable. An order which had been deliberately passed under S. 144 when the Magistrate knew and had been told that he should proceed under S. 145, if necessary, could not be left alone merely because it was time-expired, for it was impossible to encourage the Magistrate to use his powers in that way. A.I.R. 1940 Pat. 559=21 P.L.T. 413=6 B.R. 648=41 Cr. L. J. 578=188 Ind. Cas. 330.

——**S. 144—Powers of Court—Repeated orders under S. 144, to avoid decision of dispute which may be dealt with under S. 145, or S. 107, if can be passed.**

A party against whom an order is passed in proceedings under S. 145 has to go to the Civil Court and cannot, unless he does so, be heard to repeat his claim in the Criminal Court. The position when an order is passed under S. 144 is quite different: such an order decides nothing about the respective rights of the parties and may be no more than an interference with private rights required in a temporary emergency. To repeat such an order on the ground of maintaining the **status quo** is to compel the unsuccessful party to resort to the Civil Court even though the Criminal Court may have done nothing to look into the rights of the parties, and further indirectly to prolong the effect of the original order beyond the period of two months fixed in Sub-S. (6) of the section. Such a use of the section is altogether unwarrantable. It is not open to a Magistrate by passing repeated orders under S. 144, Cr. P. C. to avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107, Cr. P.C. and the power given by S. 144 is essentially an emergent power which has sometime to be passed in disregard of private rights. An order of that kind cannot possibly be allowed by repetition to spell a more or less permanent interference with private rights. 1939 Pat. 512=20 P.L.T. 374=40 Cr. L.J. 895=6 B.R. 30=184 Ind. Cas. 240.

——**Ss. 144, 147—Powers of court—Property in** which general public has no interest in possession of owner—Magistrate, if can pass order allowing other persons to enter upon property and perform ceremonies against owner's wish merely because they are prepared to use force.

Where the general public has no interest at all in a certain property in possession of its owners, a Magistrate cannot properly pass any order allowing other people to enter upon such property and perform ceremonies upon it against the owner's wish. In any event, if the Magistrate feels that he ought to do so in the interests of the public peace, it is at least necessary that he should hold some enquiry under S. 147, Cr. P.C., in order to discover for himself pending any decision by a Civil Court whether other persons have any right to the user of the land in the manner

in which they desire to use it. The owners cannot be compelled to allow their property to be used in a way in which they do not wish that it should be used unless it is established that others have a right of user. It cannot be the intention of the law that a Magistrate should compel the owner of property to submit to trespass upon it merely because the trespasser is prepared to use force. A.I.R. 1939 All. 182 =40 Cr. L.J. 383=1938 A.W.R. (H.C.) 851=180 Ind. Cas. 499.

——S. 144—Powers of court.

S. 144, Cr. P. C., deals with urgent cases of nuisance and apprehended danger of the breach of the public peace. Where there is danger of the breach of the public peace apprehended, and in consequence thereof, an immediate prevention is necessary, Magistrate specially empowered in that behalf may issue instructions to individuals or the public in general to abstain from a certain act. The power thus conferred on the Magistrates is an extraordinary power. It enables them to suspend the lawful rights of the public if they think such a suspension will be in the interests of public peace and safety. The Magistrates, however, should bear in mind that every citizen has a right to ventilate his grievance either in public or in private and ask for redress. This right should not be curtailed so long as it is exercised in a lawful manner. It is an illegal assumption of power to issue an order under S. 144 on a pretended apprehension of the danger of the breach of the public peace. A.I.R. 1939 Rang. 181=40 Cr. L. J. 645=1939 Rang. L.R. 294=182 Ind. Cas. 23.

—S. 144—Powers of court—Magistrate ordering abstention from residing at a particular place —If legal.

The Magistrate has no jurisdiction to pass an order on any person to abstain from residing in a place, where he is at the time the order is passed. A.I.R. 1934 Rang. 124=12 Rang. 283 = 35 Cr. L. J. 1300=151 Ind. Cas. 211.

—S. 144—Powers of court under.

——In the proceedings under S. 144, it is not open to the Sub-Magistrate to order the Police to carry out the decision of the Civil Court according to his interpretation of it. 1934 M.W.N. 742.

—S. 144—Powers of court—Exercise of—Guiding principle—Power of Magistrate to delegate.

The Legislature by S. 144 of the Cr. P. C., has conferred very large powers upon Magistrates who have to deal with urgent cases of nuisance or apprehended danger. That section enables a Magistrate to make temporary orders, irrespective of the rights of the parties concerned. But as the power is wide, there is great necessity to be cautious about its exercise.

Courts, civil as well as criminal, exist for the protection of rights, and, therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; when an order in suppression of lawful rights has to be made, it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective, and the order if made, should never be disproportionate to but should always be, as far as possible, commensurate with exigencies of any particular situation.

The amendment introduced by the Act of 1932 by deleting Sub-S. (3) from S. 435 which till then existed has made the order of the Magistrate open to revision, and as a Court of Revision the High Court has to consider not merely the legality of such orders but their propriety as well,

It is competent for a Magistrate, who has to make an order under S. 144 of the Code to depute another Magistrate to make an enquiry and submit a report and then to act on the report so submitted though he cannot delegate his magisterial function to another.

[On the evidence, their Lordships held that the materials on the record were not sufficient to justify the orders complained of and the orders were set aside. A.I.R. 1933 Cal. 348=34 Cr. L.J. 334=142 Ind. Cas. 319.

—S. 144—Powers of Court—Second class Magistrate—Order by legality of.

An order made by a Magistrate second class, under S. 144, Criminal P. C., is **ultra vires** and without jurisdiction particularly when the object of the Magistrate in issuing the order is not so much to prevent a breach of the peace as to preserve evidence that might be required in another suit. A.I.R. 1945 Mad. 58= (1944) 2 M.L.J. 208=46 Cr. L.J. 421=57 M.L.W. 515 =1944 M.W.N. 600=218 Ind. Cas. 109.

——S. 144—Powers of court—Second Class Magistrate—Meat shop—Powers of.

A Second-Class Magistrate cannot issue an order for the closing of a Jhatka shop under S. 144. 26 P.W.R. Cr. 1912=13 Cr. L.J. 601=16 Ind. Cas. 169.

20. Procedure.

—S. 144—Procedure—It must be shown that order was communicated to accused.

Before it can be said that the accused had knowledge of the order, it must be shown that its terms were communicated to them. The Sub-Inspector merely giving his own interpretation of it is quite a different thing. A.I.R. 1939 Cal. 703=43 C.W N. 1061=41 Cr. L.J. 105=I.L.R. (1939) 2 Cal. 507=184 Ind. Cas. 856.

——S. 144—Procedure—setting aside of ex parte order—Mode of taking evidence.

When an ex parte order under S. 144 is called in question under Cl. (4) of that section, the normal procedure should be for evidence to be recorded in the usual way by examination and cross examination of witnesses in open court and though there is no provision in the Criminal P.C., prescribing the mode of taking evidence in such enquiry, it is desirable whenever possible to adopt the normal procedure. A. I. R. 1931 Mad. 236=60 M. L. J. 378=1930 M. W. N. 841=32 Cr. L. J. 741=33 M. L. W. 632=131 Ind. Cas. 449 (2).

——S. 144—Procedure.

——Proceedings under S. 144 being judicial the accused has a right to know what the information was on which the Magistrate acted in order to show that it was unfounded or insufficient. A. I. R. 1931 Mad. 242=60 M. L. J. 370=33 M. L. W. 640=32 Cr.L.J. 763=1930 M.W.N, 849=131 Ind. Cas. 649.

——S. 144—Procedure.

Ordinarily unless the facts are on the face of them quite clear, a proceeding should be drawn up under S. 145 for the purpose of investigating the question of actual possession to land. 1930 Cr.C. 258=126 Ind. Cas. 293=31 Cr.L.J. 1005=10 P.L.T. 862=A.I.R. 1930 Pat. 162.

——S. 144—Procedure.

A case in which it would have been better to draw up proceedings under S. 145, should not be proceeded with under S. 144. 106 Ind. Cas. 223= 28 Cr.L.J. 1039=A.I.R. 1927 Pat. 432.

——S. 144—Procedure.

Under S. 144 something more is necessary to be done than a mere recital of the fact that in the

opinion of the District Magistrate there was sufficient ground for proceeding under S. 144. An order issued under the section must state the material facts of the case justifying the issue of the order. 82 Ind. Cas. 42=1924 P.H.C.C. 262= 25 Cr.L.J. 1178=6 P.L.T. 130=3 Pat. L.R.Cr. 41= A.I.R. 1924 Pat. 767.

——S. 144—Procedure—Order based on private enquiries in absence of petitioner is liable to be set aside.

If Magistrate comes to the conclusion that there is no likelihood of a breach of the peace and therefore no action need be taken either under S. 144 or under S. 147, Cr. P. Code, he would be justified in doing so. Where a Magistrate disposes of the matter by taking evidence ex parte, by going over to the office of the second party and making enquiries in the absence of the petitioners and without giving them an opportunity of adducing their own evidence and examining witnesses and coming to a distinct finding as to the alleged right of easement set up by the petitioners and comes to the conclusion that the right is with the second party and that if the petitioners go upon the land they do so at their own risk.

Held, in effect he makes an order in favour of the second party under S. 147 and prevents the petitioners from going upon the land. Such a procedure is wholly unjustifiable and the order must be set aside. 77 Ind. Cas. 807=5 P.L.T. 419 =2 Pat. L.R. Cr. 209=25 Cr.L.J. 455=A.I.R. 1924 Pat. 717.

——S. 144—Procedure.

It is desirable that the record should show, in clear and unmistakable terms, the authority under which a Magistrate, taking, action under S. 144, professes to act. 74 Ind. Cas. 65=2 Bur L.J. 22= 1 Rang. 49=24 Cr.L.J. 737=A.I.R. 1923 Rang. 146.

——S. 144 — Procedure — Grounds for order whether to be stated.

A Magistrate is fully justified in passing an emergent order under the section without setting out in the order the grounds for his action. 13 C. W. N. 188, Exp. 18 Cr. L. J. 892= 41 Ind. Cas. 1004.

——Ss. 144 and 145—Procedure.

An order under Chapter XII should specify the section under which it is passed and the Court of appeal or revision should not be put to the difficulty of finding, whether it was under S. 144 or S. 145. 18 Cr.L.J. 295=38 Ind. Cas. 327.

——Ss. 144, 145, 192 (2), 529 Procedure—Proceedings under S. 145, if may be instituted during the pendency of a suit under S. 9 of the Specific Relief Act (I of 1887)—Prohibitory order under S. 144 how far invalidates finding of possession in S. 145—Proceeding—Transfer of proceeding under S. 145 by Subordinate Magistrate — Legality — Curing of defect in transfer:—A Magistrate is not incompetent to proceed under S. 145 Cr. P. C., with regard to properties which form the subject-matter of a pending suit under S. 9 of the Specific Relief Act. A prohibitory order under S. 144 Cr.P.C., was passed against certain landlords with respect to certain lands in a proceeding to which the tenants were not parties. Subsequently in the proceedings under S. 145, Cr. P.C., the Magistrate found that the landlords were in possession of the lands through their tenants at a date when the prohibitory order was still in force. Held, that as the tenants were not parties to the proceeding under S. 144, Cr.P.C., the subsequent finding in the proceeding under S. 145, Cr. P. C., that the landlords were in possession through the tenants was not bad in law. A subordinate Magistrate cannot be empowered under S. 192 (2) to transfer proceedings under S. 145, Cr.P.C. But a transfer of such proceedings made by a Subordinate Magistrate empowered under S. 192 (2) is a legal defect curable by S. 529, Cr.P C. 13 C.W.N. 530=36 C. 370=1 Ind. Cas. 817=9 Cr.L.J. 399.

21. Processions.

——S. 144—Processions—Adi-Dravidas, rights of, to take out procession through locality of caste Hindus—Order under S. 144, when can be made.

There can be no doubt that the Adi-Dravidas have a civil right to take a procession along all public streets, just as any other persons may have; whereas the caste residents have no right at all to object. Ordinarily, those responsible for law and order should see that persons exercising their rights have the support of the Police and the Magistracy; but cases do, of course, arise where, in the interests of public peace, persons should be prevented from exercising their rights. If the Adi-Dravidas, for example, are anxious to conduct a procession, not to honour Sri Thiruvalluvar but in order to irritate and annoy the caste residents of those streets, then the Magistrate would be justified in placing some restraint upon their procession; but unless the Magistrate is satisfied that the Adi-Dravidas had no bona fide desire to do honour to the saint he should not pass an order under S. 144, Criminal P. C., unless he is quite satisfied that there is no other means within his power of preventing a breach of the peace. The fact that the Adi-Dravidas have been exercising restricted rights in the past can be rightly taken into account; but it is not in itself a sufficient ground for rufusing them protection in the exercise of their full rights. A.I.R. 1938 Mad. 714=47 M.L.W. 741 =1938 M. W. N. 606=(1938) 2 M. L. J. 160=39 Cr.L.J. 886=177 Ind. Cas. 436.

—S. 144—Processions—Right to celebrate Ram Lila and take out procession for the first time —Another section of people who have no manner of right or interest objecting—orders under S. 144—Propriety of.

Ordinarily a person desiring to do what he is lawfully entitled to do should have the support of those responsible for law and order. Orders under S. 144, Criminal P. C., are to be directed not against those who desire to do what the law permits them to do but against those who attempt to prevent the exercise of a legal right. Persons, of whatever sect, are entitled to conduct religious processions through public streets; so that they do not interfere with the manner and use of such street by the public and subject to such directions as a Magistrate may lawfully give to prevent obstructions of the thoroughfares or breaches of the public peace. The right is not one which is dependent for its enfocement on the previous exercise of it. The Magistrate should not take action under S. 144, merely because some Mahomadans who have no manner of interest or right object to the Ram Lila procession taken out by

some section f the Hindus even if the Hindus celebrate the festival only for the first time. A.I.R. 1935 All. 575=36 Cr.L.J. 955=(1935) A.L.J. 821=(1935) A.W.R. (H.C.) 674=156 Ind. Cas. 595.

——S. 144—Processions—Order containing reference to customary rules and timings—Order, if indefinite and not clear.

The fact that an order under S. 144. Criminal P. C., contains reference to customary rules and to customary timings in the matter of taking out processions, does not mean that the order is not clear and definite. It is for the persons who wish to take out the processions to find out what the customary rules and timings are. A.I.R. 1934 Oudh 162=11 O.W.N. 384=35 Cr. L.J. 699 =9 Luck. 543=148 Ind. Cas. 518.

——S. 144—Processions—Religious or social processions — Rights — Public Highway — Nuisance.

Members of Hindu community have a right to take out religious and social processions accompanied by music along public roads even while passing mosques, subject to any orders of direction issued by the Magistrate or the Police tor preventing breaches of the public peace or obstruction of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C., or under other statutory provisions or for regulation of traffic, provided that the exercise of such right does not amount to a nuisance recognised by law. A.I.R. 1931 All. 341=(1931) A. L. J. 354=53 All. 484=131 Ind. Cas. 40.

——S. 144—Processions—Restraining a right to take a procession obtained by a decree is not valid.

Where Hindus of a certain place, in accordance with a decree obtained in their favour, applied for leave to take procession along the streets and the Magistrate passed an order under S. 144, forbidding the Hindus to conduct that procession, holding that the likelihood of rioting and bloodshed was too great to allow them to exercise their lawful rights.

Held, that this was a confession of impotence on the part of the authorities. The District Magistrate is the person who is to look after the peace of his district and naturally in case of sudden emergency it may be necessary to restrict a person from exercising a pertectly lawful right. But it should not be necessary to prevent that person not only in a particular occasion in the near future but for all time from exercising that right because it would be too much trouble to render him adequate protection against persons who intend to disobey the law.

Orders under S. 144 are not intended to be used as a means of depriving the citizens of lawful rights which have been declared by competent Courts. 52 M.L.J. 651=101 Ind. Cas. 893=28 Cr. L. J. 509=8 A. I. Cr. R. 146 = A. I. R. 1927 Mad. 611.

22. "Promulgated".

——S. 144—"Promulgated" —Ex parte order privately served—If promulgated.

Quoere:—Whether order made on an ex parte application and privately served on the accused under S. 144 Criminal P. C., can be rightly described as an order "promulgated" by a public servant lawfully empowered to promulgate such order. A.I.R. 1932 Cal. 868=33 Cr. L.J. 829=36 Cal. W.N. 792=139 Ind. Cas. 739.

23. Public meeting.

——S. 144—Public meeting — If Magistrate empowered to interfere with right of public discussion.

The right of public discussion is a right of every subject and persons convening a meeting to discuss religious matters are not doing anything unlawful. If owing to ill-feeling prevailing between certain persons likely to attend the meeting or any other cause, a breach of the peace is expected, the Magistrate should proceed under S. 144 to prevent that expected breach but should not stop the meeting by arresting the applicants. (1916) 2 U.B.R. 157=11 Bur. L.T. 59=18 Cr.L.J, 512=39 Ind. Cas. 480.

24. Rescission and extension.

——S. 144 (4)— Rescission and extension.

——While it is open to the superior Magistrate to alter or rescind the order of the inferior Magistrate, he cannot make a new order. 1938 M.W.N. 974=(1938) 2 M.L.J. 509.

——S. 144 (4)—Rescission and extension.

The jurisdiction conferred by S. 144 (4), Cr. P. C., is neither appellate nor revisional and that jurisdiction is a special one that can be exercised only if the actual terms of the section are strictly satisfied. Jurisdiction is given to him by this subsection only to alter or rescind the order by which the petitioners before him are said to be aggrieved and he may remove altogether the grievance complained of or reduce its extent as it were, but he connot make a new order which would constitute a fresh grievance to a party not before him. A.I.R 1937 Mad. 487=(1937) M. W. N. 210=45 M. L. W. 367=38 Cr. L. J. 864=170 Ind. Cas. 193.

——S. 144 (4)—Rescission and extension—Jurisdiction is neither revisional nor appellate but a special one.

There is neither revisional nor appellate jurisdiction in the Magistrate under Cl. (4) of S. 144, but there is still a jurisdiction to rescind or alter any other made under S. 144 either by himself or by a Magistrate subordinate to him or by his predecessor-in-office. The proper order to pass in such a case would be to say that if the Magistrate thinks that any action is still necessary he will proceed uuder S. 145 of the Code and not under S. 144. 24 Cr. L. J. 331=72 Ind. Cas. 171=1 Pat. L. R. Cr, 53=A. I. R. 1921 Pat. 468.

——S. 144 (4)—Rescission and extension—S. 144 (4) cannot be used as an appellate or revisional power.

S. 144 (4) was not intended to be exercised as an appellate or revisional power, but was intended to be exercised when the circumstances arose rendering the continuance of the order useless. So, where the order is sought to be set aside on the ground that the Magistrate who passed it had no jurisdiction to pass it, the District Magistrate or the Magistrate who passed the order has no jurisdiction and the High Court alone can dispose of the matter. 63 Ind. Cas. 621=2 P.L.T. 484=22 Cr. L. J. 685=AI.R. 1921 Pat. 392.

——S. 144 (4)—Rescission and extension.

While it is open to the Superior Magistrate to alter the order passed by the Subordinate Magis-

trate, he cannot alter the party to be affected by the order. Where a Subordinate Magistrate allows a certain party to perform a certain festival on a certain day, it cannot be prohibited by the Superior Magistrate on an application by another party under S 144 (4) Cr.P.C., or where a Subordinate Magistrate prohibits one party from doing a certain act, the Superior Magistrate cannot under S. 144 (4), prohibit the opposite party from doing that act. A.I.R. 1937 Mad. 487=(1937)M.W.N. 210=45 M.L.W. 267=38 Cr.L.J. 864=170 Ind. Cas. 193.

——**S. 144—Rescission and extension—Superior Magistrate, if can rescind or alter order under S. 144.**

S. 144, Criminal P.C., contains no provision which suggests that a Superior Magistrate is prohibited from rescinding or altering an order merely because a Subordinate Magistrate has done so or refused to do so. A.I.R. 1937 Mad. 311=38 Cr.L.J. 582=(1937) M.W.N. 56=45 M.L.W. 249=168 Ind. Cas. 720.

—Ss. 144(4), 192, 528—Rescission and extension.

The power of District Magistrate to entertain an application under S 144 (4) of the Cr. P.C., is not lost by reason of the fact that the Sub-Divisional Magistrate subordinate to him had already dealt with an application made under that subsection to him. The provisions of that section are intended for the protection of the liberty of the subject and should be construed liberally. The Cr.P.C., does not confer a power on Superior Magistrate to suspend orders of Subordinate Magistrates and the weight of authority in the Madras Presidency is against the view that Criminal Courts in the mofussil have inherent power to make such orders in the interest of justice.

A Superior Magistrate can rescind or alter an order under S. 144 without hearing the person at whose instance the originai order was passed; the only limitation on his power is that he should hear the parties who apply for rescission or alteration before declining to do so.

The power conferred by S. 144 (4), Cr.P.C., to rescind or alter orders made by Subordinate Magistrates cannot be delegated or transferred by the District Magistrate who is moved in the matter to a Sub-Divisional Magistrate. A.I.R. 1937 Mad. 167=(1936) M.W.N. 1089=44 M.LW. 686=71 M. L. J. 761=38 Cr.L.J. 125=I.L.R. (1937) Mad. 171=166 Ind. Cas. 77.

——**S. 144 (4)—Rescission and extension.**

An order was passed by the Sub-Divisional Magistrate under S. 144. On appeal by the other party, the District Magistrate passed the following order: "In view of all the circumstances of the case, the shape of the lands and the admission of the Chamars, I am inclined to think that the masters of the first party are in present possession of the lands in dispute. I, therefore, rescind the order passed by the learned Sub-Divisional Magistrate." It was contended that the District Magistrate had no power to pass such an order, as it was a substitution of an order of his own.

Held, that there was no attempt to substitute an order of his own but was merely rescinding an order of Sub-Divisional Magistrate under S. 144, which quite clearly he had power to do. 3 P.L.J. 287, Rel. on. 109 Ind. Cas. 126=10 A.I.Cr.R. 166=29Cr.L.J. 478.

——**S. 144 (4)—Rescission and extension.**

——An order under S. 144 being operative only for two months need not be set aside after the period of 2 months is over. 88 Ind. Cas. 845=6 P.L.T. 746=3 Pat. L.R.Cr. 70=26 Cr.L.J. 1229=A.I.R. 1925 Pat. 514.

—S. 144 (4)—Rescission and extension—Second order same as first—Additional parties in second one—Total period exceeding two months—Order is illegal.

The period during which an order under S. 144 remains in force is two months only and it cannot be extended beyond that period by the Magistrate. To draw up the same order once more merely adding to the parties affected is an attempt to evade the provisions of cl. (6) of S. 144 and is illegal if the total period exceeds two months. 86 Ind. Cas. 810=26 Cr.L.J. 874=29 C.W.N. 411=A.I.R. 1925 Cal.625.

——**S. 144 (4)—Rescission and extension—Extension of period of order for indefinite time is not illegal.**

Before the expiry of the period of the order, the local Government passed an order directing that the order should remain in force until cancelled by a notification in the Gazette.

Held, that the Legislature has not limited time for which the force of the order may be extended and under the terms of the section, the local Government can extend the order so long, as the danger which it apprehended continues to exist. 73 Ind. Cas. 801=45 All. 526=24 Cr.L.J. 689=A.I.R. 1923 All. 606.

—S. 144 (4)—Rescission and extension—Rescission of order under, is justified only when reason for the order exists.

Although under the provisions of sub-s. 4 of S. 144, it is open to any Magistrate to rescind or alter any order made under the section by himself or any Magistrate subordinate to him or by his predecessor-in-office the purview of that section does not cover a reversal of an order on grounds, which interfere with the discretionary power of the officer by whom such order was originally made, but comprises only the rescission or alteration of the order when the reason for its having been made no longer exists or has varied to such a manner as to make an alteration necessary as a cororllary. 64 Ind. Cas. 507=2 P.L.T. 650=23 Cr. L.J. 27=A.I.R. 1921 Pat. 445.

——**S. 144 (4)—Rescission or extension.**

When setting aside the order made by the Magistrate under S. 144, the District Magistrate cannot direct him to draw proceedings under S. 145.

The proper course for District Magistrate in such case was to make a reference to the High Court under S. 438. 24 Cal. 391, Foll. 33 C.W.N. 723=1929 Cr.C. 385=A.I.R. 1929 Cal. 751.

——**S. 144—Rescission and extension.**

——Even though on proper grounds a Magistrate rescinds or alters an order made by another Magistrate under the provisions of S. 144, it is not at all open to such Magistrate to direct the other Magistrate to initiate proceedings under S. 145. 24 Cal. 391, Foll. 64 Ind. Cas 507=2 P.L.T. 650=23 Cr.L.J. 27=A.I.R. 1921 Pat. 445.

——**S. 144—Rescission and extension—Order by Acting Dt. Magistrate—Petition for rescission by whom to be disposed of.**

An order passed under S. 144 by the Acting District Magistrate can be altered or rescinded

only by the then Dt. Magistrate and the latter cannot transfer an application for rescission to the former. 16 Cr.L.J. 74=26 Ind. Cas. 666.

25. Revision.

Synopsis.

a. Belated application
b. Decision upon rights of parties being unnecessary
c. Dispute regarding immovables
d. District Magistrate rescinding order
e. Ex parte order
f. Interference
g. Jurisdiction—question of
h. Jurisdiction to be exercised within two months of order
i. Legality and propriety of order
j. Magistrate assuming function of Civil Court
k. Magistrate granting perpetual injunction
l. Scope.
m. S. 144 (4)—If bars revision
n. Successive orders
o. Time expired orders.
p. Miscellaneous

a. Belated application.

——Ss. 144, 439—Revision — Belated application—order ceasing to be in force by efflux of time—Interference, if proper.

Where, an application for revision against an order under S. 144, Criminal P. C., is made and the order has ceased to be in force by efflux of time, it should not be interfered with in revision, and if the applicant feels aggrieved, his remedy is by the filing of a declaratory suit in the Civil Court.

When an order purports to have been passed as an emergency measure, the Magistrate passing the order is the sole and the best judge of the emergency which constrained him to pass the order under S. 144 and he has full jurisdiction to pass it. A.I.R. 1934 Oudh. 87 (1) =11 O.W.N. (C. C.) 74=35 Cr. L.J. 472=147 Ind. Cas. 672.

b. Decision upon rights of parties being unnecessary.

——S. 144—Revision — Decision upon rights of parties, such decision being unnecessary—Order, if can be set aside after its expiry.

When a Magistrate passes an order under S. 144, Criminal P. C., under an apprehension that a breach of the peace might arise between the parties, he should not go beyond the necessities of the case. When such an order purports to decide upon the rights of the parties, and such decision is not at all necessary for the passing of the order, the High Court can interfere to set it aside even though it may have expired. A.I.R. 1933 Pat. 185=34 Cr. L.J. 717=14 P.L.T. 379=144 Ind. Cas. 228.

c. Dispute regarding immovables.

——Ss. 144, 145—Revision—Dispute regarding immovable property—Duty ot Magistrate—Revision.

The use of S. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the police report that the claim of the party creating disturbance is not a claim made in good faith. 11 C. W. N. 271, Foll; 39 Cal. 150. Ref. But where there is a dispute about possession, proceedings under S. 145 should be intiated. Proceedings under S. 144 should not be resorted to to evade an inquiry into possession. The practice of issuing notices purporting to be under S. 144 of the Cr. P. Code calling upon both parties to attend on a fixed date and submit statements is a mere evasion of the law. The notices are in effect notices under S. 145 (1),(4) of the Cr. P. Code and where such notices have been issued, the High Court will interfere in revision and direct that the procedure prescribed in Chap. XII of the Code be followed. 1 P.L.J. 336, Ref. 3 Pat. L.J. 243 = 4 Pat. L.W. 354=19 Cr. L.J. 869=47 Ind. Cas. 65.

d. District Magistrate rescinding order.

——S. 144—Revision — District Magistrate rescinding order—High Court, if can interfere.

It is within the competence of the District Magistrate to rescind any order under S. 144 of a Sub-Divisional Magistrate. He ought certainly to do so if the order is wrong and he may also always do so when he finds that the order is not required for immediate prevention of a breach of the peace. Beyond all question, the High Court will never re-impose an order under S. 144 which the District Magistrate who is responsible for the peace of his District does not wish and in his discretion has rescinded. A. I. R. 1934 Pat. 313=15 P. L. T. 216=151 Ind. Cas. 835.

e. Ex parte order.

——Ss. 144 and 439—Revision—Ex parte order—Failure to state material facts—Omission to record reasons—Remedy — Maintainability — Flying of Home Rule Flag—Legality.

The High Court rarely interferes in revision, till other remedies open to a petitioner in the Lower Courts have been exhausted, especially in matters under S. 144 Cr.P.C., where the magistrate is responsible for the peace of the District. Per Sadasiva Aiyar and Phillips JJ.—Allegations against the honesty of the conduct and intentions of responsible officials ought not to be made in an affidavit without adequate and strong materials being indicated in the affidavit itself in support of such allegations. Per Sadasiva Iyer, J. (Phillips, J., dissenting) Under S. 144 Cr.P.Code it is necessary for a magistrate to record in his order his reasons for considering the occasion to be one of emergency. Magistrates should indicate with reasonable fulness, when passing ex parte orders, the materials on which they came to the conclusion that there was an emergency which justified their proceedings to pass orders ex parte. Under S. 144 Cr.P. Code it is the duty of the Magistrate to support lawful acts as far as possible. The flying of a Home Rule Flag is a perfectly legal Act and if unreasonable people threatened to commit a breach of the peace, the Magistrate ought not to treat it as a case of emergency unless through temporary circumstances the Magistrate had no sufficient police or other force at his command to prevent an immediate breach of the peace, so as to bind them over to keep the peace. 22 M.L.T. 323=(1917) M.W.N. 721=6 L.W. 456=19 Cr.L.J. 56=43 Ind. Cas. 88.

f. Interference.

——S. 144—Revision—Interference—Facts not particularly within knowledge of Magistrate—High Courts's power to interfere.

Where there are special facts relating to a particular locality as to which the local authority is the best judge the opinion of that authority will not easily be disturbed but where there are no special circumstances and the matter is one of general impression the absence of any near or reasonable connection between the prohibited cut and the supposed danger to public tranquillity will be a ground upon which the High Court is bound to act. Order under S. 144 prohibiting wearing of Gandhi caps set aside. A.I.R. 1931 Mad. 236= 32 Cr.L.J. 741=33 M.L.W. 632= 1930 M.W.N. 841 =131 Ind. Cas. 449 (2)=60 M.L.J. 378.

——S. 144—Revision—Interference.

Where the elements essential to action under S. 144 are shown to exist upon materials before the Court, the High Court will in exercising its powers respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for the maintenance of peace. But if the grounds for action as stated in the order are either unfounded in fact or insufficient in law or if it is shown that the order against the public as framed violates the conditions laid down by S. 144 then it is the duty of the High Court to interfere in revision. A.I.R 1931 Mad. 242=1930 M.W.N. 849=60 M.L.J. 370=33 M.L.W. 640= 32 Cr.L.J. 763=131 Ind. Cas. 649.

——S. 144—Revision—Interference.

Although under S. 144 (4) it is incumbent on the petitioners to go in the first instance before the District Magistrate before coming up in revision to the High Court and ordinarily that is the practice in the High Court still the High Court will interfere where the order of the Sub-Divisional Magistrate is wholly without jurisdiction. 1922 Pat. 435 (F.B.), Foll. 75 Ind. Cas. 531=5 P.L.T. 90=1 Pat. L.R.Cr. 223=24 Cr.L.J. 947= A.I.R. 1924 Pat. 145.

g. Jurisdiction—Question of.

——Ss. 144, 435—Revision—Jurisdiction—Question of.

The High Court has power to consider under S. 435, whether a Magistrate has jurisdiction to pass an order under S. 144. A.I.R. 1934 Rang. 124=12 Rang. 283=35 Cr.L.J. 1300=151 Ind. Cas. 211.

h. Jurisdiction to be exercised within two months of order.

——S. 144—Revision—Jurisdiction to be exercised within two months of order.

——High Court can revise order under S. 144 provided revisional jurisdiction is exercised within 2 months of order. 121 Ind. Cas. 833= 31 Cr.L.J. 324=31 M.L.W. 16=1930 M.W.N. 82=2 M.Cr.C. 277=53 Mad. 320=A.I.R 1930 Mad. 242=58 M.L.J. 148.

i. Legality and Propriety of order.

——Ss. 144, 435, 439—Revision—Legality and Propriety of order.

The propriety of the order as well as its legality can be considered by the High Court in revision, though in examining the propriety of the order, the High Court will undoubtedly give due weight to the opinion of the District Magistrate who is the man on the spot and responsible for the maintenance of public peace in his District. A.I.R. 1942 Lah. 171=44 P.L.R. 297=43 Cr.L.J. 747= I.L.R. (1942) Lah. 510=201 Ind. Cas. 572 (F.B.)

j. Magistrate assuming function of Civil Court.

——Ss. 144,145—Revision—Magistrate assuming function of Civil Court — Order, if can be interfered with in revision when effect of order has expired.

The propriety of the order whereby a Magistrate assumes the function of the Civil Court and makes an order which practically amounts to an order of ejectment on grounds of title may certainly be questioned though he may be technically justified by the fact that he records his apprehension of a breach of the peace. But where the effect of the order has expired and the matter is before the Civil Courts, the application for revision of the order will be dismissed. A.I.R. 1935 Pat. 145=1 B.R. 286 (1) =36 Cr.L.J. 474=154 Ind. Cas. 184.

k. Magistrate granting perpetual injunction.

——S. 144—Revision—Magistrate granting perpetual injunction.

——If the Magistrate tries to use S. 144 as a means of granting a perpetual injunction, the High Court has the power to interfere. The order is made without jurisdiction. The word 'alter', in S. 144 cannot mean the substitution of the names of one party for those of the other. Where the Dt. Magistrate substitutes the name of one party for another he acts without jurisdiction. 67 Ind. Cas. 500=15 M.L.W. 423=1922 M.W.N. 177=30 M.L.T. 148=23 Cr. L. J. 404=A.I.R. 1922 Mad. 76=42 M.L. J. 352.

1. Scope.

——Ss. 144, 435, 439—Revision—Scope.

At least after the amendment of S. 435, Criminal P. C., by S. 116, Criminal P. Amendment Act (Act XVIII of 1923), by which Sub-s. (3) of S. 435, Criminal P. C., has now been omitted, the High Court has revisional jurisdiction also in cases disposed of under S. 144, Criminal P. C. Even before this amendment, the High Courts exercised this power of revision under S. 107 of then Govt. of India Act and this power has always been considered salutary and necessary. A Magistrate, no doubt, is responsible for the peace of his district. But from this, it does not follow that the High Court has no duty to see whether this responsibility has been properly discharged in any particular instance. Further, the peace of the district as contemplated by S. 144, Criminal P. C., is not unconcerned with individual interests and the particular individual who feels aggrieved by the interference or non-interference should not be driven out of Court simply because the Magistrate thought fit to act in a certain manner. Moreover, S. 144, Criminal P. C., is not limited in its operation only to cases of possible breach of general peace of the district. The section contemplates cases of obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot or an affray. Hence the aggrieved party is entitled to come up in revision

to the High Court. A.I.R. 1943 Cal. 35=I.L.R. (1942) 1 Cal. 488=46 C.W.N. 136=44 Cr.L.J. 288=204 Ind. Cas. 370.

——S. 144—Revision—Scope.
——Proceedings under S. 144 are revisable irrespective of the nature of the order passed. 1934 M. W. N. 742.

——S. 144—Revision—Scope.
——S. 435 (3), expressly excludes the exercise of revisional powers in cases under S. 144. The High Court has merely to satisfy that the facts found fall within the section so as to give jurisdiction to the Magistrate. 62 Ind. Cas. 409=22 Bom. L. R. 157=22 Cr. L. J. 521.

[Note.—S. 435 (3) was repealed by Act. XVIII of 1923.]

——Ss. 144 and 435—Revision—Scope.
An order under S. 144 is not open to revision under S. 435, Cr. P. Code but only under S. 107 of the Govt. India Act and that on questions of jurisdiction where grave miscarriage of justice would otherwise result. 10 L.W. 480=20 Cr. L.J. 755=(1919) M.W.N. 872=53 Ind. Cas. 483.

——S. 144—Revision—Scope.
——The section empowers the High Court, with a view to secure the ends of justice, to direct a party to re-deliver goods to the proper person who is wrongly ordered to deliver them to another under S. 144. 3. M.L.W. 498 and 28 C.L.J. 483, Foll. 105 Ind. Cas. 815=8 A.I.Cr. R. 362=8 L.R.A. Cr. 149=28 Cr. L.J. 991=26 A.L.J. 83=50 All. 414=A.I.R. 1928 All. 14.

——S. 144—Revision—Scope.
——Orders under S. 144 are not judicial orders that could be interfered with in exercise of the revisional powers of the High Court. 116 Ind. Cas. 137=30 Cr. L.J. 629=1929 M.W.N. 694=2 M.Cr. C. 200=13 A.I.Cr. R. 48=55 M.L.J. 621.

——Ss. 144, 439—Revision—Scope.
Any order passed by a Magistrate after he has passed a final order under S. 144 regarding the sale of property kept in custody is ultra vires and liable to revision. 21 Cr. L.J. 657=57 Ind. Cas. 817 (Pat.)

——S. 144—Revision—Scope.
A Magistrate, passing an order under the section should use his own discretion in every case and that too very carefully; he should also state the emergency that led to the passing of such order. A High Court can interfere with such order under S. 15 Charter Act. 38 Mad. 489=16 Cr. L. J. 629=30 Ind. Cas. 453.

m. S. 144 (4)—If bars revision.

——Ss. 144, 561-A—Revision—S. 144 (4) if bars revision to High Court.
The High Court can, in the exercise of its inherent powers under S. 561-A, Criminal P. C., or S. 107, Govt. of India Act, suspend the operation of the order of a Sub-Divisional Magistrate under S. 144, Criminal P. C.

The jurisdiction conferred by S. 144 (4) of the Criminal P. C., upon a Magistrate to rescind or alter an order made under the section by himself or any Magistrate subordinate to him or by his predecessor-in-office is neither appellate nor revisional jurisdiction; it is a special jurisdiction conferred by a special provision of the statute, and S. 144 (4) cannot bar a revision to the High Court. A.I.R. 1932 Mad. 720=(1932) M.W.N. 726 =36 M.L.W. 461=33 Cr. L.J. 826=63 M.L.J. 594=56 Mad. 149=139 Ind. Cas. 773.

n. Successive orders.

——Ss. 144 and 439 — Revision—Successive orders—Order without notice.
Successive orders under S. 144 are open to objection. An order passed under S. 144 with out serving notice on the opposite party to show cause is liable to be set aside. 1 Pat. L.T. 44=20 Cr. L.J. 829=53 Ind. Cas. 829.

o. Time expired orders.

——Ss. 144, 439—Revision—Time expired order.
It is the practice of the Patna High Court to decline to interfere in revision with an order under S. 144, Criminal P. C., when the order would become time-expired in a few days. A.I.R. 1942 Pat. 331=8 B.R. 670=23 P.L.T. 243=43 Cr. L. J. 637=200 Ind. Cas. 316.

——S. 144—Revision—Time expired order.
It is not the usual practice of the Patna High Court to interfere with an order which has spent its force unless there are special reasons for such interference. A.I.R. 1940 Pat. 185=6 B.R. 480 =41 Cr. L.J. 463 =5 Cut. L.T. 54=187 Ind. Cas. 511.

See also: A.I.R. 1935 Pat. 461=1 B.R. 812=16 P.L.T. 624=36 Cr.L.J. 1268=157 Ind. Cas. 760;—10 A.I.Cr.R. 200=29 C.L.J. 465=109 Ind. Cas. 113 =A.I.R. 1928 Pat. 480.

——Ss. 144, 145—Revision—Time expired order.
Although where there is a bona fide dispute of possession between the parties, the Magistrate ought to proceed under S. 145, Criminal P.C., and not under S. 144, the High Court will not interfere with the order under S. 144, after it has spent its force by reason of the expiry of the period to which its effect is confined. It will be unnecessary and undesirable to direct the Magistrate to begin under S. 145, when his order under S. 144, has alreaqy spent its force and his observations regarding possession will have little, if any, effect upon the question of actual possession. A.I.R. 1933 Pat. 584 (2)=35 Cr. L.J. 88=146 Ind. Cas. 557.

——S. 144—Revision—Time expired order.
An order was passed under S. 144 restraining the petitioners from interfering with the possession of the other side. On the last day on which the order could operate, the Magistrate complained against the petitioners under S. 188, Penal Code, in respect of a breach of his above order. Next day the petitioners applied to the District Magistrate to set aside the order under S. 144, and on his rejecting the application, they applied to the High Court for considering the order under S. 144.

Held: that the general practice of most of the Judges of the Patna High Court is against interfering with orders under S. 144, the operation of which has expired and the fact that the petitioner was concerned with the validity of the order in view of the prosecution under S. 188, Penal Code, was not a special circumstance, for interference. 20 C.W.N. 981, Dist. 10 A.I.Cr.R. 200 =29 Cr. L.J. 465=109 Ind. Cas. 113=A.I.R. 1928 Pat 480.

——S. 144—Revision—Time expired order.
——When an order under S. 144 has expired by efflux of time the High Court will not revise it

nor will it adjudicate upon the merits thereof. (42 M.L.J. 352, Diss.) 82 Ind. Cas. 472=1924 M. W.N. 675=25 Cr. L.J. 1304=A.I.R. 1924 Mad. 896 =47 M.L.J. 439.

——Ss. 144 and 439—Revision—Time-expired order.

The jurisdiction of a Magistrate to pass an order under S. 144 depends on the urgency of the case. A mere statement by the Magistrate that he considers the case to be urgent is not sufficient to give him jurisdiction, if the facts show that in reality there is no urgent necessity for action. In a proceeding to set aside an order of a Magistrate under S. 144 the High Court would not consider whether the opinion expressed by the Magistrate on the civil rights of the parties is right or wrong; what it has to consider is, whether the Magistrate's order was made with jurisdiction or not. A Magistrate cannot by an order under S. 144 direct a person to remove an obstruction to a culvert through which the drainage of certain Railway quarters flows into a tank on the ground that a rainfall in an hour would flood the quarters and compel evacuation. It was a danger to the inhabitants of a particular quarter who might be inconvenienced but was not a source of danger to public health. The order under S. 144 should be set aside even though more than two months had expired since its passing in as much as a prosecution of the petitioner under S. 188 of the Penal Code for disobedience to the order had been instituted. 23 C.W.N. 145=28 C.L.J. 483=19 Cr. L.J. 951=47 Ind. Cas. 803.

——Ss. 144 (5) and 439—Revision—Time expired order.

Where an order under the section had expired by efflux of time at the time of the hearing of a revision against it, the Court will not adjudicate on the question in issue. 16 Cr.L.J. 272=28 Ind. Cas. 160.

p. Miscellaneous.

——S. 144—Revision—Miscellaneous.

——Petition by A to restrain B from raising structure—Magistrate considering C as proper party and granting interim injunction against C—C succeeding in getting injunction set aside—Revision by A against order in favour of C, impleading C cannot be thrown out on the ground that C was not named as a party in the petition filed by A before the Magistrate. A.I.R. 1943 Cal. 35=I.L.R. (1942) 1 Cal. 488=46 C.W.N. 136=44 Cr.L.J. 288=204 Ind. Cas. 370.

——S. 144—Revision—Miscellaneous.

——Where the High Court finds that the trying Magistrate has jurisdiction to pass an order under S. 144; it will not send back the matter to the Magistrate notwithstanding that the order has expired, so that he may begin the proceedings again, as regards the accused's showing cause against the order. 13 C.W.N. 195; 20 C.W.N. 758; 20 C.W.N. 981; 23 C.W.N. 145 and A.I.R. 1928 Cal. 446, Ref. 125 Ind. Cas. 273=31 Cr.L.J. 804= 1930 Cr.C. 131=A.I.R. 1930 Cal. 131.

26. Scope.

——S. 144—Scope.

See also, Criminal P.C.—

(1) S. 107—Applicability and scope.
(2) S. 145—Preliminary order—When can be passed.

Synopsis.

a. Action to be directed against wrong-doers
b. Alteration of order S. 144 (4)
c. Applicant under S. 144 (5) should be given opportunity to support it.
d. Complaint dismissed
e. Conditional order
f. Court must make enquiry
g. District Magistrate if can promulgate order through out the district
h. Effect of order under S. 144
i. Election Speeches
j. Injury to property
k. Intention of section
l. Justification for order-Test
m. Nature of order
n. Nuisance
o. Order against general public
p. Order directing village munsif to be in possession
q. Order under—Effect on civil rights
r. Order under—When made
s. Order under—When not to be made
t. Power to appoint Receiver
u. Private rights
v. Question of title
w. Resort to S. 107
x. Rival business
y. Trustees restrained
z. Miscellaneous

a. Action to be directed against wrong-doers.

——S. 144—Scope—Action to be directed against wrong-doers than wronged.

Obiter.—Even in the case of an order in an emergency under S. 144, Criminal P.C., the Magistrate's action should be directed rather against the wrong-doers than the wronged though the nature of the emergency may make it necessary for a time in the public interest, to interfere with the lawful exercise of private rights. But, in any case, the authority of Magistrates should be exercised in defence of rights rather than in their suppression, in repression of illegal rather than interference with lawful acts. A.I.R. 1939 Sind 167=40 Cr.L.J. 703= I.L.R. (1939) Kar. 662=182 Ind. Cas. 698.

——S. 144—Scope—Action to be directed against wrong-doers.

——When a breach of the peace is anticipated, action is to be taken against the potential law-breakers and not against the peaceful citizens whom it is expected, that the law-breakers will molest. A.I.R. 1922 Cal. 483 and A.I.R. 1924 Pat. 767, Foll. 28 Cr.L.J. 345=100 Ind. Cas. 825=A.I.R. 1927 Lah. 430.

——S. 144—Scope—Action to be against wrong-doers.

——If the effect of the order under S. 144 is that no Mahomedan would be allowed to say his prayers in the mosque, such an order is not justified. The proper course that the Magistrate ought to follow is to find out which party is wrong, and restrain that party from committing any act which may lead to a breach of the peace. 71 Ind. Cas. 506=26 C.W.N. 904=24 Cr.L.J. 154=A.I.R. 1922 Cal. 483.

b. Alteration of order under S. 144 (4).

——Ss. 144 (4) and 145—Scope—Alteration of order.

There is no reason why the power given in S. 144 (4) should be confined to cases where there has been a

change of circumstances since the original order was made. There is nothing in the wording of the 4th clause which limits the powers of the Magistrate in the sense indicated, and there is no valid reason why words of limitation should be read into the section which would have the effect suggested. The word "alter or rescind" clearly empower the District Magistrate to modify or cancel the order upon any ground whatsover.

Per **Mullick, J.**—Where S. 107 or S. 145 will meet the requirements of the case, S. 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could not be otherwise averted an order under S. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another, whose claim to possession is a mere pretence, is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of S. 144 if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the condition required by the section exist. What is deprecated is the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145.

Per **Jwala Prasad, J.**—S. 144 is a larger and more general section than S. 145. An order under that section can be made under various circumstances including a danger of a breach of the peace. S. 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary; the latter is mandatory. The latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to breach of the peace. Therefore when the special condition of S 145 is fulfilled S. 144 then yields to S. 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S. 145 and enquire into the possession of the parties, irrespective of any order that he might have originally passed under S. 144. 68 Ind. Cas. 149=23 Cr. L. J. 549=2 Pat. 94=1 Pat. L.R.Cr. 2=1922 P.H C.C. 241=3 P.L.T. 573=A.I.R. 1922 Pat. 435 (F. B.)

c. Applicant under S. 144 (5) must be given opportunity to support it.

——**S. 144 (5)—Scope**—Applicant under S. 144 (5) must be given opportunity to support it.

The provision contained in S. 144 (5), Criminal P.C., is mandatory. Where an application is presented for cancelling the order, the applicant must be given an opportunity to support his application and it should not be dismissed summarily. A.I.R. 1939 Rang. 181=40 Cr. L. J. 645=1939 Rang. L. R. 294=182 Ind. Cas. 23.

d. Complaint dismissed.

——**Ss. 144, 147, 203—Scope—Complaint dismissed**—Preventive action not taken—Further report by Police for preventive action—Petitioner not in possession within three months—Preventive action, if can be taken.

Where the Magistrate, on a complaint, does not take action under any of the preventive sections of the Criminal P. C., on the ground that it has not been substantiated and consequently dismisses the complaint under S. 203, it is not open to him on a further report by the Police to take preventive action under S. 147, when the petitioner is not in possession within three months from the institution of the inquiry. A.I.R. 1936 Pat. 44=17 P.L.T. 37=2 B.R. 240=37 Cr. L. J. 327=160 Ind. Cas. 795.

e. Conditional Order.

——**S. 144—Scope — Conditional order** — Against whom can be made absolute.

Under S. 144, the conditional order can be made absolute only against the party which was called upon to show cause. 19 P.L.T. 796.

f. Court must make enquiry.

——**S. 144—Scope**—Court must make enquiry in the circumstances likely to cause breach of peace.

S. 144 is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. Its object is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace; but it is not intended to relieve him of the duty of making a proper enquiry into the circumstances which make it likely that such breach of the peace will occur. If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence and threatened to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right. 5 Cal. 132 Foll. 82 Ind. Cas. 42=1924 P.H.C.C. 262=25 Cr. L. J. 1178=6 P.L. T. 130=3 Pat.L.R.Cr. 41=A.I.R. 1924 Pat. 767.

g. Dt. Magistrate if can promulgate order throughout district.

——**S. 144 (1), (3)—Scope**—District Magistrate, if can promulgate order throughout district.

The District Magistrate has jurisdiction throughout his district and is empowered to direct any person to abstain from a certain act if he considers that such direction is likely to operate in any of the ways mentioned in Sub-S. 144 (1) Criminal P.C. S. 144 (3) has nothing to do with the nature of the order but is one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under Sub-S. (1). When, because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual, he can issue an order to the public generally, including, besides residents, persons who may frequent or visit a particular place and such order will be effective against each individual to whose knowledge it has come. A.I.R. 1937 Lah. 80=17 Lah. 515=38 P.L.R. 964=38 Cr. L. J. 354 (2)=167 Ind. Cas. 284.

h. Effect of order under S. 144.

——**S. 144—Scope—Effect of order under S. 144.**

An order under S. 144, Criminal P. C., does not establish possession. A.I.R. 1938 Pat. 369=19 P.L.T. 336=4 B.R. 750=39 Cr. L.J. 778=176 Ind. Cas. 715.

i Election Speeches.

——**S. 144—Scope—Election Speeches.**

Every man has a right to express his opinions in public and in general he should be entitled to the support of the Police and Magistracy in the expression of those opinions. Provided that these opinions are made with a genuine desire to convince people and not to irritate them, he ought not to be muzzled merely because those who dislike these opinions threaten opposition. Where interference with the right to speak is expected the opponents should ordinarily be prohibited from interfering and not the reformers from speaking. Occasions do, however, arise when in the interests of peace, private rights have to be encroached upon by

those responsible for public order. The Police cannot always have a number of men posted wherever persons are expressing opinions which may call upon them the wrath of the people among whom they are speaking. This is particularly the case during election, when public meetings are many and when feelings run high. A.I.R. 1937 Mad. 311=(1937) M.WN. 56 =45 M.L.W. 249=38 Cr. L. J. 582=168 Ind. Cas. 720.

j. Injury to property.

——S. 144 (1)—Scope—Injury to property as distinguished from danger to human life occupying property—Relevancy of order under S. 144 (1)—Court's power under exceptional circumstances.

The first thing which the Magistrate has got to be satisfied about is that there is sufficient ground for proceeding under S. 144, and an immediate prevention or speedy remedy is desirable and the second element which has got to be established is that the Magistrate should consider that the direction which he is about to give is one which is likely to prevent or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray.

On the allegation that his house has cracked due to the fact that at a distance of 20 feet from his house **B**, his neighbour, had started to drive piles into the soil for strengthening a foundation of a new building, **A** applied for an order under S. 144:

Held, that what Magistrate had got to be satisfied about in making an order under S. 144 of the Code, in so far as the second of the aforesaid elements is concerned, was that the direction was likely to prevent injury or risk of injury to human life or safety. The question of injury to property as distinguished from danger to or safety of human life occupying the property has got very little relevancy.

Under exceptional circumstances, the Criminal Court would be justified in cases of emergency on being satisfied as to the urgency of the situation to make an order under S. 144 of the Code, which may have the effect of interfering with the private rights of individuals, even though such rights are being lawfully exercised. A.I.R. 1934 Cal. 513=35 Cr.L.J. 1252=38 C.W.N. 388=151 Ind. Cas. 183.

k. Intention of section.

——Ss. 144, 439—Scope—Intention of section.

There is nothing in S. 144, Criminal P. C. requiring the Magistrate to uphold rights, whether constitutional or otherwise; there is nothing in the section requiring the Magistrate to hold a judicial inquiry into the rights of the parties involved. Once a Magistrate is of opinion that there is sufficient ground for proceeding under S. 144, Criminal P. C., once a Magistrate considers that there is 'apprehended danger' which can only be averted by directing a person or persons to abstain from a certain act which may result in danger to human life or a disturbance of the public tranquillity or a riot or an affray, he is entitled to make an order directing that person or those persons to abstain from such act even though such act is otherwise lawful, even though such person or persons may be acting lawfully in the exercise of the right. This section is intended to provide for an emergency, and it is idle to contend that in an emergency when a riot is apprehended and when there is apprehension of a serious disturbance of the public tranquillity, the Magistrate is required to deliberate upon and decide the rights of the parties before acting. A.I.R. 1939 Sind. 230=40 Cr. L.J. 823=I.L.R. (1939) Kar. 751=183 Ind. Cas. 641.

l. Justification for order.

——S. 144—Scope—Justification for order—Test—Order prohibiting wearing of Gandhi caps—Legality.

The test to see whether the order under S. 144 was justified or not is to find out whether the act, be it lawful or unlawful, was likely to lead to a breach of public tranquillity. The likelihood or tendency must be a reasonable or proximate one.

Held, that the prohibition of the use of Gandhi caps in a particular locality was not on the facts disclosed, necessary in the interests of peace and that the order under S. 144 should consequently be quashed. A.I.R. 1931 Mad. 236=1930 M.W.N. 841=60 M.L.J. 378=32 Cr. L. J. 741=33 M.L.W. 632=131 Ind. Cas. 449 (2).

m. Nature of order.

—S. 144—Scope—Nature of order—Order for injunction must be absolute and definite and not conditional.

S. 144, Criminal P.C., Cls. (**a**) and (**b**) do not contemplate the passing of a conditional order to be made absolute later on The order for injunction under S. 144, Criminal P.C., must be an absolute and definite order, and it must be left to the party to apply for rescinding the order by having recourse to the procedure laid down in Sub-Ss. (4) and (5) of the said section.

Where the order is in the following terms: ".....,.....either to refrain from doing any of the acts set forth above.....or to show cause, if any against the said order". It is not an order which comes within the terms of S. 144, Criminal P. C., at all. The order is not definite and no charge can be sustained under S. 188, I.P.C., for violating such order. A.I.R. 1936 Cal. 259=40 C.W.N. 640=37 Cr.L.J. 696=63 C.L.J. 137=162 Ind. Cas. 827.

n. Nuisance.

——S. 144—Scope of—Nuisance—Temporary emergency—Orders under section.

The opponent applied to the Chief Presidency Magistrate to have the noises from an adjoining house stopped under the provisions of S. 144. **Held**, per **Shah, J.** that though the order was in form within S. 144, Cr. P. Code yet it was in substance outside it, in as much as the opponent's application to the Magistrate was for the prevention of nuisance not temporarily but permanently. Per **Hayward, J.** It was difficult to say that the order was not within S. 144; nor was it possible to hold that a temporary injunction should not be passed merely because the dispute demanded a permanent injunction for final settlement. 22 Bom. L.R. 157=62 Ind. Cas. 409= 22 Cr. L.J. 521.

o. Order against general public.

——S. 144 (1), (2)—Scope—Order against general public—Order under first two clauses of S. 144 cannot be issued to general public.

The first two clauses of S. 144, Criminal P. C., do not invest the Magistrate with any power to issue an order to the general public. They are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management. A.I.R. 1939 All. 746=1939 A.W.R. (C.C.) 711=41 Cr. L. J. 121=(1939) A. L. J. 1011=I.L.R. (1939) All. 934=185 Ind. Cas. 172.

—S. 144—Scope—Order against general public.

——No order can be passed against the public without the limitation as to place. The place must be

open to the public as such. The public cannot be prohibited from putting up flags in private houses and in such a case the house owners cannot be called members of the public for purposes of the section. A.I.R. 1931 Mad. 242=60 M. L. J. 370=1930 M.W. N. 849=33 M.L.W. 640=32 Cr. L.J. 763=131 Ind. Cas. 649.

p. Order directing village munsif to be in possession.

——S. 144—Scope of—Order directing Village Munsif to be in possession.

A Magistrate acting under this section cannot direct a Village Munsif to take possession of the property in dispute but can only direct a party to the proceeding to do or abstain from doing by something. 3 L.W. 498=17 Cr. L.J. 190=(1916) 2 M.W.N. 88 =33 Ind. Cas. 830.

q. Order under—Civil Rights.

——S. 144—Scope—Order under—Civil rights—Public right—Special damage.

An order under S. 144 does not affect the civil rights of the parties and does not by itself give a right of suit. If the right sought to be established is a public right, special damage must be found. 32 M. 527; 29 M.L.J. 91, F; 32 M. 478; 2 M. 140; 18 B. 693, Dist. 42 Ind. Cas. 337. (Mad.).

r. Order under—when made.

——S. 144—Scope—Order under when made.

An action should be taken under S. 144 only in urgent cases of nuisance or apprehended danger. It is not proper that Criminal Courts should take upon themselves a jurisdiction to decide what are really civil disputes.

Where the complaint was that a person by closing a drain and obstructing the flow of the rain water of another house endangered the safety of the house but where its owner could drain off the water in some other way.

Held, that the proper remedy was in the Civil Court. 26 Cr. L.J. 560=A.I.R. 1925 All. 678=35 Ind. Cas. 656.

s. Order under when not to be made.

——S. 144—Scope of—Order under when not to be made.

An order under S. 144 can be made only in cases of urgency and when no other provision of law can be applied and not merely where the Magistrate apprehends breach of peace himself without any report from the police of the likelihood of a breach of peace. 38 Cal. 876=13 Cr. L. J. 126=13 Ind. Cas. 782.

——S. 144—Scope of—Order under when not to be made.

S. 144 Cr. P.C. cannot apply to a case where the object of the order under the section appears to have been merely to prevent pecuniary loss to the opposite party. 13 C.W.N. 188=4 Ind. Cas. 577.

t. Power to appoint Receiver.

——S. 144—Scope of—Power to appoint a Receiver.

A Magistrate has no power to appoint a Receiver in proceedings under S. 144 of the Code. 26 M. L. J. 208=(1914) M.W.N. 352=15 Cr. L. J. 509= 24 Ind. Cas. 597.

u. Private rights.

——S. 144—Scope—private rights—Order restraining exercise of — Magistrate's power to issue— Penal Code, S. 188.—Disobedience to lawful order of public officer;—If a Magistrate apprehends a breach of the peace, he can restrain temporarily the exercise by any private person of his lawful rights, if the prevention of the apprehended breach requires such order under S. 144, Cr. P. C. Disobedience to the order will be an offence under S. 188, I.P.C. 5 C.W.N. 329.

v. Question of title.

——Ss. 144 and 145—Scope—Question of title—Relevancy—Injunction order against party in possession—Propriety.

In proceedings under Ss. 144 and 145, Cr. P. Code, the Magistrate in not concerned with any question of title to land. These sections deal with possession and possession only, and they are intended to protect persons in possession and to prevent breaches of the peace. An injunction against a party restraining him from entering upon the land in dispute can only be issued in proceedings under Ss. 144 and 145 for the purpose of protecting existing possession and not to oust from possession a party who is in possession, even if such party has no right to possession. 3 A. I. Cr. D. 400.

w. Resort to S. 107.

——Ss. 144 and 107—Scope of—Resort to S. 107.

When one order under S. 144 does not prove sufficient for the purpose, the right procedure to adopt is to commence proceedings under S. 107, Cr. P. Code. 20 C.W.N. 758=17 Cr. L. J. 200=24 C. L. J. 272=34 Ind. Cas. 312.

x. Rival business.

——S. 144—Scope—Rival business — Starting of—Order under S. 144, if can be issued.

A Magistrate, as an emergency measure has power to stop, by an order under S. 144, Criminal P. C., the holding of a **hat,** or the exercise of his rights by a man on his own land. But a man, who holds a **hat** on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business, the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case, the best course is to prohibit the doing of the wrongful act or, if necessary, to bind down the wrong doer under S. 107, Criminal P. C. But an order more or less of a permanent nature is not justified under S. 144, Criminal P. C., which is meant for speedy remedy. A.I.R. 1940 Pat. 185=6 B. R. 480=41 Cr. L. J. 463= 5 Cut. L. T. 54=187 Ind. Cas. 511.

——S. 144—Scope—Rival business—When becomes a wrongful act.

Competition in trade, unless illegal mothods are adopted, is not a wrongful act. When a rival business is started in close proximity of a previously established business, the person interested in the latter is bound to object to the former, and some sort of strained feeling is inevitable. But that by itself will be no ground for restraining a newcomer from carrying his trade unless he is doing or is likely to do any wrongful act and likely to lead to a breach of the peace. A.I.R. 1934 Pat. 104=14 P.L.T. 740=35 Cr. L. J. 1057=150 Ind. Cas. 118.

y. Trustees restrained.

——S. 144—Scope of—Trustee restrained from interfering with the conduct of servants.

Where a trustee of a temple was directed by an order under S. 144 to abstain from interfering in any way with the conduct of the **adyapakam** service. **Held,** that the order was definite as it sufficiently defined the acts from which the trustee was required to abstain, and the acts comtemplated were certain within the meaning of the section. 24 Mad. 45, Appl.; 16 Cal. 80, Doubted. 19 Cr.L.J. 933=47 Ind. Cas. 657.

z. Miscellaneous.

——S. 144 (3)—Scope—Miscellaneous.

S. 144 (3) Criminal P. C., has nothing to do with the nature of the order, but is merely, one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under Sub-S. (1).

Where an order is passed under S. 144, to the public generally, prohibiting them from doing certain acts "within the limits of Nawadah Union Committee", the order sufficiently describes a particular place within the meaning of S. 144 (3), when the limits of the Union Committee are clearly and specifically defined. A.I.R. 1940 Pat. 446=41 Cr. L. J. 414=6 B. R. 425=21 P.L.T. 231=187 Ind. Cas. 135.

——S. 144—Scope—Miscellaneous.

The plain meaning of Sub-S (3) read in the light of Sub-S. (1) of S. 144, Cr. P. C., is that, in the circumstances set forth in Sub-S. (1), a Magistrate may not only direct an individual to abstain from a certain act or acts but may also issue a similar direction to members of the public generally provided, in the latter case, the prohibition is limited to occasions on which the members of the public may frequent or visit a particular place. In other words, it would not be legal to issue a general prohibition to the public to abstain from a certain act but an order to the public generally to abstaiu from a certain act on the occasions when they happened to visit a particular place would be valid. The language is also sufficiently wide to cover residents in a particular locality but, in either case, it is, of course, essential that the place covered by the order and also the act prohibited should be described with reasonable precision, whether such place be an entire district or a particular street in a town and whatever the nature of the prohibited act may be. A.I.R. 1940 Cal. 358=44 C.W.N. 641=41 Cr.L.J. 864=I.L.R. (1940) 2 Cal. 110=190 Ind. Cas. 228.

——S. 144—Scope—Miscellaneous.

An order under S. 137 (3), Criminal P. C., is not like an order under S. 144, Criminal P. C., which spends itself in 60 days. A. I. R. 1936 Pat. 577=3 B. R. 69=37 Cr. L. J. 1159=165 Ind. Cas. 542.

——Ss. 144 and 145—Scope of—Miscellaneous.

S. 145 intends definitely to settle quarrels after a fair hearing of each side and so S. 144 should not be applied to evade an enquiry into the question of possession with reference to the evidence. S. 144 is a suitable method to avoid a breach of peace if the party's claim is not made in good faith. If the facts necessitate proceedings under S. 145, S. 144 must not be applied. 3 Pat. L. J. 243=4 Pat. L. W. 354=19 Cr. L. J. 869=47 Ind. Cas. 65.

27. Successive orders.

——S. 144—Successive orders—Proceedings—Cancelled as being defective—Later valid proceeding and an effective order—if legal.

There is no authority to hold that if a proceeding initiated under S. 144, Criminal P. C., is cancelled as being defective, that will prevent the Magistrate from initiating a valid proceeding and passing therein an effective order, to enure in its operation for the statutory period of two months. The subsequent order cannot be said to be an order without jurisdiction, as it offends against the principle that there can be no successive orders, under S. 144, Criminal P. C., having the effect of extending its duration for more than two months. 1946 P.W.N. 169.

——Ss. 144 and 107—Successive orders—Time-expired order—Renewals of—Impropriety of.

S. 144 should not be used for anything in the nature of a permanent expedient without the sanction of the Local Government. Successive renewals of orders under S. 144 C.P.C. are illegal. The proper procedure would be to take action under S. 107, Cr. P. C. 3 P.L.J. 130=19 Cr. L.J. 365=44 Ind. Cas. 589.

——S. 144—Successive orders—Enlargement of time by successive orders—Illegality.

The enlargement of time by passing successive orders under the section is illegal. 20 C.W.N. 758=17 Cr. L.J. 200=24 C.L.J. 272=34 Ind. Cas. 312.

— —S. 144—Successive orders—Improper—Proper procedure.

Repeated recourse should not be had to the provisions of S. 144, Cr. P. Code in the same dispute. If danger to the public peace continues, the proper course is to obtain an order of Govt. under S. 144, Cl. (5) or to take action under S. 107 or Ch. XII of the C.P. Code. 16 Cr. L.J. 592=30 Ind. Cas. 144.

——S. 144—Successive orders.

A Magistrate cannot extend the period of two months prescribed by S. 144 by repeating the order on a subsequent date. 13 C.W.N. 195=11 Cr. L. J. 12=4 Ind. Cas. 590.

——S. 144—Successive orders—Period extended beyond two months.

A Magistrate cannot extend the period of two months prescribed by S. 144, (5) Cr. P. Code by passing successive orders. 11. C. W. N. 79, Foll. 9 Cr. L. R. 314.

28. Temporary order.

——S. 144—Temporary order.

S. 144 makes provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. 1930 Cr.C. 131=125 Ind. Cas. 273=A.I.R. 1930 Cal. 131.

——S. 144—Temporary order—Justification.

Though a person has an absolute right to use his property as he pleases, yet, if the mode of enjoyment of his property, innocent and lawful though it might be, results or tends to result, in a series of acts which are likely to lead to a breach of the peace, an order under S. 144, restraining the person temporarily from enjoying the property in that way is amply justified 10 B. L. R. 434 (F. B.) Rel. on. 11 C W.N. 79, Dist. 108 Ind. Cas. 590=32 C.W.N. 613=55 Cal. 1077=47 C.L.J. 452=29 Cr. L. J. 423=10 A. I. Cr. R. 82=A.I.R 1928 Cal. 446.

——S. 144—Temporary order — Justification—Order under S. 144 may be made though the remedy sought is permanent.

The opponent applied to the Chief Presidency Magistrate to have the noises from an adjoining house stopped under the provisions of S. 144. **Held,** Per

Shah. J. that though the order was in form within S. 144, yet it was in substance outside it, inasmuch as the opponent's application to the Magistrate was for the prevention of nuisance not temporarily but permanently. Per **Hayward, J.** It was difficult to say that the order was not within S. 144; nor was it possible to hold that a temporary injunction should not be passed merely because the dispute demanded a permanent injunction for final settlement. 22 Cr. L. J. 521=62 Ind. Cas. 409=22 Bom. L. R. 157.

——**S. 144—Temporary order — Jurisdiction.** Where a Magistrate apprehends that with the force at his disposal, a breach of the peace cannot be prevented he can pass a temporary order under S. 144 stopping a procession. 15 Cr. L.J. 30=22 Ind. Cas. 174.

——**S. 144—Temporary orders—Power to renew—Notification of Government.**

S. 144, Cr. P. C., applies to all temporary orders in urgent cases of nuisance. Extending the period during which they are to continue for more than 2 months is without jurisdiction in the absence of Government notification. Where an order itself does not set forth the materials on which it is based or no urgency is indicated, it is without jurisdiction. (1913) M.W.N. 1003=14 Cr. L. J. 658=27 M.L.J. 628=21 Ind. Cas. 898.

29. Validity of order.

——S. 144—Validity of order—Person not in possession cannot be put in possession under S. 144—Such direction, if clearly separ ble from rest, does not vitiate the whole order.

The powers of a Magistrate under S. 144 extend to a direction in the proper circumstances, to any person "to abstain from a certain act or to take certain order with certain property in his possession or under his management." If the property was not in the possession or under the management of the Sub-Inspector of Police, the Magistrate has no authority to put him in possession of that property and direct him to harvest the crop. Such a direction, however, if clearly separable from the rest of the order of the Magistrate, does not vitiate the order as a whole. A.I.R. 1944 Pat. 213=11 B.R. 70=46 Cr. L. J. 18=215 Ind, Cas. 152.

——**S. 144—Validity of order—Circumstances justifying order.**

To justify an order under S. 144, there must be a casual connection between the act prohibited and the danger apprehended to prevent which the order is passed. A.I.R. 1942 Lah. 171=44 P.L.R. 297=I.L.R. (1942) Lah. 510=43 Cr. L. J. 747=201 Ind. Cas. 572 (F. B.).

——**Ss. 144, 134,—Validity of order—Copy of order not stuck up as required by S. 134—Irregularity, when material.**

Where, as required by S. 134, no copy of an order under S. 144, is stuck up, the irregularity would be immaterial provided the persons whom it was sought to prosecute in respect of any disobedience of the order had knowledge of its contents.

Held, that the service of the order which was only a precis of formal order under S. 144 was insufficient, giving no sufficient information regarding prohibited acts and in being inconsistent with main order and no conviction could be sustained. A.I.R. 1940 Cal. 358=41 Cr. L. J. 864=44 C.W.N. 641=I.L.R. (1940) 2 Cal. 110=190 Ind. Cas. 228.

——**S. 144—Validity of order**—Fact that conviction is difficult to secure, if shows that order itself was without jurisdiction.

It is necessary to distinguish carefully between the jurisdiction of the Magistrate to make on order under S. 144, Criminal P.C., and a possible practical difficulty in showing that it has been disobeyed. It does not follow that because it is difficult for the Crown to secure a conviction, that the order itself was made without jurisdiction. A.I.R. 1939 Cal. 703 =43 C.W.N. 1061=41 Cr. L. J. 105=I L.R. (1939) 2 Cal. 507=184 Ind. Cas. 856.

——**S. 144 (3)—Validity of order**—Lahore District, if "particular place"—Order relating to such District —Legality.

District of Lahore is a particular place within the meaning of S. 144 (3).

The fact that the order forbade meetings in so large a place as the Lahore District does not make the order 'illegal' although it might have made the order difficult to enforce for one reason or another. A.I.R. 1937 Lah. 80=17 Lah. 515=38 P.L.R. 964=38 Cr. L. J 354 (2)=167 Ind. Cas. 284.

——**Ss. 144, 145—Validity of order**—Petition under S. 145 (4)—Order not purporting to be under any provision of law—No decision that dispute is likely to lead to breach of peace—Effect of order.

Where on a petition presented under S. 145 (4), Criminal P.C., an order is passed which really does not purport to be passed under S. 145 or 144 and does not in fact purport to be an order passed in the exercise of any jurisdiction conferred on the Magistrate by any section of the Criminal P.C., or any other provision of law, and the Magistrate did not decide as a matter of fact whether this dispute was likely to lead to a breach of the peace or a disturbance of public tranquillity, the essential preliminary to assuming jurisdiction thus not being found to exist, his order must be deemed to be an order having no legal force, and any expression of opinion contained therein must be deemed to be void of legal force or effect. In such circumstances, there is no order which requires to be formally set aside or modified in revision; the order complained of being one which has really no legal force or effect. But such an order must necessarily prejudice a party and it is not at all desirable that the Magistrate who has jurisdiction should omit to exercise his jurisdiction in the manner prescribed by law but on the other hand, proceed to deal with it in a way not contemplated by the law. A.I.R. 1937 Mad. 494=45 M.L.W. 473= (1937) M. W. N. 636=38 Cr. L. J. 892=170 Ind. Cas. 390.

——**Ss. 144, 530, 529 (f), 531—Validity of order**—Transfer of application under S. 144 (4) by District Magistrate—Validity of, when he had no power to transfer.

Where the District Magistrate transfers an application made under S. 144 (4), Criminal P.C, even assuming that there was no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside even if it be assumed that the District Magistrate has no power in view of S. 529 (f), and S. 531. A.I.R. 1937 Mad. 487=45 M.L.W. 367=(1937) M.W.N. 210= 38 Cr. L.J. 864=170 Ind. Cas. 193.

—**S. 144—Validity of order — Magistrate acting** for Sub-Divisional Magistrate—Sub-Divisional Magistrate returning from tour on day on which order is passed—Jurisdiction.

Where a Magistrate was dealing with the file of the Sub-Divisional Magistrate during the latter's absence on tour and the Sub-Divisional Magistrate returned from tour on the morning on which an order was passed but it was not known that the Sub-Divisional Magistrate would attend Court and he did not do so until late;

Held, that the order of the Magistrate was not without jurisdiction. A.I.R. 1934 Cal. 393=35 Cr. L.J. 881=38 C.W.N. 556=148 Ind. Cas. 773.

——S. 144—Validity of order.

An order under S. 144 cannot be passed by a Magistrate when in effect there are no materials before him justifying the order. 1929 Cr. C. 586=A. I. R. 1929 Pat. 714.

——S. 144—Validity of order—Order without sufficient material is not valid.

The report of the police who were ordered to report as to the likelihood of breach of peace, gave the Magistrate no material for proceeding against the three petitioners. There was in the body of the report a general remark about Marwaris in Murliganj; but certain persons were specially named at the end of the report and the Police Sub-Inspector prayed for proceedings against them.

Held, the effect of the report must be understood as limiting its purpose to these named persons. The Magistrate had no materials before him upon which he could make an order against petitioners. A.I.R. 1922 Pat. 239.

——S. 144—Validity of order—The interpretation of the Sessions Judge of the order directing a party not to obstruct the water by bandh is an order directing the removal of a bandh already is erected wrong.

A small river flowed by the east side of two villages **K** and S, whose lands were irrigated by the river. In August 1927 the people of **K** and certain adjoining villages raised a bandh in the bed of the river in village **K**, where upon on 2nd September the tenants of **S** filed a petition before the Sub-Divisional Officer denying the right of the people of **K** to erect a bandh and alleged that the bandh caused great damage to the crops of **S** and asked the Court to take action under S. 144 against the people of **K** directing them to remove the bandh. On 8th September the Magistrate passed the following order: "The report shows that the villagers of **K** have erected a new bandh at point **A** of this map. Issue notice S. 144, C. P. Code, restraining the second party from obstructing the flow of water into the canal by erecting a bandh at point **A** . . . Send a copy of the order to the police who will see that there is no breach of the peace." The people of **S** as also the Inspector of Police and the Sessions Judge construed the order to mean that the bandh was to be removed.

Held, that there was nothing in that order to justify the assumption that the Magistrate had given any direction to the Sub-Inspector to remove the bandh erected by the people of **K**. It was beyond the jurisdiction of the Magistrate to pass an order like this under S. 144. All that it purported to do was to restrain the people of **K** from obstructing the flow of water into the canal by erecting a bandh. This obviously could not apply to a bandh which had been admittedly erected before this order was passed, and that it could not be held that the people of **K** were acting in defiance of the order of the Magistrate. 1929 Cr. C. 283=A.I.R. 1929 Pat. 523.

——S. 144—Validity of order — Order passed under S. 144 without preliminary notice or inquiry is bad.

Where the opposite party were not parties to the proceedings under S. 145 started between the petitioners and one H, nor had any report been received from the police as to their possession of the two plots or as to a likelihood of a breach of the peace and the opposite party had merely said that their possession was being interfered with,

Held, that an order passed by the Magistrate under S. 144 was wrong, especially when he passed the order without issuing any preliminary notice to the petitioners and without hearing them on the point; it was open to him either to direct that the opposite party should be made parties to the proceedings then pending under S. 145 or a notice should have been issued on the petitioners to show cause. 84 Ind. Cas. 324=2 Pat. L.R Cr. 198=6 P.L.T. 253=26 Cr. L.J. 260=A.I.R. 1924 Pat. 703.

30. Miscellaneous.

——S. 144—Miscellaneous—Duty of a Magistrate.

A definite order, or an order refusing to take action or rescinding an order under S. 144 must be ignored when evidence regarding possession is being taken under S. 145. 27 Cal. 785, Rel. on.; A.I.R. 1925 Pat. 610, Ref. 1930 Cr. C. 1100= A.I.R. 1930 Pat. 556.

——S. 144—Miscellaneous—When an order was passed under S. 144 which amounted to an order to cut the bandh the assmbly resisting that is not unlawful.

A compromise decree to which the Secretary of State was a party was passed providing that if the work of excavation and of bunding the eastern bank of a certain stream was not completed by a certain time the injunction issued for the maintenance of the western bandh would be cancelled and the respondents (that is the plaintiffs in the suit for injunction) would raise no objection to the defendants or any other person cutting the western bandh and bunding the eastern bank after the period allowed had expired; the eastern bank was damaged and one of the defendants in the suit for injunction applied to the Collector for permission to remove the western bandh. The Collector as District Magistrate issued order under section 144 to the public generally to abstain from interfering when the western bandh was cut as conditions had arisen when it was necessary to cut the western bandh. In the result at the time of cutting the bandh a riot took place and some of the villagers who had taken part in preventing the cutting of bandh were convicted under S. 147, I. P. C., and the common unlawful object was stated to be resisting the cutting of the bandh.

Held, that in effect the order really amounted to an order to cut the bandh. The District Magistrate who is his capacity as Collector represented the Secretary of State in the civil suit and who was in effect a party thereto was taking upon himself to construe the consent decree of the Civil Court and to say that the circumstances had arisen which justified the dissolving of the injunction of the Civil Court and the cutting of the western bandh. The District Magistrate had no right to usurp the functions of the Civil Court in this way; the injunction was still subsisting and could only be dissolved by the Court which granted it and it was the High Court alone which could construe its own decree and say whether the circumstances had arisen which would justify the dissolution of the injunction and the cutting of the bandh.

Held, further in the result there was no order in express terms to cut the bandh and no one was entitled to cut the bandh in view of the Civil Court's injunction which was still subsisting and this being so the common objects set out in the charge had not been established and therefore the

conviction of and sentence passed on the petitioners must be set aside. 84 Ind. Cas. 343=28 C.W.N. 732=26 Cr.L.J. 279=A.I.R. 1924 Cal. 996.

——S. 144—Miscellaneous.

If a Magistrate abuses his power under S. 144 the remedy is probably to invoke the power of S. 107, Government of India Act. 113 Ind. Cas. 279=30 Cr. L.J. 119=12 A.I. Cr. R. 17=52 Mad. 69=1928 M.W.N. 779=28 M.L.W. 506=1 M. Cr. C. 304=A.I.R. 1928 Mad. 1108=55 M.L.J. 621.

——S. 144—Miscellaneous—Order under S. 144 may give cause of action for declaration of title.

If orders under S. 144, Cr. P. Code, are illegal or ultra vires the proper way to question them is by a Criminal Revision Petition to the High Court. It is possible to question their validity in a properly framed suit to which the Government and its officers parties. The existence of the criminal orders does not justify a refusal on the part of the Court to enquire into the Civil rights of the parties. The orders under S. 144 might remain in force unaffected by any declaratory decree, but such orders are always open to reconsideration by Government. 68 Ind. Cas. 180=15 M.L.W. 68=1921 M.W.N. 867=A.I.R. 1922 Mad. 123=42 M.L.J. 179.

——S. 145—Synopsis.

1. Action under
2. Amendment of proceedings
3. Applicability
4. Arbitration
5. Attachment. See also Cr.P. Code S. 146
6. Breach of peace
7. Burden of proof
8. Cancellation and revival
9. Compromise
10. Consent
11. Costs. See Cr. P. Code S. 148 (3)
12. Crops
13. Death of party
14. Debutter estate
15. Decision of Revenue Court
16. Decision of Criminal Court
17. Decree of Civil Court
18. Defect in procedure
19. Dismissal for default
20. Disposal of property
21. Disputes between landlords, tenants etc.
22. Dispute concerning water
23. Dispute about property
24. Distribution of fees paid by pilgrims
25. Dropping of proceedings
26. Due course of law
27. Duty of Magistrate
28. Easements. See also Cr. P. Code S. 147
29. Effect of order
30. Emergency orders
31. Evicted in due course of law
32. Evidence
33. Evidentiary value of order
34. Ex parte order
35. Final order
36. Forum
37. Foundation of jurisdiction
38. Fresh proceedings
39. Government of India Act S. 107
40. Immovable property
41. Inconsistent orders
42. Information
43. Inquiry
44. Interpretation
45. Joint inquiry
46. Joint possession
47. Joint property
48. Jurisdiction
49. Large areas
50. Likelihood of breach of peace. See Cr. P. Code S. 145—Preliminary order—When can be passed
51. Local inquiry
52. Nature of proceeding
53. Notice
54. Object of section
55. Parties
56. Pendency of Civil suit
56-a. Period of Possession
57. Possession
58. Powers of Magistrate
59. Preliminary order
60. Procedure
61. Proceedings under
62. Question of title
63. Receiver
64. Reference
65. Remedy of aggreived party
66. Review
67. Revision
68. Security for keeping the peace
69. Sine die postponement
70. Subject matter of dispute
71. Transfer of case
72. Miscellaneous.

1. Action under

——S. 145—Action under in respect of movable property — Legality — Proper disposal of attached movable property.

Action under S. 145, Cr. P. Code, can be taken only in respect of immovable property. The Magistrate has no jurisdiction to attach movable property. But where he has ordered it, he should return it to the person from whom it is found to have been seized after giving an opportunity to both the parties to produce evidence as to their possession. 1948 A.W.R. (H.C.) 257=1948 A.L.W. 344=1948 O.W.N. 346=A.I.R. 1949 All. 285=50 Cr.L.J. 473.

——Ss. 145, 148—Action under—If proper when civil remedy available.

There is nothing in Chap. 12 or in S. 146 which states that in order that action under Chap. 12 may be justified the danger of a breach of the peace should be imminent and that the opposite party should have not sufficient time to go to the proper Court. In fact no case could ever be made legal under that Chapter if it was necessary that it should be impossible to have sufficient time to go to the proper Court, because obviously it is always as easy to file a plaint in a Civil Court as to file a complaint in a Criminal Court. The provisions of Chap. 12 are intended to provide a speedy remedy in cases of disputes with which that Chapter deals, in order that the matter may be settled temporarily while more lengthy civil proceedings take place. 53 A. 215=32 Cr.L.J. 309=129 Ind. Cas. 441=A.I.R. 1931 A. 14=1930 A.L.J. 1437=1931 Cr. C. 14.

——S. 145—Action under—If justified where civil remedy is available.

When there is ample time for the obtaining of a civil remedy criminal action is not justified. 76 Ind. Cas. 691=25 Cr. L. J. 227=A. I. R. 1924 Oudh. 341.

2. Amendment of Proceedings.

——S. 145—Amendment of proceedings—Change in constitution of parties.

There is nothing illegal in the Court amending proceedings under S. 145, Cr. P. Code, consequent on a change in the constitution of the parties thereto during the pendency of such proceedings for several years. 229 Ind. Cas. 536=48 Cr.L.J. 440 =13 B.R. 390=A.I.R. 1948 Pat. 77.

3. Applicability.

——S. 145—Applicability—Dispute concerning live-stock—Proceeding, if can be taken.

No proceeding can be taken under S. 145, Criminal Procedure Code, if the dispute concerns live-stock, as it is neither land nor water. Pak. L.R. (1949) Lah. 466=A.I.R. 1949 Lah. 273=51 Cr.L.J. 55.

——S. 145.—Applicability.

——Habitual and unjustifiable use of S. 144, Criminal P.C., as a substitute for Ss. 107 and 145 of the Code is deprecated. A.I.R. 1940 Sind 158= 41 Cr. L.J. 952=I.L.R. (1940) Kar. 508=190 Ind. Cas. 618.

——S. 145—Applicability.

Where the substance of information received under S. 110, Criminal P. C., as set out under S. 112 relates to disputes concerning land, special provisions of S. 145 apply excluding the general provisions of S. 110. A.I.R. 1939 Sind 261=40 Cr. L.J. 887 (2)=184 Ind. Cas. 189 (2).

——S. 145—Applicability.

If applies to case of dispossession of tenant by landlord.

S. 145, Criminal P.C., covers the cases of dispossession of the tenants by their landlords. The question of title does not arise before the Magistrate making an inquiry under S. 145, Criminal P.C. He is concerned with the question of possession in such procedings. A.I.R. 1938 Lah. 122=39 P.L.R. 775=39 Cr. L.J. 297=173 Ind. Cas. 352.

——S. 145—Applicability.

The mere mention of an order as being made under S. 145, Cr. P.C., will not by itself make it an order under Ch. XII of the Code; 1903 A.W. N. 212=26 A. 144.

See also 7 Bom. L.R. 475.

——S. 145—Applicability—Sandal Paste on idol —Right to remove and appropriate—Dispute as to—Jurisdiction:

The Badves of a temple applied to a Magistrate under S. 147 of the Criminal P. C., saying that the right to take sandalwood paste when removed from the person of the idol belonged to them; but as this right was disputed by the pujaries, there was a likelihood of a breach of the peace. The Magistrate held that he had no jurisdiction under the Section, as the right in question was already adjudicated upon by a civil court; but the Magistrate ordered that the pujaries should hand over the sandalwood paste after removing it from the idol to the Badves, who had a right to the same:- **Held,** (1) that the Magistrate had no jurisdiction to pass the order; (2) that if the Magistrate was of opinion that the dispute might have occasioned a breach of the peace, he ought to have proceeded under Chapter VIII of the Criminal Procedure Code; (3) that Ss. 145 and 147 of the Criminal Procedure Code did not apply, as there was no dispute concerning the right of use of any land or water as defined in S. 145 of the Code or of any right of way or easement over the same; and (4) that the sandalwood paste did not fall within the description given in S. 145 (2) of the Criminal Procedure Code as forming the profits of immovable property, as it in no way arises or emanates from the temple building, or can in any regard be held to be properly arising from immovable property. 4 Bom. L.R. 438.

——S. 145—Applicability—Dispute concerning exhibition of certain film.

An order under S. 145, Cr. P. Code, cannot be passed where the dispute is not concerning a cinema building but concerning a certain film that is to be exhibited in it. Pak. L.R. (1950) Lah. 172=A.I.R. 1950 Lah. 132=51 Cr. L.J. 1142.

——S. 145—Applicability—Procedure in case of dispute about land—Proceedings under S. 107 against one of the parties—Propriety of—conversion of proceedings under S. 145 into proceedings under S. 107—Propriety. See Cr. P. Code, Ss. 107 and 145. 51 Cr. L.J. 92=A.I.R. 1949 Pat. 482.

——S. 145—Applicability—Dispute as to possession of bund.

—Where the subject-matter of dispute is possession of a complete and existing bund and not a right to erect a bund, the case falls within S. 145. 15 C.L.J. 267 and 4 C.W.N. 779, Dist. 33 C.W.N. 1004=125 Ind. Cas. 857=31 Cr. L. J. 944=1930 Cr. C. 11=A.I.R. 1930 Cal. 59.

——S. 145—Applicability—Dispute as to right of worship only—S. 147 and not S.145, is proper.

Where the real dispute between the parties was as to the right to worship in the temple and not as regards the possession of the temple.

Held, that the proper section under which action should be taken by the Magistrate to prevent a breach of peace is S. 147 and not S. 145. 16 M.L.T. 427, 29 Mad. 237 and 11 Mad. 323, Rel. on. 17 Cr. L. J. 235, Dist. 88 Ind. Cas. 2=26 Cr. L. J. 1057=A.I.R. 1925 Mad. 779=48 M.L.J. 528.

——S. 145—Applicability—Claim of right to weigh grains in a market.

——The claim to weigh grain, in a market and to realize the weighing dues is not covered by S. 145. 68 Ind. Cas. 836=20 A, L. J. 694=23 Cr. L. J. 612 =A.I.R. 1922 All. 430.

——S. 145—Applicability—Where there is no continuity of possession, proceedings cannot be taken under S. 145.

Where the hat is held on a place surrounded by walls, and the gates on those walls are shut at night and the stall-holders on removing their goods leave the hat entirely empty, when it remains in the charge of the proprietor.

Held, the subject matter is not proper for proceedings under S. 145. The element of continuity of possession is necessary, at any rate, in cases where interruption is not due to seasonal variations. 71 Ind. Cas. 527=40 Cal. 871=24 Cr. L. J. 175=A.I.R. 1922 Cal. 502.

——S. 145 — Applicability — Dispute as to mining.

The definition of land as given in the Code is wide enough to cover mining rights and even prospecting or boring licences which can only be utilised by going npon the land and exercising some rights relating to it. Nor is S. 145, limited in its scope to dispute relating to "actual possession" only, if by that expression is meant

possession by squatting the land. It is not correct to say that a licence to dig menerals confers no interest or estate in the soil, and that a disupte concerning mining rights is not one with which the Magistrate can deal under S. 145. Other proceedings might serve equally well to preserve tranquillity, but that is a matter on which the Magistrate is entitled to use his own discretion. 32 C. L. J. 54 dist. 71 Ind. Cas. 236=35 C. L. J. 456=24 Cr. L. J. 108=A. I. R. 1922 Cal. 83.

——S. 145 — Applicability — Disputes as to mines and minerals.

If a party under a mining lease is in actual possession of the mines and minerals as profit a prendre he can enforce his possession not only by a civil suit but can claim to be maintained in their possession by an order under S. 145 of the Code of Criminal Procedure. Whatever difficulty might have been felt in the construction of the corresponding section in the Code of 1878 as to whether S. 145 can comprise a dispute relating to mines and minerals it is clear that the present section provides an explanation so as to remove any doubt whatsoever upon the point. No doubt is entertained upon the point that mines and minerals and the right to take mines and minerals can well be dealt with by an order under S. 145. But behind all this rests the fundamental idea in connection with S. 145 of positive physical possession. The question as to whether S. 145 is appropriate must be determined in the circumstances of each case. The proceeding drawn up under cl. (1) of S. 145 must be considered to be conclusive of the existence of a breach of the peace unless it were shown that the information upon which the proceeding is based does not in fact disclose any danger to a breach of the peace. 71 Ind. Cas. 871=21 Cr. L. J. 263=1922 P. H. C. C. 122=A.I.R. 1922 Pat. 340.

——S. 145—Applicability.

——Where there is a dispute as to the possession of some the lands in question, an order S. 145 is justified. A.I.R. 1921 Pat. 482.

——S. 145—Applicability.

——Where the possession over the property is disputed, both parties claiming the land on the strength of recent sale deeds from the original holder, an order under S. 145 is sound. 68 Ind. Cas. 34=2 P.L.T. 392=A.I.R. 1921 Pat. 410=23 Cr. L. J. 498.

——Ss. 145 and 144—Applicability.

——It is only when the possession is either undisputed or clear beyond any shadow of doubt that S. 144 of the Code applies. Where the possession is disputed S. 144 of the Code has no application, the effective and the proper section is S. 145 of the Code. 63 Ind. Cas. 621=2 P.L.T. 484=22 Cr. L. J. 685=A.I.R. 1921 Pat. 392.

—See also; 1. Pat. L.T. 377=21 Cr. L. J. 646=57 Ind. Cas. 662.

——Ss. 145 (7) and 439—Applicability of.

Cl. (7) of S. 145 is applicable only to proceedings under S. 145 but not to revisional orders. 17 Cr. L. J. 389=4 L. W. 440=35. Ind. Cas. 821.

——Ss. 145 and 144—Applicability—Dispute as to possession—Imminent breach of the peace—Revision—Interference—High Court.

When there is a dispute as to possession, S. 145 is the proper Section under which the action should be taken. But if the Magistrate is satisfied that one of the parties is in possession of and there is an imminent danger of a breach of the peace, it is incumbent on him to restrain the opposite party by an order under S. 144. The High Court can only interfere if the Magistrate's finding about possession is not based on any material before him. But he is the sole judge of its sufficiency. 3 P.L.W. 353=19 Cr. L.J. 113=43 Ind. Cas. 401.

——Ss. 145, 107—Applicability—Dispute relating to a fishery.

——In the case of a dispute likely to cause a breach of the peace existing between two parties relating to a fishery right the proper section to proceed under for preventing a breach of the peace is S. 145, Cr. P. C., and not S. 107. The words of S. 145 are mandatory, while those of S. 107 are discretionary. In a dispute likely to cause a breach of the peace arising between two parties concerning a fishery, the Magistrate drew up a proceeding under S. 107, Cr. P. C., with the result that one of the parties was bound down to keep the peace.

Held, that the order under S. 107, Cr. P. C., is bad and ought to be set aside. If there is still a likelihood of a breach of the peace, the Magistrate may proceed under S. 145, Cr. P. C., if the thinks fit.—12 C.W.N. 487=35 C. 117=6 C.L.J. 697.

——S. 145—Applicability — Dispute between parties as to the management of partnership property—S. 145, Cr. P. C., does not cover a case of a dispute between partners as to the management of the property. 8 C.W.N. 885=32 C. 249.

——S. 145—Applicability—Dispute concerning land —Breach of the peace.—Where parties are quarrelling over land, one of whom claims to be in exclusive possession and the other to be in joint possession of the land and there is every likelihood of a breach of the peace taking place, the proper procedure for a Magistrate is to proceed under S. 145 and not under S. 107 of the Criminal P. C. 1 C. L. J. 632.

——S.145—Applicability—Jurisdiction of Magistrate—Identity of land—Admission by one party in civil suit:—Where one of the parties by bringing a civil suit for recovery of possession has admitted that the other party are in possession, there is no question as to possession for the Magistrate to decide in a proceeding under S. 145, Cr. P.C. If he still considers necessary that steps should be taken to preserve the peace, it is open to him to take proceedings under provisions of law other than S. 145, Cr. P.C. He has no jurisdiction to proceed under S. 145, Cr. P.C. Where in a proceeding under S. 145, Cr P.C., a question is raised as to the identity of the land in dispute the Magistrate is bound before going further, to ascertain and identify the lands, so that neither party may be in doubt as to the specific lands in respect of which the proceedings are taken. A Magistrate has no jurisdiction to decide a dispute as to lands in excess of those referred to in his proceedings. 7 C.W.N. 558.

——S. 145—Applicability—Court if can order boundary marks being fixed:—S. 145 does not

empower the court to make any order for laying down boundary marks and the removal of such boundary marks is no offence under S. 434, Penal Code. (1904) A.W.N. 264=1 A.L.J. 619=27 A. 300.

——S. 145—Applicability—Dispute as to the machinery employed in collection of profits:—A Magistrate cannot decide under S. 145 the method by which the possession is to be exercised or the agency by which the person in possession is to collect the profits. Where the possession is undisputed and the only dispute is as to the machinery by which the owner exercised his possession i.e., whether by collecting rents through the agency of one party or the agency of the other, the section is not applicable. It may perhaps be otherwise if the agency is not terminable at the will of the owner. 10 C.W.N. 1088 foll. 27 C. 259 dist. 4. C.W.N. 426 ref. to. Where one of two co-sharers was by arrangement entitled to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently:—**Held**: that the Magistrate had no jurisdiction to take proceedings under S.145 Cr. P.C. 36 C. 986=4 Ind. Cas. 696=11 Cr. L.J. 28.

4. Arbitration.

——S. 145—Arbitration—Awards— Acceptance of by parties—Order.

Where after the drawing up of proceedings under S. 145 Cr.P.C., the matter is with the consent of parties referred to arbitration and an award is filed and accepted by them, **Held**, that the parties having accepted the award and no evidence having been offered by the party aggrieved by the award the Magistrate acted properly in proceeding upon the basis of the award and not insisting on evidence being adduced which the parties had no desire to offer. 3 P.L.J. 249=4 P.L.W. 104=19 Cr. L.J. 266=44 Ind. Cas. 122.

——S. 145—Arbitration—Award can be used to drop proceedings but not to declare possession of any party.

A compromise can only be taken by the Magistrate as evidence for an order to be passed under cl. (5) of S. 145 and cannot possibly be made the basis of an order passed under cl. (6). The rule governs also a case in which an arbitration award is before the Court and where that arbitration refers not to existing and past possession but to future possession after division of the property or alteration of the existing condition. 92 Ind. Cas. 172=3 Pat. 288=7 P.L.T. 288=27 Cr. L.J. 220= A.I.R. 1924 Pat. 589.

——S. 145—Arbitration—Dispute referred to—Award filed—Procedure to be followed by Magistrate—Magistrate adjourning case for final orders—Party putting up application that he should be allowed to tender evidence and for decision according to law—Duty of Magistrate.

It is a fact that S. 145 contains no reference to arbitration proceedings, but there is nothing in the section to forbid the parties by mutual consent adopting any procedure on which they may agree for the amicable settlement of their dispute. If the dispute is amicably settled and no likelihood of a breach of the peace remains, the Magistrate can act under S. 145 (5) cancelling his previous order and staying all further proceedings; but if he does not do that, the only alternative is to decide the dispute and pass order under S. 145 (6). Such an order must be based on evidence and the Magistrate before making it, is bound under S. 145 (4) to receive all such evidence as may be produced by the parties. Where the award is the only evidence offered and the only evidence that either party desired to offer up to the date of the Magistrate's final order and the Magistrate does not pass an order either declaring himself satisfied that there was no longer a danger of breach of the peace or treating the award itself as the only evidence tendered and acting on it under S. 145 (4), but before he comes to dispose of the case, a petition asking that evidence should be received and the dispute determined according to law is filed, it becomes his duty to receive such evidence as might be produced, under Sub-S. (4) unless he decides to drop the proceeding under Sub-S. (5). In the face of such an application, he cannot pass orders as if the award was the only piece of evidence tendered by the parties. A.I.R. 1942 Pat. 289=43 Cr. L. J. 172 =197 Ind. Cas. 491.

——S. 145—Arbitration—Power to refer to—Question as to who is in actual possession, if can by referred to arbitration.

There is no provision in the Criminal P.C., for reference of any matter to arbitration or delegation of its power by a Criminal Court to an arbitrator. The procedure laid down under S. 145 does not contemplate that the question as to who is in actual possession should be delegated even by the consent of the parties, to an arbitrator. The section directs the Magistrate himself to receive the evidence adduced by the parties and, on a consideration thereof, to come to a decision. A.I.R. 1941 All. 42 =(1940) A.L.J. 758=42 Cr. L.J. 246=1940 A.W.R. (H.C.) 561=I.L.R. (1941) All. 14=192 Ind. Cas. 16.

——S. 145—Arbitration — Reference to is not contemplated by S. 145.

In proceedings under S. 145, a reference to arbitration is not contemplated. The section directs the Magistrate to receive evidence himself and on a consideration of such evidence to decide the question of actual possession. No doubt if the parties had privately referred the dispute to arbitration and the award of the arbitrators had been accepted by both the parties, the Magistrate would have ground for proceeding under Sub-Ss. (5) of S. 145, Cr.P.C. 63 Ind.Cas. 159=33 C. L. J. 338=25 C.W.N. 719=22 Cr. L. J. 623 =A.I.R. 1921 Cal. 637.

——S. 145—Arbitration—Reference to—Legality.

A Magistrate acting under S. 145 of the Cr.P.C., has no jurisdiction to refer the dispute to arbitrators and accept their award and his order is liable to be set aside especially where only one of the arbitrators signed the award. 2 Pat. L. J. 86; 1 P. L. J. 336; 33 C. 552; 7 C.W.N. 461 Not Fol. 1 Pat. L.W. 748=(1917) P.H.C.C. 251=18 Cr. L. J. 685=40 Ind. Cas. 333.

——S. 145—Arbitration—Reference to—Legality.

There can be no delegation by a magistrate of his duties of inquiry under the section to arbitrators even with the parties' consent. 32 C. 552, rel. on. 7 C. W.N. 461 dis. appr. 1 Pat. L.W. 81=2 Pat. L. J. 86= 18 Cr. L. J. 145=37 Ind. Cas. 513.

——S. 145—Arbitration—Reference to:—The parties to a proceeding under S. 145, Cr.P.C, asked to refer their dispute to an arbitrator who was to decide which of them was in possession. The Magistrate consented, and, pending the decision of the arbitrators, attached the properties in dispute under S. 146, Cr.P.C. On an award being made by the arbitrator,

deciding the question of actual possession:—**Held**—That the Magistrate ought to take the finding of the arbitrator as to the fact of possession into consideration in bringing the proceeding to a legal termination—7 C.W.N. 461. But see 32 C. 552.

——S. 145—Arbitration—Reference to—Legality.

S. 145 does not contemplate that the question as to who is in actual possession should be delegated even by consent of parties to arbitrators. The section directs the Magistrate himself to receive the evidence adduced by the parties and on a consideration there of to come to a decision. 1 C. L. J. 432=32 C. 552.

5. Attachment.

——S. 145—Attachment. See also. — Crl. P. Code. S. 146.

——S. 145 (4) Proviso—Attachment—Crops cut from disputed land and removed and stored in another place—Jurisdiction to attach.

S. 145, Cr. P. Code, was never intended to be used with reference to crops already cut and removed and stored in another place which is not the subject of dispute, although the crops might be crops grown on the land in dispute. A Magistrate has therefore no jurisdiction to attach such crops under the proviso to S. 145 (4), Cr. P. Code. 27 Pat. 670=A.I.R. 1949 Pat. 58=1949 P.W.N. 34=49 Cr. L. J. 657.

——Ss. 145 (4) and 435—Attachment of lanka lands by Sub-Divisional Magistrate and direction to Tahsildar to sell cultivation rights by public auction—Nature of order—Order of Sub-Divisional Magistrate setting aside sale by Tahsildar—If revisable.

When after an attachment of lanka lands under the second proviso to S. 145 (4) of the Cr. P. Code, the Sub-Divisional Magistrate directs the Tahsildar to sell the cultivation rights by public auction and submit the sale list, etc., to him the Tahsildar is only an agent of the Magistrate and the directions given to him are merely administrative orders which can be varied by the Sub-Divisional Magistrate. If the Sub-Divisional Magistrate sets aside the sale by the Tahsildar, his order is only an administrative one and no revision would lie against such an order. 64 L.W. 748=49 Cr. L. J. 456=A.I.R. 1948 Mad. 234 =1948 M.W.N. 53 (2)=(1947) 2 M. L. J. 459.

——S. 145—Attachment—Finding of possession in favour of party—Effect on order of attachment.

No order of attachment can subsist after the Magistrate has found in favour of a party on the question of possession. 25 Pat. 19=12 B R. 290=222 Ind.Cas. 611=47 Cr. L. J. 328=A.I.R. 1946 Pat. 330.

——S. 145 (4)—Attachment under S. 145 (4), Proviso and one under Civil Procedure Code, distinction.

The purpose of a Civil Court attachment is quite different from that of an attachment under S. 145 (4), Criminal P.C. Attachment of immovable property under the Civil P.C. is a preliminary step to be taken to make the property available for sale for satisfaction of the decree. The purpose of the attachment is to prohibit the judgment debtor from transferring or charging the property in any way. Such purpose is, wholly foreign to the scope of a proceeding under S. 145, Criminal P. C. The Magistrate, acting under S. 145, has nothing to do with the title to the property and is concerned with maintaining actual possession with a view to prevent breach of peace. A.I.R. 1943 Pat. 124=21 Pat. 743=9 B.R. 231= 44 Cr. L. J. 414=205 Ind, Cas. 429.

——S. 145 (4)—Attachment under Proviso to S. 145 (4)—Effect of.

The effect of an attachment under the proviso to S. 145 (4) is to bring the property under the control or custody of the Magistrate. The parties have no longer any control or possession over the land. The Magistrate may take such steps as he thinks fit for its proper custody and management. It is, therefore, competent for the Magistrate to settle the land attached pending the disposal of the case. Such action does not militate against S. 145 (8). A.I.R. 1943 Pat. 124=21 Pat. 743= 9 B.R. 231=44 Cr. L. J. 414=205 Ind. Cas. 429.

——S. 145 (4)—Attachment.

Where a dispute relates not merely to a building but also to the goods and other movable property within the building, a Magistrate acting under S. 145 has power to attach the movable property as well. A.I. R. 1933 Lah. 409=34 Cr. L. J. 342=34 P.L.R. 368=14 Lah. 615=142 Ind. Cas. 207.

——S. 145—Attachment.

In a proceeding under S. 145, a Magistrate can effect attachment of the property in dispute through the Police; attachment by prohibitory order is not the only mode of attachment contemplated by the Criminal P.C. A.I.R. 1933 Lah. 409=34 Cr. L. J. 342=34 P. L.R. 368=14 Lah. 615=142 Ind. Cas. 207.

——S. 145—Attachment.

Under S. 145, Criminal P. C., a Magistrate has jurisdiction to attach the disputed property in a case of emergency, pending the holding of the enquiry, but he has no power to make an order restraining both parties from entering the property until further orders. A.I.R. 1931 Rang. 51 (2)=32 Cr.L.J. 637 (1)=131 Ind. Cas. 63.

——S. 145 (4)—Attachment — Properties other than land.

——A Magistrate has no jurisdiction under S. 145 to attach properties other than 'land'. 71 Ind. Cas. 213 =20 A.L.J. 906=24 Cr. L.J. 85=A.I.R. 1922 All. 528.

——S. 145 (4)—Attachment—Movables.

——Under S. 145 the Sub-Divisional Magistrate has no jurisdiction whatsoever to attach movable properties. 63 Ind. Cas. 321=24 O.C. 167=22 Cr. L.J. 625=A.I.R. 1921 Oudh 6.

——S. 145 (4)—Attachment.

——Where in a proceeding under S. 145 the land in dispute is a public path and the Magistrate finds that neither party is in possession he has no jurisdiction to attach the land under S. 145. 61 Ind. Cas. 848=22 Cr. L.J. 464 (Cal.).

——Ss. 145 (4) and 146—Attachment—Judgment without evidence.

An order by "Magistrate under S. 146, must be set aside, if made without going through the documentary evidence." 20 Cr. L.J. 342=23 C.W.N. 910=50 Ind. Cas. 822.

——Ss. 145 and 146—Attachment—Third party in possession—Procedure.

Where in a proceeding under S. 145 of the Cr. P. Code the Magistrate finds neither party in possession but is with a person who does not claim to be in possession, he should proceed to attach the property under S. 146 of the Code. 20 Cr. L.J. 215=49 Ind. Cas. 775.

——Ss. 145 and 146—Attachment—Duration of.

In proceedings under Chap. XII of the Cr. P. C. Code, the attachment should continue only until a competent court has determined the rights of the parties to the property. The pendency of an appeal from the decision of a civil court is no ground for continuing the attachment. 46 P.W.R. 1917 Cr.=19 Cr. L.J. 261=44 Ind. Cas. 117.

——Ss. 145, 146 and 439—Attachment—Breach of the peace—Review of orders under S. 146—Revision.

Where there is no likelihood of breach of the peace regarding a plot the Magistrate has no jurisdiction to initiate proceedings under S. 145, Cr. P.C., in respect thereof and without such proceedings no order of attachment under S. 146, Cr. P.C., could be passed. The Magistrete had no powers to review his own order releasing the plot from attachment. The High Court can interfere with orders under Chap. XII, Cr. P. Code passed without jurisdiction. 3 Pat. L.W. 386 =19 Cr. L.J. 105=43 Ind. Cas. 329.

——Ss. 145 and 146 — Attachment — Subsequent application by third party to re-open proceedings —Procedure.

Where on institution of proceedings under S. 145, the Magistrate, being unable to satisfy himself as to which of the two partners was in possession, attached it under S. 146 and subsequently the petitioner a third party appeared and pointed out that the land in dispute belonged to his ward a minor and applied to be allowed to prove his ward's possession, but the Magistrate declined to accede to his application. **Held,** that the course adopted by the Magistrate was bad and that he ought to have given petitioner an opportunity to make out his case for the protection of his rights. 1 Pat. L.W. 373=18 Cr. L.J. 637=39 Ind. Cas. 1005.

——Ss. 145 (4) and 146—Attachment—Duty of Magistrate—High Court's powers of revision—Govt. of India Act, S. 107.

In a dispute under S. 145, Cr. P.C., a High Court cannot interfere on the merits so long as the Magistrate is acting within his jurisdiction. Under S. 145 the Magistrate must first make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists. He cannot be satisfied about this merely on the police report and if he acts merely on the police report, his order is illegal. Before ordering an attachment he must decide either that none of the parties was in possession or that he is unable to satisfy himself as to which of them was. An order of attachment if made without one or other of these findings would be without jurisdiction and the High Court can interfere under S. 107 of the Govt. of India Act. 18 Cr. L.J. 557=15 A.L.J. 270=39 Ind. Cas. 701.

——Ss. 145 and 146—Attachment—Order under S. 146 proper when peaceful possession cannot be determined.

A Magistrate should pass an order only under S. 146 if he finds that no party was in peaceful possession of land in dispute, **e. g**, where the land is under water within 2 months before the date of the proceeding under S. 145. 20 C.W.N. 1014=18 Cr. L.J. 80=37 Ind. Cas. 64.

——Ss. 145 and 146—Attachment—Duty of Magistrate—Remedy of parties.

Where a Magistrate not satisfied with the possession of either property in an application under S. 145 attached the properties under S. 146 it is unnecessary that there should be a decree in favour of all the parties to enable the Magistrate to withdraw the attachment and if there is an adjudication by a Civil Court in favour of some of the parties, that is sufficient for the purpose of enabling the Magistrate to walk out of the property and unless this is done the parties will have no remedy. 29, Ind. Cas. 321, Foll. 4 L.W. 55=20 M.L.T. 247=(1916) 2 M.W.N. 173=17 Cr. L.J. 331=35 Ind. Cas. 507.

——Ss. 145 (4) and 517—Attachment—Cancellation—Disposal of attached property—Procedure.

Where certain properties were attached under S. 145 but the order was on enquiry cancelled there being no immediate danger to the peace, **Held**, that the Magistrate had no jurisdiction to direct that the attached properties should be delivered to one of the parties. That would be in effect deciding the question at issue. The proper procedure is to keep them or their sale-proceeds in deposit, until one of the parties establishes his right to it in a Civil Court. 1 L.W. 1032=16 Cr. L.J. 104=27 Ind. Cas. 152.

——Ss. 145 and 146—Attachment.

A Magistrate cannot issue an order for attachment of property unless and until there is an inquiry under S. 145, that is after he has received and considered the evidence produced before him by the parties. 1 O.L.J. 242=15 Cr. L.J. 470=24 Ind. Cas. 350.

——Ss. 145 and 146—Attachment—Jurisdiction of Magistrate.

Though a Magistrate can make an order under S. 146, without written statements and evidence, yet an order passed without attempting to investigate the question in the light of evidence and written statements is one without jurisdiction. 11 Cr. L.J. 90= 5 Ind. Cas. 249.

——Ss. 145 and 146—Attachment—When legal.

A Magistrate is right in attaching the land in dispute under S. 146 when neither party adduce any evidence, for about two months from the initiation of proceedings under S. 145. 11 Cr.L.J. 27=14 C.W.N. 80=5 Ind. Cas. 40.

——Ss. 145 (4) and 146—Attachment — Order without evidence.

Where in a proceeding under S. 145, a Magistrate ordered a party not to obstruct without examining the parties or taking any evidence, held that the order was not final and if there was still a danger of a breach of the peace, the Magistrate must complete the proceedings and make a proper order either under S. 145 or S. 146. 17 Bom. L.R. 382= 16 Cr.L.J. 434=29 Ind. Cas. 66.

——S. 145 (4)—Attachment—Magistrate cannot order delivery of attached property to one party—after filing the proceedings.

Where a Magistrate attaches in cases of emergency the property which is the subject of dispute under S. 145 and after recording evidence adduced by the parties to the proceeding comes to the conclusion that there is no danger of a breach of the peace and on that ground files the proceedings he has no jurisdiction to direct that the attached property should be delivered to one of the parties to the proceeding. In such a case the proper order is to direct that the property should remain in his custody and management pending decision of a Civil Court on the question of title. 48 Cal. 522 (S. B.) and 1 L.W. 103. Foll. 89 Ind. Cas. 514=8 N.L.J. 69=26 Cr.L.J. 1378=21 N.L.R. 191= A.I.R. 1925 Nag. 297.

——S. 145—Attachment—Power of Magistrate to attach disputed land is limited.

The jurisdiction of a Magistrate to deal with disputes concerning land is strictly limited. A very exceptional jurisdiction in that regard has been conferred upon him by S. 145. Power under S, 145 is given to the Magistrate for the purpose of preserving the peace and it is only for that purpose that he may, where a breach of the peace is imminent, attach disputed property. 7 Lah. 134=

95 Ind. Cas. 281=27 Cr.L.J. 761=8 L.L.J. 358=27 P.L.R. 341=A.I.R. 1926 Lah. 205.

——S. 145 (4)—Attachment—Effect of S. 10 of Bengal Alluvial Lands Act is to stay earlier proceedings under S. 145.

Some char lands became the sujbect-matter of proceedings under S. 145, and at the time when proceedings were intiated an attachment order was made against the lands. Various steps were taken in those proceedings and subsequently the Magistrate after reviewing the situation passed an order directing that the lands be released from attachment under S. 145 and decided to replace those proceedings with others under the Bengal Alluvial Lands Act, 1920. It was contended that S. 10 of that Act was intended to apply to proceedings under S. 145 so far as their institution or carrying on was concerned and not to the attachment order made under that section and that once an attachment was made, S. 10 conferred no right on the Collector to make a further attachment under that Act.

Held, that if the contention were sound it would result in nullifying the provisions of the Bengal Alluvial Lands Act of 1920. The provisions of S. 10 were wide enough to apply to all proceedings, including an attachment that may have been had under S. 145, the effect of S. 10, Bengal Alluvial Lands Act, would, therefore, be to stay the earlier proceedings under S. 145, Criminal P.C. 13 C.W.N. 125; A.I.R. 1921 Cal. 631, Dist. 33 C.W.N. 1115=1929 Cr.C. 326=A.I.R. 1929 Cal. 646.

——S. 145 (4)—Attachment.

When once the Magistrate raises the attachment and drops further proceedings in the case he has no jurisdiction to direct the delivery of possession of the disputed property to any person. 1930 M.W.N. 771.

——S. 145—Attachment.

Possession is the chief thing to be seen and if the property definitely be in possession of one party, a Court cannot pass an order for its attachment. 1935 M.W.N. 368.

——S. 145 (4)—Attachment.

A Magistrate's order that neither party should work the land is incorrect. Under S. 145 (4), if he thinks the case is emergent he can attach the land. 84 Ind. Cas. 548=26 Cr.L.J. 324=3 Bur.L.J. 256=A.I.R. 1925 Rang. 111.

——S. 145, Sub-Ss. (1) (4)—Attachment — Order on written statements without evidence when witnesses present:—There are other provisions than those contained in Sub-section (1) the contravention of which affects the jurisdiction of the Magistrate. An order of attachment passed without examining the witnesses that were ready, on a mere perusal of the written statement of parties was bad for want of jurisdiction. 34 C. 840.

6. Breach of Peace.

——S. 145—Breach of peace—Complaint of likelihood by reason of counter-petitioners' acts—Order by Magistrate to police to warn opposite party without any enquiry—Legality.

The petitioner filed before the Joint Magistrate of the place complaining that the counter-petitioners and their party had no right to recite certain Sankalpams at the Tirumalai tank and that there was likelihood of breach of peace by their reciting such Sankalpams. The Joint Magistrate without taking evidence and going into the matter, directed the police to warn the counter-petitioners not to create a breach of the peace by such recitations. The matter was taken in revision to the Sessions Judge who set aside the order of warning. On revision to the High Court,

Held, that the Joint Magistrate was not justified in asking the police to warn the counter-petitioners without taking evidence and deciding whether such a right was there or not. Nor had the Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself. If the Sessions Judge found the order of the Joint Magistrate wrong, he should have written to the High Court and asked it to interfere. I.L.R. (1947) Mad. 154=59 L.W. 301 (1)=1946 M.W.N. 345 (1)=47 Cr.L.J. 872=A.I.R. 1946 Mad. 412=(1946) 1 M.L.J. 458.

——Ss. 145 and 537—Breach of peace—Likelihood of—Absence of formal order—Curability under S. 537.

A Magistrate acquires jurisdiction to proceed under S. 145, Cr. P. Code, only when there is a likelihood of a breach of peace. If there is material before him upon which he feels satisfied that there is a likelihood of a breach of peace, an omission to record a formal order under S. 145 (1) may be treated as a mere irregularity which can be cured under S. 537. But when there is no such material on the record and when there is no indication that this aspect of the question was considered by the Magistrate, the very foundation of his jurisdiction is affected. 1948 O.W.N. 424=1948 A.L.W. 422=1949 A.L.J. 16=A.I.R. 1949 A. 402=1949 A.W.R. (H. C.) 79=50 Cr.L.J. 655.

——S. 145—Breach of peace—Likelihood of—Absence of an order under S. 145 (1)—Effect.

Before a Criminal Court can be said to have any jurisdiction with regard to a case relating to the possession of immovable property, it must indicate that it is satisfied that an apprehension of the breach of the peace exists. That is why an order under S. 145 (1) has to be passed before any further proceedings are taken. When the Court fails to pass such an order at any stage of the proceedings and there is not sufficient material on the record on the basis of which such an order could be passed, it cannot be held that the Criminal Court had jurisdiction to take proceedings under S. 145 of the Cr. P. Code. Any further proceedings taken would be equally without jurisdiction. 1947 O.W.N. 619=A.I.R. 1948 Oudh 184=49 Cr.L.J. 291 (2).

——S. 145—Breach of peace.

It is necessary for making an order under S. 145 that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question. The making of an order, therefore, some months after the report on which it was purported to be passed, cannot be supported. 34 C.W.N. 899=1930 Cr. C. 1115=A.I.R. 1930 Cal. 715.

——S. 145—Breach of peace.

Magistrate has no jurisdiction to initiate proceedings under S. 145 where the dispute between the parties is likely to cause breach of peace not at the time but only at some future date (e.g. 2 months hence). 33 C.W.N. 509=49 C.L.J. 394=118 Ind. Cas. 892=30 Cr. L. J. 977 = A.I.R. 1929 Cal. 341.

——S. 145—Breach of peace.

——If the Magistrate is satisfied at any time that there is an apprehension of a breach of the peace arising out of a dispute with regard to certain land, the proper course for him would be to institute a proceeding under S. 145, or to proceed against both the parties, under S. 107. 115 Ind. Cas. 545=30 Cr. L. J. 492=10 P.L.T. 639=12 A.I. Cr. R. 451=A.I.R. 1929 Pat. 67.

——S. 145—Breach of peace.

——The law does not require the Magistrate to record an express finding in his judgment that a breach of the peace was imminent. Such a finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order. 90 Ind. Cas. 541=2 O.W.N. 704=26 Cr. L. J. 1581=A.I.R. 1925 Oudh 605.

——S. 145—Breach of peace.

——An order under S. 145 can only be passed when there is a present danger of a breach of peace. In the absence of any finding that there is a likelihood of a breach of peace, an order under S 145 cannot be sustained. It is not enough for the Magistrate to merely say that the parties are "in a contesting mood." 86 Ind. Cas. 1008=12 O L.J. 256=2 O.W.N. 220=26 Cr. L.J. 944=29 O.C. 23=A.I.R. 1925 Oudh 416.

——S. 145—Breach of peace.

——The finding of breach of peace is necessary for the purpose of the preliminary order, when a Magistrate assumes jurisdiction, but once he is satisfied that there is an apprehension that peace will be broken, it is unnecessary that he should record a finding to that effect again when passing his final order. 73 Ind. Cas. 519=24 Cr. L. J. 631=A.I.R. 1923 Lah. 253.

——S. 145—Breach of peace.

——Directions under S. 145 by Magistrate after finding that there was no likelihood of breach of peace are with out jurisdiction. 74 Ind. Cas. 447 =17 M.L.W. 429=24 Cr. L J. 783=A.I.R. 1923 Mad. 472.

——S. 145—Breach of peace.

——Unless a party is in a position to show to the Magistrate that there is no likelihood of a breach of the peace, the Magistrate's order under subsection (1) stands. The mere absence of a finding by the Magistrate that there is likelihood of a breach of the peace does not go to the root of his jurisdiction. 62 Ind. Cas. 180=33 C.L.J. 69=25 C.W.N. 215=22 Cr.L.J. 484=A.I.R. 1921 Cal. 631.

——S. 145—Breach of peace.

——Where there is no evidence of likelihood of breach of peace between the parties, final order cannot be made under S. 145. 62 Ind. Cas. 326 =25 C. W. N. 214=22 Cr. L. J. 502=A.I.R. 1921 Cal. 261.

——S. 145—Breach of peace.

——S. 145 contemplates the existence of disputes regarding property likely to lead to a breach of the peace, and where all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders passed on account of the dispute. 59 Ind. Cas. 36=1 Lah. 451=22 Cr. L. J. 4.

——Ss. 145 (3) and 144—Breach of peace—Proceedings under S. 144—Conversion of into S.145—No fresh proceedings—Mere irregularity.

Proceedings were initiated under S. 144 of the Code but subsequently on the day fixed for hearing the Magistrate converted them into proceedings under S. 145 in the presence of the parties who thereafter filed their written statements and adduced evidence in support of their case. No fresh notice of proceedings was served on the parties. Held, that the parties having been cognisant of the case and having filed and hotly contested throughout the Magistrate's action was not illegal. 4 Pat. L.W. 234=19 Cr. L.J. 396=44 Ind. Cas. 748.

——S. 145—Breach of the peace—Police report stating possibility of a breach of peace:—Where proceedings under S. 145, Cr. P.C., were instituted on a Police report which showed that the two parties were disputing about the possession of a tank and that they were Zamindars and which stated that though there was nothing to show that there was a likelihood of a breach of the peace, yet it was not impossible that there should be a breach of the peace. Held—That the Police report, as it is, cannot be and ought not to be the foundation of a proceeding under S. 145, Cr. P.C., the opinion expressed by the Police officer without sufficient materials ought not to be the ground for the institution of the proceedings Every case in which the question as to the likelihood of a breach of the peace that should justify the institution of proceedings under S. 145 Cr. P.C., arises must be judged on its own merits. 11 C.W.N. 835.

——S. 145 — Breach of peace — Preliminary order — Cancellation of order—Fresh information — Admissibility—Right of party to appeal—Jurisdiction of High Court to interfere:—Proceedings under Ch. XII of the Criminal P.C., are intended to prevent breach of the peace and not to settle the respective rights of rival parties; and the existence of a dispute likely to cause a breach of the peace is a condition precedent to the Magistrate exercising jurisdiction under Ch. XII. If at any stage after making an order under Cl. (1) of S. 145 the Magistrate is satisfied that the dispute is not likely to cause a breach of the peace, it is competent to him to drop all further proceedings. If the Magistrate refuses to act under Ch. XII or after making the preliminary order drops all further proceedings on the ground that there was no longer any likelihood of a breach of the peace, the parties have no locus standi to question the propriety of his refusal to act. As proceedings under Ch. XII are entirely at the discretion of the Magistrates and they cannot be said to act without jurisdiction in refusing to institute proceedings under that chapter, the High Court cannot in revision interfere with such order and direct the institution of proceedings under S. 145. 6 C.W.N. 417=30 C. 112. See also 5 C.W.N. 428=28 C. 446.

7. Burden of proof.

——S. 145—Burden of proof.

Where in proceedings under S. 145, Cr. P. Code, it is found that one of the parties was in possession of the property in dispute till about $1\frac{1}{2}$ years before the starting of the proceedings, the burden is on the other party who claims present possession to prove

that he dispossessed the former within more than two months prior to the institution of the proceedings. A.I.R. 1950 Pat. 472.

——S. 145—Burden of proof.

Where plaintiff failed to prove possession both in proceedings under S. 145 and also in survey proceedings,

Held, the onus thus lay heavily on the plaintiffs to show that the defendant was not in possession of the properties by virtue of the title he alleged in the previous proceedings. 74 Ind. Cas. 747=21 A.L.J. 554=4 Pat. L.T. 447=1 P. L. R. 345=2 Pat. 676=50 I. A. 183=25 Bom. L.R. 1259=28 C.W.N 277=33 M.L.T. 233=18 M.L. W. 728=4 L.R.P.C. 123=5 L.R.P.C. 8=39 C.L.J. 318=3 P.L.R. 1924=A.I.R. 1923 P.C. 128=45 M. L.J. 578 (P.C.)

——S. 145—Burden of proof.

Though there is nothing in S. 145 to suggest which party should begin the case it is usual for the second party to begin his evidence. In proceedings under S. 145 the Court is in no way concerned with the question title. It has merely to consider and investigate the question of possession. 21 Cr. L. J. 136=54 Ind. Cas. 616 (Pat.)

8. Cancellation and revival.

——S. 145 (5)—Cancellation of preliminary order—Revival—Power of magistrate—proper course.

It is absolutely within the competence of a Magistrate under S. 145 (5), Cr. P. Code, to cancel a preliminary order on the showing of a party or even an outsider interested in the land that there is no likelihood of a breach of the peace. There is no provision in the Code which authorises the Magistrate to revive or review his own order or to revive the order so cancelled. Of course, there is no bar to the magistrate on a later date starting fresh proceeding under S. 145 (1) if he is satisfied on that date that there is still an apprehension of the breach of the peace and this is the proper course for him to take. But such fresh proceeding must be based on a fresh report and not on the materials on which the previous proceeding was based. 52 C.W.N. 251.

——S. 145 (5)—Cancellation—Order under S. 145 (5) cancelling order under S. 145 (1)—Jurisdiction to further adjudicate.

Once the Magistrate passes an order under S. 145 (5), Criminal P. C., cancelling the order under S. 145 (1), he has no further jurisdiction to adjudicate upon the dispute between the parties, or adjudicate upon the division of the produce other than to direct that the produce should be restored, if it had been taken, to the possession of the person from whom it had been taken. The parties must, so far as possible, be restored to the position which they occupied before the proceedings were started, not only with regard to the land but with regard to the produce of the land or its proceeds. But the circumstances may arise where it is not possible to put the parties in the position they had occupied before the proceedings started, once the produce had been sold. In such cases, the parties should be directed to seek redress of their grievances in Civil Court. A.I.R. 1942 Sind 117=I.L.R. (1942) Kar. 120=43 Cr.L.J 876=202 Ind. Cas. 617.

——S. 145 (5)—Cancellation—Denial of existence of dispute—Necessity of.

S. 145 (5), Criminal P. C., applies only to those cases where any of the parties concerned in the dispute or any other person interested appears before the Magistrate and denies the existence of such dispute, and if this is not the case, Sub-S. (5) does not come into operation at all. A.I.R. 1936 Lah. 1012=38 Cr.L.J. 242=166 Ind. Cas. 580.

——S. 145 (5)—Cancellation—Denial of dispute—Burden of proof.

In a proceeding under S. 145, Criminal P. C., if any party or other person interested denies the existence of the dispute, the onus lies on him to show that it does not exist and the Magistrate should state clearly whether he believes or not that a dispute likely to cause a breach of the peace exists.

But, where, though the Magistrate did not definitely say that there was a likelihood, yet, he found that there was a 'quarrel' and there was also evidence to show that the complainant wanted to take forcible possession:

Held, that it might reasonably be concluded that there was a breach of the peace and the Magistrate's order was not ultra vires. A.I.R. 1932 Oudh. 21=8 O.W.N. (C.C.) 1182=33 Cr.L.J. 46=134 Ind. Cas. 1020.

——SS. 145, 517, 520,—Cancellation of proceedings—Order allowing one party to reap the crops illegal:—When a Magistrate cancels proceedings under S. 145, Cr.P.C., on the ground that there is no likelihood of a breach of the peace, he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other. Such an order, if passed, under S. 517, Cr.P.C., is fit to be set aside under S. 520, Cr.P.C. 3 C.L.J. 573.

—S. 145—Cancellation of order—Magistrate, if and when can cancel his order under S. 145 (1) or terminate prceedings.

The Magistrate can cancel his order under Sub-S. (1) or terminate the proceedings when, upon other information, or, it may be, on his own information, he is satisfied that no dispute likely to cause a breach of peace exits. However, as proceedings are instituted upon some information, so they should be terminated likewise upon some information and ordinarily, it is desirable before a Magistrate terminates proceedings of this sort in the exercise of powers which by necessary implication, the section, confers, that he should have on record a police report or other information to the effect that no dispute likely to cause a breach of the peace exists. But where, the diary shows that the parties attended the Court from time to time, talked about a compromise and then finally stayed away and did nothing for months, that might be said to constitute information which justify a Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify his order terminating the proceedings. A.I.R. 1940 Sind 51=I L.R. (1939) Kar. 775=41 Cr.L J. 507=187 Ind. Cas. 752.

—S. 145—Cancellation.

——Contesting parties compormise--No danger of breach of peace—decision cannot be postponed for the benefit of the objector who did not appear in the original proceedings. 1939 N.L.J. 197.

—S. 145—Cancellation—preliminary order—If can be subsequently cancelled — property attached, if can be ordered to be delivered to one of parties.

Where in proceedings under S. 145, Criminal P.C., a Magistrate has issued a perliminary order under Sub-S. (1) and has attached the property in dispute, the Magistrate has jurisdiction under Sub-S. (5) to cancel the original order subsequently where the circumstances justify this. The Magistrate, however, has no power after cancelling the preliminary order to order delivery of the property attached, to one of the parties to the proceedings. The proper order in such a case is to direct that the property should remain in his custody and management pending decision of a Civil Court on the question of title. A.I.R. 1939 Oudh 284=1939 O.W.N. (C.C.) 891=40 Cr.L.J. 930=1939 A.W.R. (C.C.) 203=15 Luck. 19=184 Ind. Cas. 290.

—S. 145—Cancellation — compromise — fresh proceedings—when proper.

——Proceedings stayed when both parties appeared in Court and agreed to compromise—Parties intent upon creating a breach of peace—Proceedings can legally be started afresh. 1934 N.W.N. 733.

——S. 145 (5)—Cancellation and revival—Order of "stay"—Effect of—If termination or dropping of proceedings—subsequent revival—Legality. See Cr.P.Code, Ss. 147 and 145 (5) A.I.R. 1950 Pat. 350.

9. Compromise.

—S. 145—Compromise—Proceedings under S. 145 cannot be compromised nor can they be referred to arbitration.

Proceedings under S. 145 cannot be compromised, nor can they be submitted to arbitration; all that can be done is that there may be an agreement as to the mode of taking evidence as regards actual possession on the date of the preliminary order either by a commissioner or by arbitrators. Such a commissioner or arbitrators have no power to decide the case, but can only submit a report, and the Magistrate would then be bound to take that report into consideration before passing an order. It has, however always to be borne in mind that if the parties come to any agreement with regard to a dispute even an agreement as regards the mode of ascertaining actual possession it at once becomes doubtful whether there is any likelihood of a breach of the peace, and if the Magistrate is satisfied that no likelihood of a breach of the peace exists he should cancel his preliminary order under S. 145 (5). 121 Ind. Cas. 47=1929 Cr.C. 459=A.I.R. 1929 Nag. 285.

——S. 145—Compromise as to possession, will not transfer title or operate as estoppel.

Where a compromise as to possession but not as to title was arrived at in proceedings under section 145, Held, that the compromise is no substitute for the duly stamped and registered instrument. The compromise could at the utmost amount to an admission of title but could not be deemed to have the effect of estoppel. 76 Ind. Cas. 527=45 All. 162=20A.L.J. 932=A.I.R. 1923 All. 77.

10. Consent.

---S. 145—Consent—No enquiry—Effect.

Order of the Magistrate under S. 145 without any inquiry as to possession is not ultra vires if the party against whom the order is made admits the possession of the other side. 9 M.L.T. 91=12 Cr.L.J. 47=9 Ind. Cas. 285.

——S. 145—Consent—Consent order is bar to fresh proceedings. 15 C.W.N. 568=12 Cr.L.J. 32 =9 Ind. Cas. 167.

11. Costs.

——S. 145—Costs. See Cr.P. Code S. 148 (3) Costs.

12. Crops.

——S. 145—Crops cut and severed from land are not immovable property.

Crops cut and severed from land are movable property and not 'immovable' within the meaning of S. 145, Cl. (2) to which alone the porvisions of S. 145, Criminal P. C., are applicable. A.I.R. 1938 Pat. 527=19 P.L.T. 728=5 B.R. 118=40 Cr. L. J. 125=178 Ind. Cas. 582.

——S. 145—Crops.

——Crops which have been cut and gathered on the threshing floor are not crops or other produce of land within the meaning of sub-s. (2) of S. 145. 30 Cal. 110, Rel. on. 111 Ind. Cas. 441=22 S.L.R. 386=29 Cr.L.J. 857=A.I.R. 1928 Sind 193.

——S. 145—"Crops."

——The word "crops" in S. 145, cl. (2), includes cut and stored crops about which there is a dispute likely to cause a breach of the peace and is not restricted to standing crops. 30 Cal. 110; 28 All. 266; A.I.R. 1927 All. 99. A.I.R. 1922 Oudh 199, Diss. 2 Weir 108 and 13 Cr.L.J. 295, Rel on. 105 Ind. Cas. 813=22 S. L. R. 151=9A. I. Cr. R. 165=28 Cr.L.J. 989= A.I.R. 1928 Sind 68.

——S. 145 (2)—Crops or other Produce—Muhwa crop—Movable property:—The words 'crops or other produce of land' used in sub-s. (2) of S. 145 Cr.P.C., mean crops or produce attached to land; in other words, growing crops or produce. 13 C. 179 foll. Hence muhwa crops which had fallen from the trees and been actually collected and removed are movable property and an order made under S. 145 was bad in law. 3 A.L.J. 13=1905 A.W.N. 278=28 A. 266.

——S. 145 (2)—Crops and other produce—Felled trees on disputed lands—Jurisdiction of Magistrate to attach.

Trees which have been felled and severed from lands covered by a dispute involving a likelihood of breach of peace, but which are still lying on the spot and not carried away, will be covered by the phrase "crops or produce" of land in S. 145 (2), Criminal Procedure Code. The object of S. 145 namely to prevent a breach of peace will be largely defeated, if disputed trees lying so severed on the land are not also attached. 1934 M.W.N. 77, distinguished and explained. I.L.R. 1947 All. 741, followed.

The provisions of S. 145, Criminal Procedure Code, must be liberally interpreted in order to arm the Magistrates with sufficient power to attach properties in dispute between fighting factions and persons and prevent breaches of peace. Therefore, the trees which have been just cut and severed a few hours or days before the preliminary order and are still lying in or near the disputed lands must come within the clear purview of the Magistrate acting under S. 145, Criminal P. C. 63 L.W. 409= A.I.R. 1950 Mad. 658=1950 M.W.N. 213=(1950) 1 M.L.J. 213.

——Ss. 145 and 146—Crops and produce—Trees which have been cut but not removed—Order which could be passed.

S. 145, Cr.P. Code, being a preventive section it should be given a liberal interpretation and if the dispute is as regards land, then the Magistrate would have jurisdiction relating to movable property which may be attached to the land or appertains to it. But where the dispute is as regards trees which have been cut but not removed, the word 'land' is wide enough to include them. As they have not been removed away, an attachment order under S. 146 can be passed in respect of them. I.L.R. (1947) All. 754=A.I.R. 1948 All. 94=49 Cr.L.J. 15=1947 A.W.R. (H.C.) 292=1947 A.L.J. 533.

13. Death of party.

——S. 145 (5), (7)—Death of party—Proceedings if to be dropped.

The object of S. 145, Criminal P.C., is to prevent breaches of the peace from occurring as a result of disputes regarding land or water or the boundaries thereof, and it provides a summary procedure for determining which party was in possession at the date on which the proceedings were started. Once proceedings under that section have been started, they must be proceeded with until the question of possession has been determined, and the order on which the proceedings are based can only be cancelled under Sub-S. (5) if the Magistrate is satisfied that no dispute likely to cause a breach of the peace exists or has existed. An order dropping the proceedings made merely because one of the parties to the proceedings had died is ultra vires and fresh proceedings are without jurisdiction. But such an eventuality is provided for in Sub-S. (7) which empowers the Magistrate to cause the legal representatives of the deceased to be made parties, and directs that the Magistrate shall thereupon continue the enquiry. A.I.R. 1934 Cal. 787=38 C.W.N. 724=36 Cr. L.J. 303=153 Ind. Cas. 174.

——Ss. 145 (7) and 439—Death of party.

The death of the petitioner for revision of an order under S. 145 of the Code during the pendency of the application causes the application to abate. S. 145 (7) applies only to proceedings before the Magistrate. 6 P.R. (Cr.) 1893, Ref. 23 P.R. (Cr.) 1919=20 Cr. L.J. 720=52 Ind. Cas. 800.

14. Debutter estate.

——S. 145—Debutter estate—Dispute amongst shebaits regarding management—Shebait entrusted with sole management.—Possession that can be pleaded in a proceeding under S. 145, Cr.P.C., must be possession based on a claim of right to possession. The possession of an agent or a servant which is permissive cannot give a party to a proceeding a locus standi as against his principal or master. The possession of one of several co-shebaits who for convenience has been entrusted with the sole management of a debutter estate is, as regards the shebaiti right of his co-shebaits, that of an agent. The agency can be withdrawn. A dispute between such a person claiming sole management and his co-shebaits who have withdrawn the agency and claim to have joint management with him is not a fit subject for a proceeding under S. 145, Cr. P.C. Debutter property being by nature impartible and inalienable, the possession of co-shebaits must necessarily be always joint and as such beyond the scope of an order under S. 145, Cr. P.C. 27 Cal. 259 distinguished; 32 Cal. 249 referred to. 10 C.W.N. 1088.

15. Decision of Revenue Court.

——S.145(6) and (9)—Decision of Revenue Court Decree stayed pending appeal—Duty of Magistrate to maintain right of successful party.

Under S. 145 (9), Cr. P. Code, it is discretionary with the Magistrate to summon or not any witnesses in a proceeding under that section. When the rights of the parties have been determined by a competent civil or revenue court recently, the dispute is at an end and it is the duty of the Magistrate to maintain the rights of the successful party and not to allow the defeated party to invoke the aid of the Magistrate and police to neutralise the effect of the decree of the competent court. The fact that the operation of the decree has been stayed by the High Court in appeal by an interim order does not nullify that decree. It only means that execution of that decree cannot be taken out pending the decision of the appeal in the High Court. The decree subsists and must be treated as valid until it has been set aside or varied. 1942 A.L.J. 629; 1947 Pat. 245 and 1924 All. 777, rel. on, A.I.R. 1949 All. 230=50 Cr. L.J. 345.

——S. 145 Decision of Revenue Court—Patni sale—Proceeding under S. 145—Court, if can go into question whether prior tenure holder continued in possession in spite of proclamation under S. 15 (2) of Bengal Patni Taluks Regulation.

When in proceedings under S. 145 a dispute arises whether or not the purchaser had taken possession of the disputed tenure under the proclamation in terms of S. 15 (2), Ben. Patni Taluks Regulation, it becomes essential for the Magistrate during the course of the proceedings under S. 145 Criminal P.C., to decide this point after finding whether the tenure has been created before or after the date on which the Patni itself came into existence and the prior tenure-holder continued in possession A.I.R. 1944 Cal. 389=I.L.R. (1943) 2 Cal. 436=46 Cr. L.J. 138=216 Ind. Cas. 48.

——S. 145—Decision of revenue court—Decision of commutation court on question of possession—Magistrate can institute and investigate question of possession.

Even where the commutation Court has given a decision on the question of possession, a Magistrate is not incompetent to institute proceedings under S. 145 and investigate the question of possession. He can undoubtedly take into consideration the judgment of the commutation Court as an item of evidence in deciding the case. A.I.R. 1941 Pat. 516=8 B.R. 25=42 Cr. L.J. 876=196 Ind. Cas. 469.

——S. 145—Decision of Revenue—Court.

——Taking possession under S. 87, Bengal Tenancy Act, is not forcible and the person so taking possession cannot be ousted under Cl. (4). 100 Ind. Cas. 117=7 A.I. Cr. R. 357=31 C.W.N. 242=28 Cr. L.J. 245=A.I.R. 1927 Cal. 944.

——S. 145—Decision of Revenue Court.

——The order either under S. 145 or under. S 146. does not interfere with the subsequent order under S. 40 of the Land Revenue Act, by which possession has been made over to the party in whose favour mutation has been effected. 90 Ind. Cas. 399=26 Cr. L.J. 1551=A.I.R. 1926 Oudh. 179.

——S. 145—Decision of Revenue Court.
——The mere fact that the Revenue Records show that the holding was joint is not sufficient to stop the enquiry contemplated by S. 145. 17 Bom. L.R. 382 and 20 C.W.N. 518, followed. 66 Ind. Cas. 65=23 Cr. L.J. 225=2 Lah. 372=A.I.R. 1922 Lah. 348.

——S. 145 (4)—Decision of Revenue Court—Possession — Evidence of—Land Registration Act, Ss. 52 and 78—Registration.

A summary adjudication upon the question of possession by the Land Registration Officer under Act VII of 1876 is entitled to the same respect on the question of possession in a proceeding under S. 145 of the Cr. P. Code as the decree of a Civil Court. 6 Cal. 835, Foll. But where there was no adjudication of possession by the Revenue Courts in the land registration proceedings, and they refused to register the name of a particular party on the ground that he was neither a proprietor, manager nor a mortgagee, the Magistrate in a proceeding under S. 145 of the Cr. P. Code was bound to determine as to which of the parties was in actual and physical possession of the property in dispute. 1 Pat. L.T. 588=21 Cr. L.J. 785=58 Ind. Cas. 513.

——S. 145 (4)—Decision of Revenue Court—Revision.

After a Revenue officer's order validating a notice to quit, the tenant's remedy after the lawful dispossession is an appeal or the like, but if he obstructs the landlord, he can be restrained under S. 145 33 P.W.R. Cr. 1912=193 P.L.R. 1912=13 Cr. L. J. 719=16 Ind. Cas. 527.

16. Decision of Criminal Court.

——S. 145—Decision of Criminal Court.

The foundation of jurisdiction for a Court to pass an order under S. 145 is only laid when a party is actually found to be in actual possession of the property on the date on which his possession was likely to be disturbed and cause a breach of the peace and not on the date on which the order is passed under S. 145. It is not open to a Civil Court to go behind the finding of the Criminal Court although it is open to it to decide that a person found or deemed to be in possession of the property, had no right or title whatsoever to be or to remain in possession, and to put any other person in possession, if his right or title to get into possession or found for him. The legal effect of the finding would be to place the person found in possession in a position, which will be protected if any attempt is made to contravene the order.

Hence, in suit by a party for declaration that he was the mahant of the property in dispute and was in that capacity, entitled to be in possession thereof, and asking for the recovery of possession of certain land and injunction under O. 39, R. 1, restraining the opposite party from interfering with the property, the Court cannot ignore the previous finding of the Criminal Court in proceedings under S. 145, that the opposite party was in possession of the property, and it cannot grant the injunction asked for, in regard to the property of which the plaintiff is seeking possession through Court or in regard to the property which does not form the subject-matter of the plaint. 226 Ind. Cas. 292=A. I. R. 1947 Lah. 173.

——S. 145—Decision of Criminal Court—Joint possession given in previous proceeding—Effect—Order to be passed in subsequent proceedings.

Where a Magistrate, in the earlier proceedings under S. 145, Criminal P. C., makes an order putting one of the parties in possession, he is bound to maintain him in possession of it and cannot, in a subsequent proceedings under S. 145, on an application by the opposite party, oust him and attach the property under S. 146. In any event, even if the order made in the earlier proceeding could be construed as an order putting both the parties jointly in possession, it is patently wrong of the Court to make another order excluding one of them from one-half of the land in dispute and leave the other in exclusive possession of the other half. Even if the Court thinks that the parties had been put in joint possession of the entire land and a dispute had arisen between them as to how it should be partitioned, it is its duty to bind both of them down until the matter is decided by a Civil Court or settled by arbitration. A.I.R. 1941 Pat. 607=42 Cr.L.J. 791=7 B.R. 982=22 P.L.T. 731=195 Ind. Cas. 854.

——S. 145—Decision of Criminal Court—Party placed in possession by Civil Court—Criminal Court must support such party.

The Criminal Court is bound to support persons placed in possession of property by the Civil Court and whose possession has been wrongfully disturbed. The other party must show that they subsequently came into possession by some lawful means. The Magistrate is not only bound to look into events occurring within two months of the date when the proceedings were drawn up but he should consider the whole history of the dispute from the date when the first party was put in possession by the Civil Court. His failure to do so vitiates his findings. A.I.R. 1937 Pat. 557=38 Cr.L.J. 1096=4 B.R. 41=171 Ind. Cas. 593.

——S. 145—Decision of Criminal Court—Order in previous proceedings under S. 145—Whether can legally bar initiation of fresh proceeding.

As the question to be taken into consideration by a Criminal Court under S. 145, Criminal P. C., is the question as to the present possession of the parties concerned, an order passed in previous proceedings under S. 145 does not legally bar initiation of fresh proceedings if there be reasonable grounds for such initiation as contemplated by law. A.I.R. 1935 Cal. 494=157 Ind. Cas. 674.

——S. 145—Decision of Criminal Court.

A Magistrate in deciding the question of possession under S. 145, is precluded by a previous order of a Criminal Court relating to the subject of the dispute, unless he finds that there has been a change of possession since the previous order of the Criminal Court was passed. 33 Cal. 33 and A.I.R. 1922 Cal. 364; 49 Cal. 174, Dist. 95 Ind. Cas. 479=27 P.L.R. 630=27 Cr. L. J. 815=A.I.R. 1926 Lah. 479.

——S. 145—Decision of Criminal Court.

The existence of a decision incidentally arrived at by a Criminal Court or for the matter of that, even by a Civil Court does not **per se** cause a cessation of the dispute between the parties as to possession. 86 Ind. Cas. 806=6 P.L.T. 710=26Cr.L.J. 870=A.I.R. 1925 Pat. 593.

——S. 145—Decision of Criminal Court.

The decision of civil or criminal Courts is not conclusively binding upon the Magistrate. No hard and

fast rule can be laid down in this respect. 75 Ind. Cas. 535=5 P.L.T. 69=2 Pat. L. R. Cr. 104=A.I.R. 1924 Pat. 509.

——S. 145—Decision of Criminal Court.

Where in spite of the decree of a Civil Court declaring title and giving possession to the first party and also in spite of an order in appeal of the High Court to that effect, under S. 145, Cr. P. Code, the Magistrate, on the ground that second party was not a party to the previous proceedings and that the dispute was not the same, declared them to be entitled to claim possession and gave it.

Held, when, under Cl. 3, proceedings under Cl. 1 of S. 145 are published by affixing at a conspicuous place or near the subject matter in dispute and thus sufficient notice is given to persons interested in the subject-matter in dispute to come forward and be made parties to the proceedings, the proceedings are binding upon the whole world. As far as the Magistrate is concerned, the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under S. 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. The possession was effectively delivered by the Civil Court to the 1st party and the only course open to persons, other than the judgment-debtors, was to apply under O. 21, R. 100 of the Code and thereafter to institute regular suit. The subject matter in dispute being the same in the new as well as in the previous proceedings that in itself is sufficient ground to set aside the order of the Magistrate. 77 Ind. Cas. 1005=10 P. L. T. 685=25 Cr. L. J. 541=A.I.R. 1922 Pat. 210.

——S. 145—Decision of Criminal Court—Weight to be attached to—Discretion of Magistrate.

The likelihood of the breach of the peace is sufficient to give the Magistrate jurisdiction. The weight to be attached to a previous order of a Civil or Criminal Court is a question for the consideration of the Magistrate. Where, therefore, the Magistrate has jurisdiction to proceed under S. 145, Criminal P. C., there can be no interference with his discretion even if the matter might have been more suitably dealt with under S. 107. In such circumstances, however, the case ought not to be kept pending for the decision of the application for revision against the previous orders in a land registration case relating to the land in dispute. The Magistrate should proceed with the case and decide it without avoidable delay so that the property may be restored as soon as possible to the party which was in possession of it. He is bound to receive all such evidence as may be produced. A.I.R. 1934 Pat. 471=15 P.L.T. 453=36 Cr. L. J. 624 (2)=1 B. R. 369=155 Ind. Cas. 36.

——S. 145—Decision of Criminal Court—Finding as to possession, effect of :—Possession found by a Criminal court is not such as can be treated in the manner in which recent possession given under a decree of a civil court is treated in cases under S. 145 of the Code of Criminal Procedure. In proceedings under S. 145 of the Code of Criminal Procedure, the Magistrate should uphold possession given by a civil court, so that a person who has obtained a decree declaring his right to possession and had been put in possession might not find himself again forced to litigate his title. 2 C. L. J. 147. See also 2 A. L. J. 274.

17. Decree of Civil Court.

——S. 145—Decree of Civil Court upholding title and possession of party—Duty of Magistrate to respect.

A Magistrate has no jurisdiction under S. 145, Cr. P. Code, to re-agitate a dispute that has been settled by a competent Civil Court and to give a declaration in favour of a party whose claim to title and present possession has already been negatived in a recent contested litigation. Once the Civil Court settles the question, the Criminal Court is not at liberty to set that decision at nought. The scope of S. 145 does not allow such interference by Criminal Courts with the decision of Civil Courts. A Magistrate is bound to respect a Civil Court decree of a recent date when there is no evidence to show disturbance or change of possession since the decree; if he does not do so, he acts without jurisdiction. 226 Ind. Cas. 516=47 Cr. L. J. 976=12 B.R. 770=A.I.R. 1947 Pat. 245.

——S. 145—Decree of Civil Court.

Rights of the parties determined by competent Civil Court—Subsequent application under S. 145, Criminal P.C.—Magistrate should maintain the rights of the successful party and should not allow the defeated party to invoke the aid of the Criminal Courts. I.L.R. (1948) All. 150=(1942) A. L. J. 629=1942 A.W.R. (H. C.) 361.

——S. 145—Decree of Civil Court—Proceedings under S. 145 are objectionable.

In a proceeding under the U. P. Encum. Estates Act, the Special Judge passed a decree and sent it to the Collector for execution informing the Collector of the nature and extent of the property which he found to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. This property included the property in dispute. The opposite party did not object under S. 11, Encum. Estates Act but claimed to be in possession of the property in dispute:

Held, that as the question of title was already decided by the Special Judge, the opposite party was not entitled to agitate his claim. The proceedings under S. 145, Criminal P.C., were, therefore, clearly objectionable. A.I.R. 1943 Oudh 410=1943 O.W.N. (C.C.) 299=1943 A.W.R. (C.C.) 81=44 Cr.L.J. 789=19 Luck. 300=208 Ind. Cas. 472.

——S. 145 — Decree of Civil Court.

The proposition that possession obtained through Court should be upheld would be applicable to possession obtained against the judgment-debtor but not when the party in possession at the time is not the judgment-debtor but one of the decree-holders claiming exclusive title. A.I.R. 1940 Nag. 265=1940 N. L. J. 375=41 Cr. L. J. 799=189 Ind. Cas. 774.

——S. 145—Decree of Civil Court.—Stale delivery of possession by Civil Court, whether conclusive proof of present possession.

The law is that the Criminal Court ought to hold that if on a given date, the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a delivery of possession cannot be conclusive as to present possession. A.I.R. 1940 Pat. 135=6 B.R. 155=41 Cr. L. J. 171=185 Ind. Cas. 346.

——S. 145—Decree of Civil Court—Decree-holder getting symbolic possession of judgment-debtor's zamindari property—Interference with possession by judgment-debtor—Proceedings by decree-holder under S. 145, if can be entertained.

Where a decree-holder is given symbolical possession of the judgment-debtor's **Zamindari** property and he finds afterwards that his possession is being interfered with by the judgment-debtor and initiates proceedings

under S. 145, Criminal P. C., for retaining possession, the Magistrate cannot refuse to entertain proceedings on the ground that the Civil Court had not given actual possession to the decree-holder.

If however circumstances show that the decree-holder or action-purchaser has slept over his right and has allowed the judgment-debtor to regain possession of the property and he is at the time of the proceeding in peaceful possession of it, the matter stands on quite a different footing. But in such cases, the Magistrate must take it as an indisputable fact, once delivery of possession is proved, that on the day of the delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ. He must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is established. The judgment-debtor can only succeed if he establishes beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute. A.I.R. 1939 Pat. 151=19 P.L.T. 632=5 B.R. 385=40 Cr. L. J. 339=20 P.L.T. 333=4 Cut. L.T. 69=180 Ind. Cas. 322.

——**Ss. 145, 146—Decree of Civil Court**—Decree-holder obtaining symbolical possession in execution of decree upon delivery warrant—Judgment-debtor attempting forcible entry within two months—Application under S. 145 by decree-holder—Magistrate by order under S. 146 (1) referring back parties to Civil Court—Propriety of.

Where in execution of a decree, the Court orders delivery of possession of judgment-debtor's property to the decree-holder and the Officer of Court executing the delivery warrant gives effect to the order and since then the decree-holder is in possession both in fact and in law of the property in question but the judgment-debtor, within two months of the execution of such warrant, attempts forcible entry upon the land, whereupon the decree-holder files a petition in Criminal Court under S. 145, Criminal P. C., the Magistrate cannot go behind the decision of the Civil Court in the matter and cannot ignore the decree even though the Court passing the decree had no jurisdiction over the land. It is immaterial that the delivery of possession is symbolical only. In the enquiry under S. 145, there is only one conclusion possible for the Magistrate to arrive at with reference to the land, that is that it was in the possession of the applicant on the date of the order passed under Sub-S. (1) of S. 145. Even assuming that the applicant (decree-holder) had been forcibly dispossessed at any time after the execution of the delivery order, the first proviso to Sub-S. (4) will operate in favour of the applicant. Consequently, when in such circumstances, the Magistrate passes an order under S. 146 (1) referring the parties back to Civil Court for the determination of their rights, the order is highly improper and opposed to all principles of justice. A.I.R. 1939 Rang. 388=1940 Rang. L.R. 157=41 Cr. L. J. 123=185 Ind.Cas. 119.

——**S. 145—Decree of Civil Court.**

A lease of certain land was granted to the applicant for a year. For the next year, the land was leased to the opposite party as dissatisfaction was felt with the appllicant who said that the land having been leased to him, he had entered into possession and that possession could not be taken away from him and, therefore, the Court should not have found that the opposite party was in possession. Applicant tried to retain possession. A decree was passed in a civil suit declaring the applicant to be tenant for the second year but it related only to a fraction of the land. The trial Magistrate declared the opposite party to be in possession under S. 145, Criminal P. C.:

Held, that the decision was correct and the actual physical possession had to be determined as otherwise a breach of the peace was likely to result, and that the Magistrate was not bound by the decision of the Civil Court. A.I.R. 1937 Rang. 202=38 Cr. L. J. 805=169 Ind. Cas. 939.

——**S. 145—Decree of Civil Court.**

——**Quoere.**—If the decree had been for delivery of possession followed by execution, the proof of formal delivery of possession might well be treated as conclusive proof in favour of the successful complainant but where there has been no execution, and all that exists is a simple declaratory decree, whether the opinion of the Munsif on this matter of possession should have any weight at all with a Criminal Court which has to decide the question of possession on the evidence before it, is doubtful. A.I.R. 1936 Pat. 537 =15 Pat. 336=3 B.R. 30=17 P.L.T. 526=37 Cr. L. J. 1126=165 Ind. Cas. 289.

——**S. 145—Decree of Civil Court—Possession given by Civil Court**—Duty of Criminal Court to respect and maintain that possession.

It is the duty of the Criminal Court to respect, maintain and preserve the possession given by the Civil Court. A.I.R. 1934 Pat. 565=36 Cr. L. J. 146 =15 P.L.T. 819=1 B.R. 65=152 Ind. Cas. 591.

—**S. 145—Decree of Civil Court.**

——Where in a suit for recovery of possession, possession is decreed, although the decree may be **ex parte**, as between judgment-debtor and decree-holder for purposes of S. 145, the presumption is that the decree-holder entered into possession on the date of the decree and continued till his possession was disturbed by the judgment-debtor, and the onus is on the judgment-debtor to prove his entry subsequent to date of decree. 10 P.L.T. 862=1930 Cr. C. 258=126 Ind. Cas. 293=31 Cr. L. J. 1005=A.I.R. 1930 Pat. 162.

—**S. 145—Decree of Civil Court.**

——Decision of a Civil Court as to proprietorship does not bar magistrate from deciding question of possession. 2 A.L.J. 274, Foll. 111 Ind. Cas. 662= 24 N.L R. 148=29 Cr. L. J. 902=11 A.I. Cr. R. 166 =A.I.R. 1928 Nag. 284.

—**S. 145—Decree of Civil Court—Symbolical possession under.**

——A Criminal Court is not bound by **ex parte** Civil Court decree in execution of which plaintiff landlord obtained merely symbolical possession, in a case between the decree-holder and the third party; 20 C.W.N. 796; 26 Cal. 425, Dist. 81 Ind. Cas. 928 =25 Cr. L. J. 1104=A.I.R. 1925 Cal. 186.

—**S. 145—Decree of Civil Court—Symbolical possession under.**

Where the heirs and representatives of the original judgment-debtor were in possession of a property symbolical possession of which was given to the decree-holder auction-purchaser on 17th November 1918 a few days before the death of the judgment-debtor, **held,** the Magistrate could not, in S. 145 proceedings instituted on 22nd January 1921 validly put the auction-purchaser in possession. 75 Ind. Cas. 75=49 Cal. 177=25 C.W.N. 743=24 C. L. J. 875=A.I.R. 1922 Cal. 364.

—**S. 145—Decree of Civil Court.**

——Once a decree for possession in respect of a land has been passed in favour of a person, the magistrate cannot again refer him to civil Court to

have his title cleared. He is only to give effect to the decree of the Civil Court. 91 Ind. Cas. 75= 27 Cr. L. J. 43 (Oudh).

—S. 145—Decree of Civil Court.

In a proceeding under S. 145, the Magistrate cannot go behind the decision of the Civil Court in the matter. It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court. When the decree is **inter partes** it is immaterial whether the delivery of possession is symbolical or not. In disregarding this delivery of possession the Magistrate acts with gross irregularity and in a manner that is likely to cause a failure of justice. 73 Ind. Cas. 53=37 C.L.J. 256=27 C.W.N. 267=24 Cr. L.J. 517=A.I.R. 1923 Cal. 176.

——S. 145—Decree of Civil Court.—Although a Magistrate in deciding the question of possession under S. 145, is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subject matter of dispute and the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case, yet when there is a recent order of a Civil Court delivering possession to a particular party, that order ought ordinarily to be respected and given effect to by a Magistrate under S. 145, unless and until there is something shown which might induce the Magistrate to hold that subsequent to the delivery of possession, something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. A.I.R. 1922 Cal. 364; 33 Cal. 33 and 1 P.L.J. 336, Cons. 75 Ind. Cas. 363=4 Pat. L. T. 333=24 Cr. L.J. 939=A.I.R. 1923 Pat. 437.

——S. 145—Decree of Civil Court.

It is true that a Magistrate in proceedings under S. 145 is bound to maintain the decisions as to title passed, and possession delivered by a Civil Court in execution of its decree, if such possession has been given within a reasonable time from the initiation of the proceedings under S. 145. But this is not an invariable rule and evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of the particular case. 33 Cal. 33 Foll. 72 Ind. Cas. 883=4 P.L.T. 248=1 Pat. L. R. Cr. 166=24 Cr. L. J. 467=A.I.R. 1923 Pat. 364.

——S. 145—Decree of Civil Court.

A recent delivery of possession by a Civil Court binds a Criminal Court in dispute as to possession, and the court must uphold that possession. 71 Ind. Cas. 999=3 P.L.T. 628=24 Cr. L. J. 279= A.I.R. 1923 Pat. 76.

——S. 145—Decree of Civil Court.

The Criminal Court cannot re-open the question of possession delivered by a Civil Court or to investigate under S. 107, 144 and 145 or in an enquiry of an offence under the Penal Code. The Magistrate has power under S. 145, to investigate into the actual service of the writ of delivery of possession. But as soon as it is proved that the **dakhaldahani** has been effected, it is his duty to maintain the possession of the auction-purchaser. 66 Ind. Cas. 817=3 Pat. L. T. 335=23 Cr. L. J. 321=A. I. R. 1922 Pat. 197.

——S. 145—Decree of Civil Court.

An order of a Civil Court under O. 21, R. 98, 99 or 101 or under S. 33 or 37 of the Public Demands Recovery Act is, until set aside in a Civil suit conclusive and binding upon the Criminal Court or any Court which has to adjudicate upon the possession of the parties. When the possession in law is vested in one party as against any person claiming to be in possession by reason of the writ of delivery of possession, S. 145 is not necessary. There is no **bona fide** claim of possession of the 2nd party. In other words there is no dispute in law as to the possession of property. 71 Ind. Cas. 785=3 Pat. L. T. 826=24 Cr. L. J. 241=A.I.R. 1922 Pat. 13.

——S. 145—Decree of Civil Court.

Although a Criminal Court is bound to respect the decree and delivery of possession by a Civil Court and cannot go behind the decree yet when, in a proceeding under S. 145 it is shown by evidence that, notwithstanding such a decree, the party affected adversely thereby has continued in possession, and the Criminal Court has declared that the party should continue in due course of law, the High Court will not interfere in revision with the order. 60 Ind. Cas. 430=22 Cr. L. J. 238 (Pat.)

——S. 145—Decree of Civil Court.

A landlord got a rent-decree against the tenants recorded in the **Sherista** and obtained delivery of possession through the Civil Court in execution. The Judgment-debtors with other members of their family who were not parties to the rent-decree interfered with the possession of the landlord purchaser. **Held,** that it was not necessary for the landlord to institute his rent suit against all the members of the family but he can sue only those who are recorded in his **Sherista** as tenants of the holding and that those, who are not impleaded could litigate their title in a Civil suit. There being no dispute concerning the lands, the Civil Court's decree and delivery of possession thereunder must be upheld by the Criminal Court. The only way to maintain the possession of auction purchaser is by proceeding under S. 144 or S. 107 and a proceeding under S. 145 was unwarranted, there being no dispute as to the possession having been delivered to the purchaser by the Civil Court. 1 Pat. L.T. 81=(1920) P. H. C. C. 124=21 Cr. L. J. 575=57 Ind. Cas. 95.

——S. 145—Decree of Civil Court.

Where a decree-holder has obtained delivery of possession under O. 21 R. 35, C. P. C. in execution of his decree, the judgment-debtor is precluded and a Magistrate acts illegally and without jurisdiction in starting a case under S. 145, Cr. P. Code and not upholding the Civil Court's decree. Delivery of possession under O. 21, R. 35 is not symbolical but actual. 26 Cal. 625; 29 Cal. 208; 20 C.W.N. 796 Foll. An intermediate holder between the decree-holder and judgment-debtor may properly contest the question of delivery of possession which will have to be adjudged by the Magistrate as also when possession is delivered under O. 21, R. 36, if the other ingredients under S. 145, Cr. P. Code be established. 5 Pat. L. J. 104=1 Pat. L.T. 9=(1920) P.H.C.C. 79=21 Cr. L. J. 200=2 U. P.L.R. (Pat.) 21=54 Ind. Cas. 984.

——S. 145—Decree of Civil Court.

A previous order of the civil court relating to the proceedings in dispute may throw light upon the evidence upon the matter but the evidentiary value to be attached to it must depend upon the particular circumstances of the individual case. Per **Huda, J.**— If there has been real contest between the parties to a suit and upon adjudication regarding title or possession, a party has been awarded a decree and has been put in possession in execution of such a decree it may not be enough for a party claiming adversely to such a decree to show that he was not a party to it. In the case of an execution under a money decree there is no adjudication regard-

ing title to the property except that an attachment gives rise to a claim and there is an adjudication on such claim or where the delivery of possession leads to an investigation under O. 21, Rr. 97 to 100, C. P. Code. In estimating the value of delivery of possession against third parties, it is also material to see what is the true nature of the possession said to have been delivered. 23 C.W.N. 982=30 C.L.J. 123=20 Cr. L.J. 840=53 Ind. Cas. 936.

——S. 145—Decree of Civil Court.

If one of the parties to the proceedings was in actual possession of the property in dispute and lost that possession by the execution of the decree of the Civil Court, then it lies heavily on him to show that he has since regained possession. But if he was not a party to the civil decree and if it is not shown that either of the party to the civil decree was in actual possession, then the former civil proceedings would be of no evidentiary value against him. Although a proceeding under S. 145 of the Cr. P. Code will not be lightly set aside, the Judl. Commr. will interfere if the Magistrate acts without jurisdiction and declares possession with a person who has been long out of possession. 20 Cr. L. J. 445=51 Ind. Cas. 269.

——S. 145—Decree of Civil Court.

Certain properties were attached uuder S. 146 and in a Civil suit one of the claimants was declared entitled to possession from the Receiver. On application for delivery being made, proceedings under S. 145 were again instituted. **Held,** in revision that the proceedings were absolutely without jurisdiction and were liable to be quashed.
17 A. L. J. 434=20 Cr. L. J. 410=51. Ind. Cas, 170.

——Ss. 145, 146—Decree of Civil Court.

Where property is attached by a magistrate under S. 146, Cr. P. C., in a dispute arising under S. 145 of the Code, a suit to recover possession of the property filed more than 6 years since the Magitrate taking over possession will be barred. The Magistrate should withdraw the attachment as he is bound to do so after a civil adjudication in favour of even some of the parties. (26 M. 410, Foll.) 4 L. W. 55=20 M.L.T. 247=(1916) 2 M.W.N. 173=17 Cr. L. J. 331=35 Ind. Cas. 507.

——S. 145—Decree of Civil Court.

Where a Civil Court had ordered possession against judgment debtor, the decree-holder should not be ousted by an order under S. 145 and he should not be forced to go to the civil court again for a declaration though the judgment-debtor might have had possession actually. 17 Cr. L. J. 182=23 C.L.J. 555=20 C.W.N. 796=33 Ind. Cas. 822.

——S. 145—Decree of Civil Court.

The dicision of a Civil Court on the question of possession is not conclusive in proceedings under S. 145 and the Magistrate must arrive at his own finding. 15 Cr. L J. 663=25 Ind. Cas. 991.

——S. 145—Decree of Civil Court.

A decree of a Civil Court adjudging title of one of the parties does not bar a magistrate from determining the actual possession on a particular date under S. 145 Order under S. 146 must be preceded by procedure under S. 145. 16 M.L.T. 52=1 L. W. 493 =15 Cr. L. J. 559=(1914) M.W.N. 798=24 Ind. Cas. 967.

——S. 145—Decree of Civil Court.

The first party was put in possession of disputed property under a decree of a Civil Court which was not one against the second party. **Held,** that a Magistrate had jurisdiction in a proceeding under S. 145 of the Cr. P. Code to declare the possession of the second party. 13 Cr. L. J. 583 =15 Ind. Cas. 999.

——S. 145—Decree of Civil Court.

Certain land jointly leased to tenants by two joint owners was in their possession for several years under the lease. One of the joint owners obtained a decree for partition but he did not obtain possession of his share under the decree and while the old tenants were in possession as before, some new tenants forcibly entered on the land asserting that they were the tenants of only one of the joint owners. The Magistrate acting under S. 145, put the old tenants in possession. **Held,** that the Magistrate was right. There is no doubt that the Magistrate must give effect to a decree of a Civil Court for partition yet in this instance as the dispute was not between the parties to the decree but between two rival sets of tenants, the principle did not apply. 3 Bur. L. T. 74=11 Cr. L. J. 655=8 Ind. Cas. 453.

——S. 145—Decree of Civil Court.

Where the possession of the whole of an estate was delivered to a person who purchased in execution of a decree in a civil court, a court proceeding under S. 145 cannot go behind it and determine the shares of other persons belonging to the family who were not parties to the suit and confine the possession of the purchaser only to the share of the defendant in the civil suit. It is enough for him to decide the question of possession that the civil court has given possession of the whole. 6 C.W.N. 841.

——S. 145—Decree of Civil Court—Possession—Duty of Magistrate to maintain possession according to the decree:—Where symbolical delivery of possession was given by the civil court to **A** on a certain date and soon after proceedings are taken under S. 145. Cr. P. C., the Magistrate must maintain possession according to the civil court's decree. 6 C.W.N 38 =29 Cal. 208.

——S. 145—Decree of Civil Court:—The duty of a criminal court in a case under S. 145, Cr. P. C., where there is a decree of a civil court for possession in respect of the disputed land is to find which party held such civil court decree and then to maintain that party in possession. It is not necessary that such decree should be a decree for possession as between the parties to the proceeding under S. 145, Cr. P. C. 5 C.W.N. 563.

——S. 145—Decree of Civil Court—Symbolical possession—In execution of a foreclosure decree, not effective against a lessee who was not a party to the mortgage suit—Actual possession, to be considered in S. 145, Cr. P. C.:—It is a settled rule of law that no decree for foreclosure could be effective against a person interested in the property, if he was not made a party to the suit. Where therefore, S had executed in 1890 a mortgage by conditional sale in favour of G and had in 1893 leased the properties covered by it to B for 25 years and G in 1892 instituted a suit against S upon the mortgage without making B a party and obtained symbolical possession in

execution of a decree for foreclosure passed therein: Held:—That such delivery of possession could not affect the possession of B. 4 C. L. J. 562.

18. Defect in procedure.

——S. 145—Defect in procedure—Effect. See also Criminal P. C. S. 537.

——S. 145 (1)—Defects in procedure.

A Magistrate's order under S. 145 without complying with the requirements of Cl. (1) thereof is without jurisdiction and illegal. 25 A. 537; 36 A. 19, Ref. 15 Cr.L.J. 424=24 Ind. Cas. 160.

——S. 145—Defect in procedure—Errors and omissions.

——Procedural errors and omissions do not destroy jurisdiction where party is not prejudiced. 26 Cr.L.J. 1292=89 Ind. Cas. 156=A.I.R. 1926 Sind. 53.

——S. 145—Defect in procedure—Errors.

In S. 145 the words "parties concerned in such disputes" include all persons claiming to be in possession and merely because some of those parties are unlikely to cause a breach of the peace, the proceedings under the section are not without jurisdiction. The result of the proceedings will not be invalidated by any and every error and a radical defect must be established corrupting the whole proceedings before their jusisdiction can be questioned. The mere fact that some of the parties file a compromise does not prevent the Magistrate from putting such parties into possession although had the compromise been filed by all the parties and had there been no longer any dispute, it might be held that the Magistrate's jurisdiction had ceased and that he was only empowered to cancel the proceedings under S. 145 (5). In so far as a Magistrate's order in proceedings under S. 145 limits the period within which a civil suit may be brought by any of the parties, an order in mutation proceedings does not affect the Magistrate's order under S. 145 because an order in mutation proceedings is not a final decision as to ownership. 82 Ind. Cas. 691=11 O.L.J. 757=A.I.R. 1925 Oudh. 190.

——S. 145—Defect in procedure—Irregularity—When curable under S. 537 and when not. See Cr. P. Code (V of 1898), Ss. 537 and 145. A.I.R. 1950 All. 731.

——S. 145—Defect in procedure—Omission to consider separately possession of different members of same party—Death of some members pending proceeding—Effect of.

An order of a Magistrate under S. 145, Cr. P. Code, is not bad merely because he does not consider separately the possession of the different members of a party or because some of the members of a party have died during some stage or other of the proceeding, when the members of that party were in possession under one title and separate possession amongst them was a matter of private arrangement. 25 Pat. 19=12 B.R. 290=222 Ind. Cas. 611=47 Cr.L.J. 328=A.I.R. 1946 Pat. 330.

——S. 145—Defect in procedure.

——The Magistrate has no jurisdiction to decide the question of an actual possession without giving the claimants an opportunity of being heard. An omission to record reasons for holding that there is a likelihood of a breach of the peace though a culpable irregularity does not oust the jurisdiction of the Magistrate. 12 M.L.W. 315=59 Ind. Cas. 378=22 Cr.L.J. 90.

——Ss. 145 and 439—Defects in procedure—Omission to consider decree of Civil Court—Material irregularity.

Neglecting to decide the effect of a Civil Court's decree between parties to proceedings under S. 145, Cr.P.C, on the question of possession, is omission to deal with material part of a case, and a refusal of jurisdiction justifying interference, in revision. 11 Cr.L.J. 184=5 Ind. Cas. 646.

——S. 145—Defect in procedure — Omission to record reasons explicitly:—Where a Magistrate passed an order under S. 145 of the Code of Criminal Procedure under circumstances in which the passing of such order was proper, the High Court declined to interfere in revision upon the ground merely that the preliminary order did not set forth as explicitly as it might have set forth the reasons which satisfied the Magistrate that there was a likelihood of a breach of the peace, there being a substantial compliance with the requirements of S. 145 of the Code. (1905) A.W.N. 260=28 A. 237.

——S. 145—Defects in procedure—Omission to record reasons.

Where both parties to a proceeding inform a Magistrate that breach of peace is apprehended there is no want of jurisdiction if the Magistrate issues the initial order without recording reasons in full, as, in such case no party is prejudiced in any way. 32 All. 132=7 A.L.J. 53=11 Cr.L.J. 141=5 Ind. Cas. 471.

——S. 145 (3)—Defect in procedure — Non-compliance—If vitiates proceedings—S. 537.

The failure to serve an order under S. 145, Cr. P. Code, in accordance with S. 145 (3) is not an illegality which goes to the jurisdiction, but is a mere irregularity which can be cured under S. 537 of the Code. 4=A.I.Cr.D.282=A.I.R. 1950 Pat. 372=51 Cr.L.J. 1365.

——S. 145—Defect in procedure—Omission to record finding as to—likelihood of breach of peace—If fatal.

A Magistrate has no juridiction and cannot take action under S. 145, Cr. P. Code, unless he is satisfied regarding the existence of a dispute likely to cause a breach of the peace; the mere fact that the Magistrate issues an order under S. 145 (1) would not necessarily lead to the inference that the Magistrate was satisfied regarding the existence of a dispute likely to cause a breach of the peace.

Whether or not the omission of the Magistrate to comply with the section and to record that he was satisfied that a dispute likely to occasion a breach of the peace exists can be treated as a mere irregularity curable under S.537, the materials before him must be so coercive as to lead to the inference or indication that the Magistrate must have been satisfied that there was a dispute which was likely to lead to a breach of the peace, although he has not recorded that he was so satisfied as requried by the express direction of the statute.

Quoere: Whether the omission of the Magistrate to comply with the express direction in S. 145 and to record a finding of his being satis-

fied as to the existence of a dispute likely to occasion a breach of the peace is a mere irregularity to which S. 537, Cr.P. Code, applies. 55 All. 301; 11 Luck. 157, dist. and expl. 4 A.I.Cr.D. 181.

——Ss. 145 and 435, Cl. (3)—Defect in procedure—Omission to state likelihood of a breach of the peace.

Where proceedings are in intention, in form and in fact, proceedings under Chap. XII of the Cr. P. Code by a Magistrate duly empowered to act under that chapter, the High Court has no power to send for those proceedings or to revise them. The mere omission by a Magistrate to state that he was satisfied from the police report there was a likelihood of a breach of the peace is not a fatal defect. 18 A.L J. 1140=59 Ind. Cas. 401=22 Cr. L.J. 97.

——S. 145 (1)—Defect in procedure—Omission to specity locality.

The word "information" in S. 145 is not used in any technical sense; it is used to include the knowledge of the Magistrate derived by reading the petitions filed in the S. 144 case. Where the parties fully knew what the disputed plots were, the mere fact that the Magistrate did not specifically mention them, does not vitiate the order., 1 Pat. L. T. 369=21 Cr.L.J. 625=57 Ind. Cas. 449.

——S. 145—Defect in procedure—Omission to Specify locality.

An order under S. 145 (3), Cr. P. C. is not defective simply because the property in dispute was not set forth with sufficient accuracy when the parties were found to know the land perfectly well. An omission to have a copy of such order locally published does not affect the jurisdiction of the Court when the provisions of S. 145 (1) are complied with. 12 O.C. 400=11 Cr. L.J. 69=4 Ind. Cas. 876.

——S. 145— (1)—Defect in procedure—Omission to state reasons.

In passing a preliminary order under S. 145, the Magistrate is not bound to set out any reasons for his belief as to a likelihood of the breach of the peace. 33 C. 352, Foll. If a Magistrate finds that possession was with one party, the natural inference is that he dealt with possession on the date of his preliminary order. 34 Ind. Cas. 329, Foll. 8 Cr. L.R. 463.

——S. 145—Defect in procedure — Omission to set out grounds of belief.

A Magistrate is not required to set out his grounds of belief in the notice issued under the section. 18 Cr. L.J. 156=37 Ind. Cas. 524.

——S. 145—Defect in procedure—Omission of grounds in the order.

Jurisdiction of a Magistrate is not affected by. his not recording grounds in his preliminary order under S. 145. 3. O.L.J. 546=19 O.C. 136=18 Cr. L.J. 100=37. Ind. Cas. 308.

——S. 145—Defect in procedure--Omission to state in preliminary order—grounds of belief—Effect.

——In instituting proceedings under S. 145, Cr. P. C., the magistrate is bound to state in his initiatory order the grounds on which he is satisfied that there is a likelihood of a breach of the peace. Even where a magistrate acts on a police report or other information he is still bound to state the grounds upon which he is satisfied that there is likelihood of a breach of the peace. 20 C. 520; 20 C. 513; 27 C. 981 : 28 C. 417. foll. Where a proceeding was instituted by an order under S. 145 (1) which commenced thus:— "Whereas it appears from local inquiry held by me on the 27th June 1904 that a dispute likely to cause a breach of the peace exists, etc.": Held, that as the Magistrate had omitted in the initiatory order to state the grounds of his being satisfied as to the likelihood of a breach of the peace, the final order directing one of the parties to be retained in possession was made without jurisdiction. 9 C.W.N. 621=32 C. 771.

——S. 145—Defect in procedure—Decision based on inquiry.

——A decision of a Magistrate under S.145, Cr.P.C. based purely on what the Magistrate himself saw, heard and inferred at the local inquiry, about all of which there was nothing on the record, is not a decision legally found, but one in which the Magistrate has erred materially in his jurisdiction and therefore liable to be set aside. 10 C.W.N. 181. See also: 6 C.W.N. 925; 12 C.W.N. 771.

——S. 145—Defect in procedure — Refusal to give time for production of documents.

Where any proper appreciation of oral evidence regarding possession was impossible in the absence of important documents touching the question of status.

Held, that the order refusing an adjournment for the production of the documents was an arbitrary order constituting a denial of justice and must be set aside. 61 Ind. Cas. 63=33 C.L.J. 507= 25 C.W.N. 602=22 Cr. L. J. 335.

—S. 145—Defect in procedure—Refusal to give time for written statement.

When in a proceeding under S. 145 the land in dispute is attached and there is no immediate prospect of a breach of the peace, the Magistrate should not refuse to grant a reasonable request for time to file written statement and should not try the case ex parte. 19 Cr.L.J. 799=46 Ind. Cas. 719.

—S. 145 (a)—Defect in procedure—Refusal to hear arguments.

A refusal to hear arguments vitiates the final order under S. 145 as being in excess of jurisdiction. The procedure under S. 145 should be regarded on all points as that prescribed for summons cases. 5 Pat. L.W. 103=19 Cr.L.J. 741= 46 Ind. Cas. 517.

19. Dismissal for default.

—S. 145—Dismissal of complaint for default after issuing of order under S. 145 (1)—Legality.

In preventing disputes relating to land likely to cause a breach of the peace, the State is as much concerned as private parties to the dispute. That is one of the reasons why there is no provision in the Cr.P. Code, for a complaint made under S. 145 to be dismissed for default of the appearance of the complainant after the Magistrate had issued an order under sub-S. (1) of that section. A dismissal or the default of a complainant under S. 145 is not an order contemplated by a law. I.L.R. (1949) A. 384=49 Cr.L.J. 714=3 A.I.Cr.D. 184=A.I.R. 1948 A. 425=1948 A.W.R. (H.C.) 216.

—S. 145—Dismissal for default of appearance—ultra vires.

There is no provision in S. 145, Criminal P. C., which would warrant the dismissal of the case

merely because the complainant failed to attend. The order of the Magistrate dismissing the case for default of the complainant is ultra vires, and consequently, the question of the subsequent revival of the case on the application of the complainant does not arise. A.I.R. 1940 Oudh 22=1939 A.W.R. (C.C.) 277=41 Cr.L.J. 96 (2)=1939 O.W.N. (C.C.) 974=184 Ind. Cas. 751.

20. Disposal of Property.

—S. 145—Disposal of property.

——The Court has no jurisdiction over the crops harvested before the preliminary order in S. 145 proceedings. 1934 M.W.N. 405.

—Ss. 145 and 522—Disposal of property—Magistrate—Placing one in possession by ousting another—Order illegal.

Under S. 145 of the Cr. P. Code, a Magistrate of the first class has no power to oust one person and to place another in possession of a disputed property. A Magistrate has such power under S. 522 of the Code, but to give him jurisdiction under that section there should have been a conviction for an offence. 37 All. 654=13 A.L.J. 932=16 Cr.L.J. 714=30 Ind. Cas. 1002.

—Ss. 145 and 522—Disposal of property.

An order under S. 522 which is not carried out is no bar to a proceeding under S. 145. 18 C.W.N. 1088=15 Cr.L.J. 700=26 Ind. Cas. 148.

—S. 145. Cl. (1)—Disposal of property—Division of crops—Magistrate, jurisdiction of:—A Magistrate has no jurisdiction to order a division of the crops on the land, which is subject-matter of proceedings under S. 145. Cr.P.C., between the parties. 8 C.L.J. 242.

——S. 145—Disposal of property — Supurdar defaulting to restore crops entrusted to him in proceedings under S. 145—Order for attachment of immovable property of supurdar under O. 40. R. 4, C. P. Code—Legality.

The provisions of the C.P. Code cannot apply to any proceedings in connection with anything done or purporting to be done under the provisions of the Cr. P. Code, unless under some other provision of law certatn specific provisions of the Cr. P. Code, were made applicable to proceedings under the Cr. P. Code.

Where on the default of a supurdar to restore the crops enrusted to him in proceedings under S. 145 C. R. Code, a Magistrate orders the attachment of the supurdar's immovable property under O. 40, R. 4, C. P. Code, the order passed is illegal and all references in the order to the C. P. Code, are irrelevent. 51 Cr. L. J. 1314=A. I.R. 1950 All. 490=4 A.I. Cr. D. 509=1950 A. W. R. 485.

—S. 145—Disposal of property—Release of attached property in favour of a party because of the absence of the other party—Legality.

An order for the release of attachment in favour of a party because it happened that the other party was absent more than once on the hearing dates, is irregular. I.L.R. (1949) A. 384=1948 A.W.R (H.C.) 216=A.I.R. 1948 A. 425=49 Cr.L.J. 714=3 A.I.Cr.D. 184.

——S. 145—Disposal of property—Property in custodia legis—**Declaration of title in Civil Court—Prayer for possession—Necessity—Duty of Criminal Court.**

Where at the time of filing a civil suit in respect of property about which there is a dispute, the property is in **custodia legis,** all that is necessary for the plaintiff in the suit is to seek a declaration of his title. It is not nccessary for him to ask further for possession of the property as the Criminal Court would be bound to respect the declaration made by the Civil Court and to give due effect to it. 60 L. W. 308=A.I.R. 1947 Mad. 373 (1)=1948 M.W.N. 61=(1947) 1 M.L.J. 337.

21. Disputes between landlords and tenants.

——S. 145 (2)—Dispute between rival landlords claiming possession through different tenants—Tenant denying possession on landlord's behalf—Proper order.

When the parties to a dispute regarding possession of land are rival landlords claiming possession through different tenants, the possession of the tenant may amount to possession by his landlord. But where the tenant, though he has obtained possession originally by virtue of a settlement from his landlord, denies that he is the tenant of that landlord in respect of the land which he actually possesses, his possession cannot by regarded as possession of the landlord and the Magistrate must declare the tenant and not the landlord to be in possession. I.L.R. (1948) 1 Cal. 150.

——S. 145—Dispute between landlord and tenants—Tenants having same source and nature of possession—General evidence by tenants as to their possession—General finding in favour of the tenants—Details given in appendix to judgment—Legality of the order.

The property in dispute was under a mortgage, and the equity of redemption in them was purchased by **C** who claimed to have got possession and thereafter sold the property to **B** party and it was alleged that the possession which **C** had, also passed to the **B** party. The **A** party consisted of 34 tenants who alleged that they have been cultivating these properties and have been in actual possession for a long time even while the properties were with the mortgagee. Each one of them in his statement stated the parcel or parcels of land in his possession and the particular crops raised by him in each particular year. The Magistrate adjudged that possession was with **A** party, and passed orders accordingly. The lower Court appended to its judgment a schedule mentioning the list of disputed lands, stating the survey number, classification, area and the rank of the **A** party member who is in possession of each plot. On a contention that the order was bad as there was no separate findings as to each of the members of the **A** party,

Held, that in the circumstances, it could not be held that the Magistrate had not come to any definite decision as to the possession of the various plots by the various members of the **A** party when the whole matter was clearly stated as appendix to the judgment. As the members of the **A** party were in possession under one title and separate possession amongst them was a matter of arrangement, the order of the Magisrate upholding their possession would not be bad even though he had not considered the separate possession of each particular member of the party. 1948 M.W.N. 573=A.I.R. 1949 Mad. 226=50 Cr.L.J. 253=(1948) 2 M.L.J. 209.

22. Dispute Concerning water.

——S. 145—Dispute Concerning water.

Channel not used for irrigation is not land or water but when used there can be "dispute concerning water". 76 Ind. Cas. 691=25 Cr. L. J. 227=A. I. R. 1924 Oudh. 341.

23. Dispute about property.

——S. 145—Dispute about property—Property sold—Order by Magistrate to pay to one party, how

far judicial order—Revision:—An order passed by a Magistrate to pay the value of certain properties sold about which there was a proceeding under S. 145. is not a judicial order and so the High Court has no power to revise such an order. 6 C.W.N. 882.

24. Distribution of fees paid by pilgrims.

——**S. 145—Distribution of fees, paid by pilgrims —dispute as to**:—Proceedings under S. 146, Cr.P.C., cannot be instituted in respect of a dispute between two parties relating to the distribution of fees paid by pilgrims at Gaya for performing **sradha** ceremony, although there may be a likelihood of a breach of the peace in consequence of such dispute. Such fees can in no sense be said to be profits which issue out of land. 3 Cr. L. J. 137.

25. Dropping of Proceedings.

——**S. 145 (5)—Dropping of proceedings on ground of non-existence of dispute likely to cause breach of the peace.**

It is not incumbent on a Magistrate, once proceedings are started under S. 145 Cr. P. Code, to complete the inquiry and pass a final order. Such a view is erroneous, because under S. 145 (5), the Magistrate has power to cancel the original order and stay further proceedings and drop them if he is satisfied that no dispute likely to cause a breach of the peace exists or has existed between the parties. 1948 A.M.L. J. 19.

——**S. 145—Dropping of proceedings—Propriety —Expiry of lease on basis of which one of parties claimed possession.**

In a proceeding under S. 145, Cr. P. Code, the material question for decision is the question of possession at the date of the order under sub-S. (1). The magistrate is bound to uphold the possession of the party who was in possession on that date. It would be obviously improper to drop proceedings or set aside the order of the Magistrate on the ground that the lease on the basis of which one of the parties claimed to be in possession has expired by efflux of time, when it is not admitted that that party has given up possession after the expiry of the lease, and the dispute between the parties still subsists. 25 Pat. 19=12 B.R. 290=222 Ind. Cas. 611=47 Cr. L.J. 328=A.I.R. 1946 Pat. 330.

——**S. 145(5)—Dropping proceedings under—when proper.**

Where persons in possession were dispossessed after showing a notice from a Magistrate, which notice was based on incorrect information, the dispossession is forcible dispossession. Actual force is not necessary to constitute forcible dispossession. Misrepresentation and improper threats are sufficient.

Proceedings can be dropped under S. 145 (5) only when there is a subsequent settlement between the parties. Merely because there has been no further violence it cannot be said that there cannot be a breach of the peace and proceedings be dropped (1946) 2 M.L.J. 349=1946 M.W.N. 692= 59 M.L.W. 645=A.I.R 1947 Mad. 133.

——**S. 145(5)—Dropping proceedings under—when proper.**

Held, that the statements made by each party that that party did not intend to break peace, taken together could not be held to establish the facts required by Sub-S. (5) of S. 145, Criminal P.C., namely, that a party shows that "no . . . dispute exists or has existed." A.I.R. 1943 Cal. 559=45 Cr. L.J. 107=209 Ind. Cas. 215.

——**S. 145—Dropping of proceedings—Continuance of attachment—Legality of.**

Under S. 145, Criminal P.C., the Magistrate should decide who is in actual possession so that the parties may know who is to resort to a Civil Court as a plaintiff.

It is not open to a Magistrate to drop proceedings under S. 145, Criminal P.C., and yet order continuance of attachment. 1937 M.W.N. 55.

——**Ss. 145, 561-A — Dropping of proceedings —** Institution of civil suit for declaration—Appointment of Receiver in respect of property in dispute—Criminal proceedings, if can be quashed—Inherent powers under S. 561-A—Prevention of abuse of process of Court.

The mere institution of a suit in the Civil Court for declaration in respect of the right thereatened or infringed is not by itself sufficient to justify the dropping of proceedings under S. 145, Criminal P.C., which have already been instituted, if there is a danger of breach of the peace which can best be averted by summary proceedings under S. 145. But where the Civil Court has appointed a Receiver, all such danger is averted. The policy of the law is to give preference in matters of this nature to possession by a Receiver appointed under orders of a Civil Court. Consequently, in such a case, the only proper course would be to drop the proceedings under S. 145 in order to avoid unnecessary harassment to the parties and useless waste of time, money and energy:

Held also, that under these circumstances, the case was an eminently fit one for the exercise of the inherent powers of the Court recognised under S. 561-A, Criminal P.C., in order to put a stop to the proceedings under S. 145, Criminal P.C., which have now become wholly useless and unnecessary, especially as if the proceedings under S. 145 were allowed to be continued, it would be a sheer abuse of the process of the Court for the preventing of which S. 561-A was intended. A.I.R. 1935 Oudh 255=36 Cr.L.J. 464=1935 O.W.N. (C.C.) 239=10 Luck. 564=154 Ind. Cas. 121.

26. Due course of Law.

——**S. 145 (6)—'Due course of law'—Meaning.**

The phrase 'due course of law' in S. 145 (6), Cr.P.C. means an order of a Civil Court or a Court acting under statutory authority. In the latter case, there must be a clear indication express or implied in the terms of the statute itself to show that the order has the effect of a decree. 12 C.W.N. 696, Fol. Order of a Settlement Officer does not effect eviction in due course of law. 1 Pat. L. W. 642=18 Cr.L.J. 682=40 Ind. Cas. 330.

27. Duty of Magistrate.

——**Ss. 145 and 537—Duty of Magistrate**—Satisfaction as to existence of dispute likely to cause breach of peace—Necessity prior to taking cognizance.

S. 145, Cr. P. Code, requires that before a Magistrate takes cognizance of a case under that section he must be satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, and it is only then that he can take cognizance of the case. Where a Magistrate takes cognizance even before he was so satisfied but comes to that satisfaction at a later stage of the proceedings that would not give him the necessary jurisdiction to take action in a case under S. 145, Cr. P. Code. In such circumstances, S. 537, Cr. P. Code, can be of no assistance. 1950 A.W.R. 640=A.I.R. 1950 All. 734= 1950 A.L.J. 692.

——**S. 145—Duty of Magistrate—Absence of evidence.**

—Order declaring right of one party to be in possession and forbidding others from interfering with the possession is one under S. 145.

Where a Magistrate, on a police report being received that there was a dispute regarding a piece of land

and breach of peace was appehended, called for documentary evidence from the parties, heard arguments and passed an order declaring one party in possession and directing that if the other were to obstruct him, proceedings under S. 118 would be started and referred the parties to Civil Court.

Held, that the Magistrate acted judicially and passed without jurisdiction an order which he could only pass under S. 145 and therefore it should be vacated. 90 Ind. Cas. 295=26 Cr.L.J. 1511=A.I.R. 1926 Pat. 51.

——**S. 145—Duty of Magistrate**—Bona fide **dispute.**—Where the Magistrate finds that there is a **bona fide** dispute between the parties, he ought to initiate proceedings under S. 145. A.I.R. 1922 Pat. 435 (F.B.) and 4 Pat. L.W. 354, Foll.

Where the presumption of the record of rights and of the partition papers was in favour of petitioners, and the Police report was in favour of the opposite party:

Held, that there was clearly a case in which there was a **bona fide** dispute between the parties as regards possession. 88 Ind. Cas. 845=6 P.L.T. 746=3 Pat. L. R. Cr. 70=26 Cr. L. J. 1229=A.I.R. 1925 Pat. 514.

——**S. 145—Duty of Magistrate—Civil dispute.**

There is far too great a tendency amongst private individuals to file applications under S. 145 simply as a first move which they imagine may put them in an advantageous position in the subsequent civil litigation as against the party with whom they are at loggerheads. This misuse of these provisions of law requires to be discouraged, and therefore though the Magistrate can rely on the Police report, ordinarily it would be well for Magistrates to carefully scrutinize the evidence in this connection in this class of cases. 33 Cal. 352, Rel. on. 91 Ind. Cas. 244=27 Cr. L. J. 68=A.I.R. 1926 Nag. 371.

——**S. 145—Duty of Magistrate—Civil dispute.**

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. 33 P. R. 1910 Cr., Foll. 59 Ind. Cas. 654=3 L. L. J. 99=22 Cr. L. J. 142=A. I. R. 1921 Lah. 185.

——**S. 145—Duty of Magistrate—Decree—Extraneous evidence — Error—Rectification**:—Where an act complained of is justified under a decree of the civil courts, it is the duty of the magistrate to maintain the decree of the civil court. If there is any error in the decree it is for the civil courts to rectify it; the magistrate has no jurisdiction to take evidence and rectify the decree. 5 C. W. N. 215.

——**S. 145—Duty of Magistrate—Enquiry and conclusion not to be delayed.**

It is highly desirable that enquiries started under S. 145, Cr. P. Code, should be conducted and concluded with the least possible delay and should not be allowed to take a long and unwieldy course. 1948 A. M. L. J. 19.

——**S. 145—Duty of Magistrate.**

Although, where there is a **bona fide** dispute of possession between the parties, the Magistrate ought to proceed under S. 145, Cr. P. C., and not under S. 144 of the Code, the High Court will not interfere with the order under S. 144 after it has spent its force by reason of the expiry of the period to which its effect is confined. It will be unnecessary and undesirable to direct the Magistrate to begin under S. 145, when his order under S. 144 has already spent its force, and his observations regarding possession will have little, if any, effect upon the question of actual possession. A.I.R. 1933 Pat. 584 (2) =35 Cr. L. J. 88 =146 Ind. Cas. 557.

——**S 145—Duty of Magistrate.**

Though a Magistrate's powers under S. 144, Criminal P.C., are very wide, the Court must deprecate the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145 of the Code. A summary procedure under S. 144 should not be substituted in cases in which without possible doubt, pro- ceedings under S. 145 can be taken. A. I. R. 1940 Pat. 382=41 Cr. L. J. 907=7 B. R. 54=190 Ind. Cas. 425.

——**S. 145—Duty of Magistrate—Order.**

In a proceeding under S. 145 of the Cr. P. Code, the order of the Magistrate finding one of the parties to be in possession of the land in dispute, should accurately describe the land, by specifying the boundaries thereof, in order to show clearly and exactly what land is covered by the order. 61 Ind. Cas. 513=22 Cr. L. J. 385 (Cal.).

——**S. 145—Duty of Magistrate.**

An order ought to declare the party in whose favour possession is found to continue to be in possession of the property until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction. 62 Ind. Cas. 177=2 P.L.T. 267=1921 P.H.C.C. 167=22 Cr. L.J. 481=A.I.R. 1921 Pat. 176.

——**S. 145—Duty of Magistrate—Parties.**

Duty of Magistrate under S. 145, is to determine what parties are concerned in the dispute and who are in actual possession—He is not deprived of the jurisdiction under S. 145 though some parties only are in possession. 5 C.W.N. 900 and 30 Cal. 155. 89 Ind. Cas. 153=26 Cr. L. J. 1289=A.I.R. 1925 Nag. 457.

——**S. 145—Duty of Magistrate—Points for decision.**

Cuming and Cammiade JJ.—In a case under S. 145, what the Magistrate has to determine is who is in actual possession at the time or within two months of the proceeding and to declare him to be entitled to possession.

Actual possession means actual physical possession. Actual possession is not necessarily lawful possession. It may be the possession of a trespasser without any title whatever. The person who has obtained what is known as symbolical possession through a civil court is not necessarily in actual possession.

Graham J.—Possession means lawful possession and not possession taken by force in defiance of law. No Court ought to recognize such possession. 109 Ind. Cas. 231=55 Cal. 826=47 C. L. J. 233=32 C.W.N. 275=10 A.I.Cr.R. 160=29 Cr. L. J. 503=A.I.R. 1928 Cal. 344.

——**S. 145—Duty of Magistrate.**

A failure to record an express finding as to possession and the consequent disregard of the express provision of Cl. (1), S. 146, are very much to be deprecated. 111 Ind. Cas. 445=29 Cr.L.J. 861=11 A.I.Cr.R. 194=A.I.R. 1928 Nag. 325.

——**S. 145—Duty of Magistrate.**

Magistrate is incompetent to base final order on the merits of the claims of parties to a right to possess, but should confine himself to the question of actual possession even if the possession is that of a trespasser, provided it is peaceable. 111 Ind. Cas. 662=24 N. L. R. 148=29 Cr. L. J. 902=11 A.I.Cr.R. 166=A.I.R. 1928 Nag. 284.

—**S. 145—Duty of Magistrate—Points for decision.**

——Under sub. s. (4) S. 145, the Magistrate has to decide the question of possession without reference to the merits of the claim of any party and a proper

judgment under the section should state the case of both parties and then leave alone the question of title. If there is oral evidence on either side, there should be some discussion of it. 110 Ind. Cas. 580 =10 P.L.T. 47=29 Cr. L.J. 724.

—S. 145—Duty of Magistrate—Preliminary and final order.

——The provisions of S. 145 (1) are mandatory and a disregard of those provisions vitiates the entire proceedings in the case. The Magistrate who has to draw up the order under S. 145 (1) is the Magistrate who after drawing up the order proceeds to decide the case. 99 Ind. Cas. 1031=49 All. 325= 25 A. L. J. 246=8 L.R.A. Cr. 39=28 Cr. L. J. 231 =7 A.I. Cr. R. 267=A.I.R. 1927 All. 286.

—S. 145—Duty of Magistrate—The existence of dispute likely to cause breach of peace is absolutely necessary to give the Magistrate jurisdiction.

The Powers conferred upon criminal Courts by S. 145 are somewhat of an exceptional character because they enable the Magistrate mentioned in the section to partially deal with a matter over which civil courts have jurisdiction. Therefore the requirements of the section should be strictly followed. A Magistrate would have no jurisdiction unless he was satisfied that there existed a dispute concerning land, etc., and which dispute is likely to induce a breach of the peace. A formal order to this effect under Sub-S. (1) is absolutely necessary to give the Magistrate jurisdiction. A.I.R. 1924 Lah. 91, Foll. 26 P.L.R. 712=105 Ind. Cas. 685=28 Cr. L.J. 973=A.I.R. 1927 Lah. 805.

——S. 145—Duty of Magistrate—Failure to make initial order vitiates proceedings.

Under S. 145 (1) it is first of all essential that the Magistrate should be satisfied that a dispute likely to cause a breach of the peace exists and that he sould make an order in writing stating the grounds of his being satisfied. Omission to pass an order under Sub-S. (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub section the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145. 74 Ind. Cas. 79 =4 Lah. 66=24 Cr. L. J. 751=A.I.R. 1924 Lah. 91.

——S. 145—Duty of Magistrate

It is the duty of the Magistrate to complete the inquiry and to pass final orders under S. 145, where proceedings have been started under it and a preliminary order was passed. 71 Ind. Cas. 112=16 M.L.W. 592= 24 Cr. L. J. 64=A.I.R. 1923 Mad. 180.

——S. 145—Duty of Magistrate—Quick disposal— Original application should not be sent to police—Magistrate must himself be satisfied as to likelihood of breach—Proceedings should not be dilatory.

The Magistrate must be alert, active and prompt. The Magistrate must himself be satisfied, and he must form his own judgment and not proceed automatically upon a mere opinion of the police or the direction of some other officer; (33 Cal. 33, Foll.). His decision that there is a dispute likely to cause breach of the peace is the very foundation of all subsequent investigation and without it the latter is void and inoperative. The object of S. 145 being the prevention of a breach of the peace the foundation of jurisdiction is its likelihood; (21 Cal. 29 and 30 All. 41, Foll.). Both the fact that he is satisfied and the grounds thereof must appear in the first order directing the issue of notice. Where a party being wrongfully dispossessed moved the Magistrate to initiate proceedings under S. 145 and the Magistrate thinking fit to invite police report sent the application itself in original for enquiry and report to the police, and the police report reached the Magistrate after a considerable delay and he passed an order which did not fulfil the requirements of S. 145, Cr.P.C.

Held, that the Magistrate failed to appreciate the true and proper scope of the application, and to pass orders according to law, but by his dilatory procedure, deprived the party dispossessed of the valuable right to claim benefit of the presumption of continuance of his possession for a space of two months next prior to the date of his preliminary order, and thus defeated the very object with which the legislature enacted. Prov. 1, sub-S. (4). 28 Cr. L. J. 929=105 Ind. Cas. 449 =9 A.I.Cr.R. 374=A.I.R. 1928 Nag. 81.

——S. 145—Duty of Magistrate.

It is highly desirable that once the hearing of a case under S. 145 is commenced and witnesses are examined the hearing should go on from day to day until all the evidence is taken and argument is heard; then order should be passed as soon as possible. 83 Ind. Cas. 665=1924 P.H.C.C. 231=26 Cr. L. J. 105= 3 Pat. L. R. Cr. 145=6 P. L. T. 258=A. I. R. 1924 Pat. 689.

—S. 145—Duty of Magistrate—Procedure for warrant case should not be adopted—Acting on evidence in chief without opportunity of cross-examination is illegal.

The object of S. 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where naturally the proceeding has to be a protracted one. It is therefore incumbent upon Magistrates to dispose of proceedings under S. 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section. The procedure for the trial of a case under S. 145 is that laid down for the trial of summons cases where witnesses are examined, cross-examined, and re-examined, and then discharged. The Magistrate is wrong in treating the case as if it was a warrant case. The present case was prolonged from day to day. The Magistrate examined the witnesses in chief and postponed their cross-examination till after the first party had closed its case. When the cross-examination of one of the witnesses of first party had to be resumed, the second party did not appear in time. The Magistrate then disposed of the case **ex parte** holding that the evidence adduced by the first party was sufficient to prove its possession over the lands in question.

Held, that the Magistrate acted without jurisdiction in acting on the evidence which was not tested by cross-examination, and that the order was wrong also because no opportunity was given to the opposite party to produce their evidence. 73 Ind. Cas. 339=24 Cr. L. J. 595=A.I.R. 1923 Pat. 53.

——S. 145—Duty of Magistrate—Reasons for findings.

——Where a Sub-Divisional Magistrate makes an order under S. 145 (1) and fills up form 22 in Sch. 5, it is necessary to send the proceedings back to him in order that he may write proper judgment. There is nothing in S. 145 to absolve a Magistrate from his ordinary duty of giving reasons for his decision. 114 Ind. Cas. 625=52 Mad. 241=30 Cr. L. J. 340=28 M.L.W. 664=1928 M.W.N. 921=1 M. Cr. C. 320= A.I.R. 1928 Mad. 1230=55 M. L. J. 693.

——S. 145—Duty of Magistrate.

Where an order only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons as to why the claim of actual possession by any particular person is true,

such an order is not a decision as required by the law and must be set aside. 107 Ind. Cas. 907=10 A. I. Cr. R. 2=29 Cr. L. J. 312=A. I. R. 1928 Nag. 255.

——**S. 145—Duty of Magistrate — Magistrate must give reasons for his decision.**

Per Buckland, J.—Whether Ss. 366 and 367 do or do not apply to proceedings under S. 145, Magistrate must give a statement of the reasons for the decision sufficient to determine whether he has or has not complied with sub-S. (4) of S. 145 and directed his mind to the consideration of the effect of the evidence adduced before him. To what extent a Magistrate should state the reasons cannot be laide down by a general rule, but provided he states the reasons so as to enable the High Court to appreciate and deal with the case in revision, a degree of brevity which would be out of place in a judgment to which S. 367 applies would not necessarily be open to objection.

Per Cuming. J.—The law does not require that the court should give reasons for the decisions in a proceeding under Chap. 12. 86 Ind. Cas. 979=41 C.L.J. 357=29 C.W.N. 475=26 Cr. L.J 915=A.I.R. 1925 Cal. 1040.

——**S. 145—Duty of Magistrate—Striking off a case under S. 145 with a remark, that there was no likelihood of breach of peace, without any material before the court for such order, is illegal.**

Where after several adjournments and long after the evidence and arguments on both sides were heard the Court struck off the case with a remark "I find I passed no final order in this case. As so long has elapsed, I do not think any breach of the peace is likely. I therefore strike the case off," though there was no material before the Court for concluding against such likelihood, **Held**, that the order was wholly illegal. It may be that if the Magistrate gets information from any source whatsoever that there is no longer any apprehension of a breach of the peace he would be entitled to drop the proceeding. 83 Ind. Cas. 665=1924 P.H.C.C. 231=26 Cr. L.J. 105=3 Pat. L.R. Cr. 145=6 P.L.T. 258=A.I.R. 1924 Pat. 689.

——**S. 145—Duty of Magistrate — Magistrate must give reasons.**

Where Magistrate without stating any grounds said that he was satisfied that there was a dispute likely to cause a breach of the peace,

Held, he failed to comply with the provisions of the law and his subsequent proceedings were without jurisdiction. Litigants often resort to S. 145 as an easy way of getting possession without the expense, delay and trouble of a civil suit and Courts should be on guard against an abuse of legal powers. 81 Ind. Cas. 985=2 Bur.L.J. 295=25 Cr.L.J. 1161=A.I.R. 1924 Rang. 178.

——**S. 145—Duty of Magistrate—Omission to record reasons for decisions under S. 145 is bad.**

Whether Ss. 366 and 371 do or do not apply to proceedings under S. 145, the magistrate has to give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub-section (4) and directed his mind to the consideration of the evidence adduced and whether in making his final order he has acted within or without jurisdiction, The mere statement that certain number of witnesses had been heard and that the oral and documentary evidence of both parties had been considered in the light of the arguments addressed, is not sufficient. 62 Ind. Cas. 323=49 Cal. 187=34 C.L.J. 125=25 C.W.N. 887=22 Cr. L.J. 499=A.I.R. 1922 Cal. 382.

——**S. 145—Duty of Magistrate.**

——S. 145 does not require the Magistrate to give in his final order, a finding that there is a likelihood of a breach of the peace. After he has made an order in writing under Sub-section (1) the only matter which he has to determine is the question of the possession of the disputed property. 67 Ind. Cas. 584=A.I.R. 1922 Lah. 454=23 Cr. L. J. 424.

——**S. 145—Duty of Magistrate.**

——Under S. 145 the Magistrate is bound to set forth the grounds of his satisfaction of the existence of danger to a breach of the peace and unless this is done he acquires no jurisdiction. 62 Ind. Cas. 177=1921 P.H.C.C. 167=2 P.L.T. 267=22 Cr. L.J. 481=A.I.R. 1921 Pat. 176.

——**S. 145—Duty of Magistrate — Summoning witnesses.**

——The direction to receive evidence implies a duty on the Court to summon such witnesses as may be mentioned to the Court by either party. 32 Cal. 1093, Dist. 1930 Cr. C. 432=1930 A.L.J. 484=52 All. 91=125 Ind. Cas. 463=31 Cr. L.J. 839=A.I.R. 1930 All. 319.

——**S. 145—Duty of Magistrate.**

A Magistrate should not without satisfaction of the allegation of non-service, reject an application to re-open proceedings under S. 145 which does not necessarily require an affidavit in every case, of the service having been effected or not. 32 C.L.J. 14=24 C.W.N. 902=58 Ind. Cas. 928=21 Cr. L J. 848.

——**S. 145—Duties of Magistrate.**

The entry in the Register D of a Collectorate though not conclusive, yet may give rise to a presumption of legitimate possession. But the Magistrate is bound to see who is in the actual possession of the property in the proceedings under S. 145, in which one of the parties claims the property as the owner and not as a manager or servant. 1 Pat. L. T. 588=21 Cr. L.J. 785=58 Ind. Cas. 513.

——S. 145—Duty of Magistrate.

A Magistrate has no jurisdiction to try proceedings against a party in a case under S. 145 where that party has been already declared to be in possession, unless it has been surrendered by him or is vacated in due course of law, and his order is liable to be set aside. Where a Magistrate includes in his order a piece of property already declared to be in possession along with other property of which possession is sought, he acts without jurisdiction with respect to that piece. 1 Pat. L. J. 557=21 Cr.L.J. 753=58 Ind. Cas. 337.

——**S. 145—Duties of Magistrate—Breach of the peace—Essentials to give jurisdiction——Description of subject-matter to be precise.**

In an order directing the issue of proceedings under S. 145 the Magistrate was of opinion that there was no likelihood of a breach of the peace but the section did apply as the dispute was one relating to possession. **Held**, that Magistrate acted without jurisdiction as the basis of jurisdiction in cases of this character is the likelihood of a breach of the peace. Want of a clear specification of the subject-matter of dispute in the proceedings in such cases is a serious defect. 24 C.W.N. 621=21 Cr. L. J. 593=31 C. L. J. 369=57 Ind. Cas. 161.

——S. 145—Duty of Magistrate—Possession—Title may be looked into.

In a proceeding under S. 145 if there is a substantial evidence of possession or a conflict of evidence thereon, the Magistrate can look into the evidence of title in corroboration of the evidence of possession. 19 Cr. L.J. 717=46 Ind. Cas. 301.

——S. 145 Cl. (5) and (6)—Duties of Magistrate—Lands not the subject of dispute—Jurisdiction of Magistrate.

In proceedings under S. 145 Cr. P. Code a Magistrate has no jurisdiction to declare that a land not in dispute between the parties is in the possession of a person not a party to the proceeding but who has been directed by the Magistrate to come in only for a limited (purpose under S. 145(5). If he makes such an order he exceeds his jurisdiction. 19 Cr. L. J. 653=45 Ind. Cas. 845.

——S. 145—Duty of Magistrate.

On application under S. 145 a Magistrate's order passed on the enquiry and report of Zaildar alone, is wholly bad in law. 21 Cr. L. J. 563=57 Ind. Cas. 83 (Lah).

——S. 145—Duties of Magistrate—Requisites before action is taken under.

Where a Magistrate passed a preliminary order under S. 145 on the report of a Zaildar, the parties having no opportunity of producing their evidence before the Zaildar, the proceedings are void owing to the absence of judicial evidence showing the likelihood of a breach of the peace and that the report of the Zaildar could not be invoked in support of the order. 25 P.W.R. Cr. 1917=115 P.L.R. 1917= 18 Cr. L.J. 565=39 Ind. Cas. 805. See also 39 Ind. Cas. 701.

——S. 145—Duties of Magistrate—Nature of the breach—Breach between the rival claimants not necessary.

For proceedings under this section it is enough if the breach is apprehended on account of the dispute in question and need not actually be between the rival claimants only. 18 Cr L.J. 156 =37 Ind. Cas. 524.

——S. 145—Duties of Magistrate—Powers of Magistrate—Police forcibly delivering possession order to.

Neither under S. 145 nor under S. 147 is a Magistrate competent to order the police to deliver possession of a house to the complainant and to instruct the accused not to interfere with the complainant's possession until he gets a decree in his favour. 14 A.L.J. 146=17 Cr.L.J. 145=33 Ind. Cas. 625.

——S. 145—Duties of Magistrate.

A Magistrate can at any stage of an inquiry under S. 145 drop proceedings on being satisfied that there was no apprehension of the breach of the peace. 17 Cr. L. J. 138=4 L. W. 57=33 Ind. Cas. 314.

——S. 145—Duties of Magistrate—Order of possession under.

Order of possession under S. 145 passed on the evidence of a person not called by either party is bad in law. 4 P.R.Cr. 1916=17 Cr.L.J. 129=23 P.W.R. (Cr.) 1916=33 Ind. Cas. 305.

——S. 145—Duty of Magistrate—Enquiry—Summons to witnesses.

It is in the discretion of a Magistrate in an inquiry under S. 145 to allow witnesses to be re-summoned upon an application towards the end of the inquiry. 17 M.L.T. 225=(1915) M.W.N. 267 =16 Cr. L.J. 284=28 Ind. Cas. 332.

——S. 145 (4)—Duty of Magistrate, to find possession.

Under S. 145 (4) a Magistrate should find as to who is in actual possession of the disputed property on the date of his order, not on any date anterior to that, although previous possession may be a guide to the finding of peaceful and actual possession on the date. 16 Cr.L.J. 239=27 Ind. Cas. 911.

——S. 145—Duties of Magistrate—Non-compliance with S. 356 (1) Cr.P.C.—Revision.

Non-compliance with provisions of Cr. P. Code S. 356 (1) vitiates order under S. 145. 42 Cal. 381 =19 C.W.N. 124=16 Cr.L.J. 192=27 Ind. Cas. 672.

——S. 145—Duties of Magistrate.

A Magistrate must determine who is in actual possession of the property at the time of his preliminary order in enquiry under S. 145. 1 L.W. 939=15 Cr.L.J. 708=26 Ind. Cas. 156.

——S. 145—Duties of Magistrate—Evidence of actual possession wanting—Further evidence necessary.

Where evidence of actual possession is wanting, a Magistrate acting under S. 145 should call in further evidence before passing final orders. 19 C.L.J. 356=18 C.W.N. 700=15 Cr.L.J. 202=22 Ind. Cas. 986.

——S. 145—Duties of Magistrate—Application for summons against a Sub-Inspector rejected—No opportunity given to examine him—Final order—Legality.

In a case under S. 145 where an application was made by the petitioner for issue of summons against a Sub-Inspector of Police, the Magistrate rejected the same as vexatious, and proceeded to pass the final order under S. 145, both the orders were bad, the latter on the ground that it was made with out jurisdiction as the petitioner was not given an opportunity of examining the Sub-Inspector of Police. 18 C.W.N. 94=15 Cr.L.J. 79 =22 Ind. Cas. 431.

——S. 145 (4)—Duty of Magistrate—Date originally fixed for hearing—Adjournment.

S. 145 (4) contemplates that on the date originally fixed, the magistrate should take all the evidence produced before him and decide then and there which of the party is in actual possession unless the court considers it necessary for good reasons to require further evidence. The court is not bound to exhaust the processes of the court, to enforce the attendance of witnesses that did not appear. 17 C.WN. 144=17 C.L.J. 610=14 Cr. L.J. 40=18 Ind. Cas. 264.

——S. 145—Duties of Magistrate—Order without giving opportunity to produce evidence.

An order under S. 145 without giving the parties an opportunity to produce evidenec, and without going into the question of possession, is illegal and must be set aside. 13 Cr.L. J. 296=14 Ind. Cas. 760.

——S. 145—Duty of Magistrate.

The Magistrate in a proceeding under this section need not enforce the attendance of witness at the instance of the parties and therefore for a failure to enforce attendance the High Court will not interfere. 38 Cal. 24=11 Cr.L. J. 530=7 Ind. Cas. 798.

——S 145—Duties of Magistrate—Evidence of title.

The Magirtrate in a proceeding under Chap. XII of Cr.P.C. may take evidence of title only to determine the question of actual possession. 34 Mad. 138=8 M.L.T. 104=11 Cr.L.J. 353=(1910) M.W.N. 400= 6 Ind. Cas. 398.

——S. 145—Duties of Magistrate.

Where a Magistrate took a case under S. 145 on his own file from that of a Dy. Magistrate, he ought to proceed under S. 145 (5); if he thought that there was no likelihood of the breach of the peace, he has no jurisdiction to summarily quash the proceedings on the ground that in view of certain admissions, **i. e.**, a certain letter from first party to second party, no proceedings under the section should have been taken. 13 C.W.N. 125=10 Cr.L.J. 560=4 Ind. Cas. 354.

——S. 145—Duties of Magistrate.

In proceedings under S. 145, Cr. P. C. the Magistrate should himself enquire as to the fact of possession and record his finding on the evidence laid before him. Order of Magistrate, who arrived at a finding on the basis of certain alleged admissions of one of the parties contained in Police report without himself hearing the parties is illegal and should be set aside. 6 M.L.T. 91 =10 Cr.L.J. 6=2 Ind. Cas. 428.

——S. 145 (4)—Duty of Magistrate—Contents of order.

Order by magistrate under S. 145 (4) should contain a clear finding as to who was in possession at the date of the order; it is not enough to state, who was in possession a year before the date of proceedings. 9 Cr.L.J. 505=2 Ind. Cas. 159.

——S. 145—Duty of Magistrate—Miscellaneous.

The Court is bound in the absence of one party to satisfy itself by examining the evidence tendered by the other that other party is entitled to an order. 120 Ind. Cas. 895=31 M.L.W. 104=1929 M.W.N. 708=2 M.Cr.C. 321=1929 Cr.C. 615=31 Cr.L.J. 190=A.I.R. 1929 Mad. 847.

——S. 145—Duty of Magistrate—When a site claimed to be burial ground, Court should see whether the right to bury was exercised at previous occasion when it arose.

In a case where certain persons claim to have a right to bury their dead in a burial ground the Magistrate should address himself to the question whether the persons claiming the right exercised that right when occasion arose. The fact that a portion of the ground was ploughed and sown is no ground for thinking that is not a burial ground. Vacant portions of a burial ground may be improperly used for raising crops; but that would not take away the right of persons entitled to bury their dead when occasion arises. S. 147 which relates to the exercise of any right of use of any land or water covers cases of this description. 110 Ind. Cas. 100=51 Mad. 522=28 M.L.W. 75=10 A.I.Cr.R. 368=1 M.Cr.C. 186=29 Cr.L.J. 644=A.I.R. 1928 Mad. 598=55 M.L.J. 40.

——S. 145—Duty of Magistrate.

Where a person claims to be in possession of land and complains that another person, in collusion with a Magistrate, is disturbing his possession and that there is danger of breach of peace, the proper procedure is to proceed under S. 145 and not to give the applicant a warning not to go to the land on reports by police or other officers. 109 Ind. Cas. 805=10 A.I.Cr.R. 320 =29 Cr.L.J. 613=A.I.R. 1928 Pat. 574.

——S. 145—Duty of Magistrate.

A Court should not place the disputed property in the actual possession of persons who are parties to the proceedings and who are found not to have been in possession of the disputed property irrespective of any prejudice or not to any party to the proceedings. 104 Ind. Cas. 104=7 Pat. 1=9 A.I.Cr.R. 8=28 Cr.L.J. 776=9 P.L.T. 109=A.I.R. 1927 Pat. 393.

——S. 145—Duty of Magistrate—When possession and title of first party proved, no other proof is wanted.

If the first party shows that the land in dispute is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently leased to the second party. Moreover the Magistrate is bound to decide on a consideration of the lease of the first party itself, whether the disputed land was within the land leased to the first party; he is not entitled to go outside the document in order to interpret its terms. 72 Ind. Cas. 971=24 Cr.L.J. 507=A.I.R. 1923 Pat. 31.

28. Easement.

——S. 145—Easement.

On a proceeding under S. 145 a Magistrate can not only award possession of the land in dispute, but also grant a right of way over it to one of the parties before him. 86 Ind. Cas. 404=48 Bom. 512=26 Bom. L.R. 436=26 Cr.L.J. 772=A.I.R. 1924 Bom. 452.

——S. 145—Easement.

S. 145 has no application to a dispute about an easement in respect of which action must be taken under S. 147. 64 Ind. Cas. 288=22 Cr.L.J. 768=A.I.R. 1921 Nag. 100.

——Ss 145 and 147—Easement.

Where the subject-matter of the dispute is an easement to spread fishing nets on another's land without any claim to possession of that land, the proper section is 147 and not 145. 21 Cr.L.J. 697=57 Ind. Cas. 937 (C).

——Ss. 145 and 147—Easement—Subject matter—Dispute of absolute continuous possession dealt with.

As S. 145 only deals with rights of absolute continuous possession of immovable property, proceedings under it are entirely without jurisdiction unless they are directed to the decision of absolute continuous possession of either party. As the right of a party, who does not claim anything beyond the right to worship on one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding the **Puja**, is an easement and not in the nature of possession, such a party cannot be made a party to a proceeding under S. 145 17 C.L.J. 397=17 C.W.N. 205=13 Cr.L.J. 739=17 Ind Cas. 533.

29. Effect of order.

——S. 145—Effect of order.

The order cannot be regarded as dispossession by a landlord for the purpose of Art. 3 of Sch. III, of Bihar Ten. Act. A.I.R. 1942 Pat. 287=8 B.R. 413=198 Ind. Cas. 347.

——S. 145—Effect of order—Order of Magistrate has reference to subject-matter of dispute than to parties concerned.

Intention of the legislature in enacting this provision is that the order made by the Magistrate should have reference rather to the subject-matter of the dispute than to the persons who are engaged therein, that is to say, that once the declaration has been made as regards possession of the land it is without using the word in strict technical sense binding upon all persons interested therein. 1 Pat. L.W. 642; A.I.R. 1922 Pat. 210, Rel. on. 117 Ind. Cas. 643=10 P.L.T. 689=1929 Cr.C. 265 =30 Cr.L.J. 840=A.I.R. 1929 Pat. 505.

—S. 145—Effect of order.

——Failure to file suit under O. 21, R. 103 or within three years of criminal Court's order refusing right to present possession and S. 145 does not bar the suit for redemption. 105 I. C. 427=23 N.L.R. 164=A.I.R. R. 1928 Nag. 97.

—S. 145—Effect of order.

——Magistrate can direct possession to party in peaceful possession until eviction by Court. Notwith-

standing injunction in favour of party in forcible possession, by Civil Court after Magistrate's findings, the High Court in revision will not allow party in forcible possession to get advantage of his forcible possession. 94 Ind. Cas. 709=27 Bom. L. R. 1353=27 Cr. L. J. 661=A.I.R. 1926 Bom. 91.

—S. 145—Effect of order.

——An order under S. 145 does not bar a suit for ejectment under the Agra Tenancy Act. The expression "eviction in due course of law" in S. 145 is equally applicable to ejectment proceedings under Chapter V Agra Tenancy Act, and to ejectment under a Civil Court decree. 82 Ind. Cas. 651=A.I.R. 1925 All. 210.

—S. 145—Effect of order.

——The proposition cannot be comprehensively laid down that in every case where an order under S. 145, has been made, the necessary consequence is the actual dispossession of the unsuccessful party. 84 Ind. Cas. 942=11 O. L. J. 743=26 Cr. L. J. 398=A.I.R. 1925 Oudh 251.

—S. 145—Effect of order — Unsuccessful lessee can sue for mesne profits without suing in ejectment.

An order under S. 145 (6) declares the party found to have been in possession of the property at the date of the notice to be entitled to possession thereof until evicted therefrom in due course of law. This does not mean that the successful party is thereby entitled as of right, to the property in defeasance of whatever legal title there may be existing in favour of the rightful owner. The party who was unsuccessful can therefore sue for mesne profits without suing in ejectment. 76 Ind. Cas. 76=18 M.L.W. 649=1923 M.W. N. 779=A.I.R. 1924 Mad. 224.

—S. 145—Effect of order.

——A decision in proceedings under S. 145 does not throw the **onus** on the loser in those proceedings. The decision in proceedings under S. 145, is not of such a nature as to give rise to a presumption in the Civil Court in favour of the winning party in those proceedings. 71 Ind. Cas. 478=A.I.R. 1923 Pat. 401.

—S. 145—Effect of order.

——Cl. (3) of S. 145 says that a copy of the order of the Magistrate under Cl. (1), of the section, namely, the proceeding under S. 145, shall be published by being affixed to some conspicuous place at or near the subject-matter of dispute. This new provision is intended to give notice to the persons interested in the subject-matter of the dispute to come forward and be made parties to the proceeding. As far as the Magistrate is concerned the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under Ss. 107 and 144, Cr. P. Code, as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession irrespective of whether the intruders were parties to the prior proceedings or not. 10 P.L.T. 685=A.I.R. 1922 Pat. 210.

—S. 145—Effect of order.

——An order under S. 145 no doubt ceases to have any force as soon as it is superseded by the order of a competent civil court, but until it is superseded, it is as final and binding as any order of the civil court itself could be. 61 Ind. Cas. 240=24 O.C. 21=22 Cr. L. J. 384=A.I.R. 1921 Oudh 119.

——S. 145 (4) — Effect of order — Whether amounts to dispossession.

It is not in every case where an order under S. 145, Cr. P.C., has been made, that the necessary consequence is the actual dispossession of the unsuccessful party. Unless there is an order followed by delivery of possession, it cannot be treated as causing dispossession of the unsuccessful party, who can sue for a declaration of title and confirmation of possession. 12 C.L.R. 139 and 29 Cal. 187, P. C., Dist. 22 C.L.J. 415=16 Ind. Cas. 898.

——S. 145, Cl. 3—Effect of order.

All persons who may have notice of the proceeding under S. 145 and who may be concerned in dispute are bound by the Magistrate's order. 11 Bom. L.R. 377=11 Cr. L. J. 64=2 Ind. Cas. 513.

——Ss. 145 and 144—Effect of order—Person in possession temporarily dispossessed by **ex parte** order under S. 144 and another put in possession—Application by person so dispossessed to set aside order dismissed on ground of expiry of order—Re-entry by him, if wrongful dispossession of person put in possession under **ex parte** order.

A Magistrate is not bound to order possession to be given to the person who was in possession two months before the passing of the preliminary order; but under Proviso 1 to Cl. (4) of S. 145, Criminal P. C., he may treat the party dispossessed forcibly and wrongfully within two months as having been in possession on the date of the preliminary order. If a person in possession of property is temporarily dispossessed by an **ex parte** order under S. 144 and his application to set aside that order is dismissed only on the ground that the time for which the order was in force had already expired, the re-entry into possession by the person so dispossessed cannot be wrongful dispossession of the person who obtained temporary possession on account of the **ex parte** order. A.I.R. 1943 Mad. 402=(1943) 1 M.L.J. 259=1943 M.W.N. 178=56 M.L.W. 220=44 Cr. L. J. 557=206 Ind. Cas. 630.

—S. 145—Effect of order—Symbolical delivery of possession by Court, whether gives actual possession or mere right to possess—Bengal Land Revenue Sales Act (XI of 1859), S. 29.

Where possession has been delivered to the auction purchaser by the Collector under S. 29 of Beng. Act XI of 1859, the auction-purchaser gets actual possession and not merely a right to possession in the eye of the law.

Under the proviso to S. 145 (4), Criminal P. C., if it appears to the Magistrate that any party has, within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

The effect of the delivery of symbolical possession is to transfer to the purchasers the possession which was in the proprietors. A.I.R. 1933 Cal. 424=37 C. W.N. 652=34 Cr. L. J. 810=144 Ind. Cas. 708.

——S. 145—Effect of order:—The provisions of S. 145 of the Criminal P. C. make it clear that the parties whom the Magistrate has to deal with are not merely the actual parties to, but all persons who may be concerned in the dispute, the object being to prevent a breach of the peace. Therefore it is not the actual parties but all parties who may have notice of the proceedings that are bound by the order:—11 Bom. L. R. 377=10 Cr. L. J. 64=2 Ind. Cas. 513 (1).

——S. 145—Effect of order as to placing party in "possession":—It is perfectly true that S. 145, Cr. P. C., does not expressly authorize the court to place the successful party in possession, but its practical result is the same. 9 W.R. 902 ref. to. 12 C. W. N. 696=7 C.L.J. 547. But see also 14 C.W.N. 78.

——S. 145—Effect of order:—An order under S. 145 Criminal P. C., does not confer any title on the

person in whose favour the order is made. The person declared by the order to be in possession is, however, entitled to retain such possession until he is evicted by a person who can prove a better title or who can prove a better right to possession. 6 C.W.N. 386=29 C. 187=4 Bom. L. R. 167=12 M.L J. 83=29 I.A. 24 (P.C.).

—S. 145—Effect of order.

Magistrate's orders under S. 145 of the Criminal P.C. do not decide question of title, but only the fact of possession. The person so found in possession cannot be evicted by any person who cannot show a better title. 11 C. 365 ref. to. 4 Bom. L. R. 167=6 C.W.N. 386=12 M.L.J. 83=29 C. 187=29 I. A. 24 (P. C.).

30. Emergency orders.

——Ss. 145 and 144—Emergency orders—Breach of peace—Proceeding under S. 145. A Magistrate can after a final order under S. 144, draw up a proceeding under S. 145. 1 Pat. L.T. 369=21 Cr. L. J. 625=57 Ind. Cas 449.

——Ss. 145 and 144—Emergency orders—Breach of the peace— Order under S. 144.

It is competent for a Divisional Magistrate to initiate proceedings under S. 145 Cr. P. Code during the subsistence of an order passed by a Sub-Magistrate under S. 144. 11 L.W. 459=27 M.L.T. 234=21 Cr. L. J. 473=54 Ind. Cas. 473.

——Ss. 145, 435—Emergency order—Omission of Magistrate to comply subsequently with the provisions of S. 145—Revision:—Where a Magistrate made an emergent order for possession of immovable property under S. 145 (4) but subsequently omitted to follow out the procedure prescribed by the section and make an inquiry on evidence into the fact of possession, the court ordered the Magistrate to make such an inquiry, holding that the order was not absolutely without jurisdiction and therefore not exempted from the application of S. 435 (3) of the code. (1901) A.W.N. 154.

31. Evicted in due course of law.

——S. 145—"Evicted in due course of law"—Proceedings under S. 9, Specific Relief Act—If excluded. See Specific Relief Act, S. 9 and Cr. P. Code, S. 145. 1948 O.W.N. 366=A.I.R. 1947 Oudh 129.

32. Evidence.

——S. 145 (4)—Evidence.

The Magistrate must hear the evidence supplied by the parties and must hear the arguments of their pleaders; otherwise he cannot be said to have complied with the imperative provisions of law in this respect. 5 Pat. L. J. 246=1 Pat. L. T. 608=21 Cr. L. J. 572=57 Ind. Cas. 92.

—S. 145—Evidence—Absence of.

In a case regarding possession of the property in dispute the counter-petitioner was absent at the final hearing of the case. The trying Magistrate passed order in favour of the petitioner without recording any evidence at all, upon the question of possession.

Held, that the Magistrate had no jurisdiction to found an order upon the mere absence of a party.

Held further, that the irrigularity is material enough for the counter-petitioner to be entitled to have it set right. 6 C.W.N. 925 and 12 C W.N. 771, Rel. on. 120 Ind. Cas. 895=31 M.L W. 104=1929 M.W.N. 708=2 M. Cr. C. 321=1929 Cr. C. 615=31 Cr. L. J. 190=A.I.R. 1929 Mad. 847.

—S. 145—Evidence—Absence of.

The essential requisite to give a Magistrate jurisdiction under S. 145 is that he must be satisfied that a dispute likely to cause a breach of the peace exists and that once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure. It being so, the High Court will not interfere in rivision with an order under S. 145, even when the order is passed without giving an opportunity to the aggrieved party to produce evidence, that being only an irregularity in procedure. 23 Cr. L. J. 424=67 Ind. Cas. 584 =A.I.R. 1922 Lah. 454.

—S. 145—Evidence—Admission of.

Ordinarily in a proceeding under S. 145 the trial whereof is to be of the nature of a summons case, the Court has jurisdiction to curtail the number of unnecessary witnesses upon the ground that the examination of those witnesses will delay and possibly defeat the ends of justice. But even in a summons case the parties have an undoubted right to examine their witnesses and their right can only be curtailed by the Court upon the ground mentioned above. 61 Ind. Cas. 718=2 P.L.T. 330=22 Cr. L.J. 430=A.I.R. 1921 Pat. 308.

—S. 145—Evidence—Omission to read over to witness.

——Omission to read over the evidence to the witness does not vitiate the order S. 145. 76 Ind. Cas. 25=5 P.L.T. 237=2 Pat. L.R. (Cr.) 108=25 Cr. L.J. 89= A.I.R. 1924 Pat. 786.

——S. 145—Evidence—order without receiving.

An order passed by a Magistrate under S. 145 without receiving the evidence offered by the counter petitioner with a view to show that there was no dispute likely to cause a breach of the peace is an order passed with out jurisdiction and is therefore liable to be set aside by the High Court on revision. 16 M. L. J. 419=29 Mad. 561=1 M. L. J. 405.

——S. 145 (4)—Evidence—Order without recording.

Where a Magistrate makes an order under S. 145, Cr. P. C., without giving either party an opportunity of adducing oral evidence as to possession the order is liable to be set aside. 21 C.W.N. 928=27 C. L. J. 88=19 Cr. L. J. 108=43 Ind. Cas. 332.

——S. 145 (4)—Evidence—Omission to record.

Order under S. 145, by Magistrate passed without recording the evidence of petitioners is **ultra vires.** 22 P. R. (Cr.) 1916=18 Cr. L. J. 36=36 Ind. Cas. 868.

——S. 145 (4)—Evidence—Refusal to admit.

A Magistrate refusing to admit documents of title, in a proceeding under S. 145 commits an error in the exercise of his jurisdiction. 19 Cr. L. J. 764=46 Ind. Cas. 604.

——S. 145—Evidence—Refusal to admit.

The failure of a magistrate to add a person as party to the proceedings does not involve absence of jurisdiction in the magistrate. Clause (4) of the section throws the obligation upon the Magistrate to hear parties and whether there is documentary evidence before him or not, the section gives the parties the right to be heard. An order passed otherwise will be set aside. 1 Pat. L.W. 214=18 Cr. L. J. 322=(1917) Pat. H.C.C. 118=38 Ind. Cas. 434.

——S. 145—Evidence—Refusal to admit.

A Magistrate refusing to take evidence and to make any inquiry as to the likelihood of a breach of the peace after he issued notice to the parties, holding that there is a likelihood of a breach of the peace after perusing the police report acts illegally and his action is open to revision by the High Court.

29 M. 561; 18 C.W.N. 94 and 700, Foll. 2 L.W. 1208=16 Cr. L. J. 789=31 Ind. Cas. 645.

——Ss. 145 (4) and 439—Evidence—Refusal to take oral evidence.

The Magistrate inspected the locality and being of opinion that the inspection completely satisfied him as to the fact of actual possession of the disputed property, declined to take oral evidence and passed an order after discussing the documentary evidence. **Held,** the Magistrate acted without jurisdiction in refusing to take evidence and the High Court could set aside his order. 36 M. 275, Ref; 31 M. 82, Rel. on. Documents showing title to the property should only be utilised for elucidation of the oral evidence and should not by themselves be used for concluding the question as to possession. 38 M. L. J. 73=27 M. L. T. 85=(1920) M.W.N. 133=11 L. W. 285=21 Cr. L. J. 46=54. Ind. Cas. 254.

——S.145—Evidence—Refusal to look at documents of title before passing orders — If material irregularity—Revision.

The refusal by a Magistrate to look into documentary evidence of title produced by the parties and deciding a case on evidence not of a cogent nature is not such a material irregularity as to be interfered in revision, though the Magistrate would have exercised a wiser discretion if he has passed orders under S. 146. 22 C. W. N. 499=27 C.L.J. 465=19 Cr. L. J. 681=46 Ind. Cas. 41.

——S. 145—Evidence—Rejection of.

The mere rejection of a document or the omission to consider some of them will not vitiate the finding arrived at by the Magistrate unless and until those documents relate to possession. It depends on the circumstances of each case whether the rejection or the omission from consideration of documents or evidence would be tantamount to refusal to exercise proper jurisdiction. 20 Cr. L. J. 234 and 1 Pat. L. T. 93, Ref. 2 P.L.T. 333=A.I.R. 1921 Pat. 483.

——S. 145—Evidence—Rejection of.

A Magistrate fails to exercise his jurisdiction in proceeding under S. 145 if he does not consider both the oral and documentary evidence in the case. A decision based simply upon the consideration of only the oral or the documentary evidence is liable to be set aside. An order under S. 145 based upon it is bad. 1 P.L.T. 291=(1920) Pat. H. C. C. 288=21 Cr.L.J. 601=57 Ind. Cas. 169.

33. Evidentiary value of Order.

——S. 145—Evidentiary value or Order.

The order under S. 145 is only a piece of evidence to be taken into consideration in determining who is in possession. It would go no doubt to show that the party in whose favour the order is made was in possession on the date when it was made. But it is open to the other party to show in a subsequent proceeding that in spite of the order, they were actually in possession or regained possession after the order. 104 Ind. Cas. 443=31 C.W.N. 964=28 Cr. L. J. 827=A.I.R. 1927 Cal. 701.

——S. 145—Evidentiary value of Order.

The order of a Criminal Court in proceeding under S. 145, Cr. P. Code can be used as evidence of possession in a subsequent civil suit but the statements of witnesses must be proved only by citing the witnesses over again. 21 C. W. N. 175=39 Ind. Cas. 356.

34. Ex parte Orders.

——S. 145, Cl. (4)—Ex parte orders—One party absent—Decision without proof—Warrant of arrest—Jurisdiction:—In a case under S. 145 of the Code of Criminal Procedure a Magistrate cannot on the failure of one party to file a written statement summarily pass an order declaring possession with the party who has filed a written statement without taking evidence in proof of such statement. 5 C. W. N. 71.

35. Final Order.

——S. 145—Final order.

Awarding of costs.
See, Criminal P. C., S. 148 (3)
Binding nature.
Decision as to possession.
Effect.
Execution of.
Form and Contents.
Liability for breach.
Necessity.
Power to sell.
Remedy of aggrieved party.
Review of.
Validity.

——S. 145—Final order — Awarding of costs.
See Criminal P. C. S. 148 (3).

——S. 145—Final order—Binding nature.

Where one of the parties to a proceeding under S. 145, Criminal P. C., waits for a year and allows the order initiating the proceeding to go unchallenged so long, it cannot subsequently be heard to complain of excess of jurisdiction, because the final order has gone against it and claim as a matter of right that the proceedings should be quashed. A.I.R. 1943 Pat. 44=44 Cr. L. J. 25=9 B. R. 73=203 Ind. Cas. 275.

——S. 145—Final order — Binding nature of—Attachment of house in possession of P—Possession delivered to opposite party R—Order set aside in revision—Possession should be given to P and R be directed to take civil proceedings.

The intention of the Legislature in enacting S. 145 (6), Criminal P. C., is that the order made by the Magistrate should have reference rather to the subject-matter of the dispute than to the persons who are engaged therein, that is to say, that once the declaration has been made as regards possession of the land, it is, without using the words in the strict technical sense, binding upon all persons interested therein. Once the order of the Magistrate has been made as regards the land, then it is for the person whether he be a party to the proceedings or not who disputes that possession, to take proceedings in a Civil Court.

In proceedings under S. 145, Criminal P. C., instituted by **R,** an order was passed by a Magistrate putting **R** in possession of the house. **P** was in possession of this house at the date of the preliminary order. While the proceedings were pending, the Magistrate attached the house. As a result of the order passed by the Magistrate in favour of the opposite party, the possession of the house was delivered to **R. P**'s revision against the order was allowed and the order of the Magistrate was set aside. It was further ordered that if **P** had been dispossessed, he should be put in possession of the house again. **R** was directed to take such steps in the Civil Court as she thought proper. **R** in the meantime put in a tenant in the house while the actual possession still remained with her. The applicant, therefore, applied to the Sub-Divisional Magistrate for restoration of possession of the house to him. The Magistrate passed the following order:—"If the tenant is not leaving the house, **P** will have to take legal action to eject him":

Held, that **P** was entitled to restoration of possession without any interference or obstruction from

R or from her tenant and that it was for R or the tenant to take proceedings in a Civil Court. A.I.R. 1943 Oudh 229=1943 O.W.N. (C.C.) 76=44 Cr. L. J. 459=1943 A.W.R. (C.C.) 14=206 Ind. Cas. 92.

——**S. 145—Final order—Binding nature of.**

The whole object of S. 145, Criminal P. C., is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession be force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under S. 145, Criminal P. C. This will be a definite encouragement to disobedience of orders under the section. A.I.R. 1939 Pat. 611=18 Pat. 544=6 B. R. 203=31 Cr. L. J. 191=21 P.L.T. 45=185 Ind. Cas. 529.

——S. **145—Final order—binding nature.**

Obiter.—Where in previous proceedings under S. 145, Criminal P. C., a party is declared to be entitled to possession, the Magistrate has jurisdiction so start fresh proceedings under S. 145 if the party to such proceedings was not a party to the previous one. A. I.R. 1939 Pat. 611=18 Pat. 544=6 B.R. 203=41 Cr. L. J. 191=21 P.L.T. 45=185 Ind. Cas. 529.

——**S. 145—Final order—Binding nature.**

The Magistrate can start fresh proceedings in respect of the same land, when the parties to the proceedings are not the same as in the previous proceedings. A.I.R. 1938 Pat. 1=18 P.L.T. 886=4 B.R. 211 =39 Cr.L.J. 268=173 Ind. Cas. 107.

——**S. 145—Final order—Binding nature—Person not party is not bound by order passed by Magistrate.**

A person who is not a party to the proceedings under S. 145 cannot be held to be a person bound by the order. A.I.R. 1935 Lah. 115 (2).

——**S. 145—Final order—Binding nature.**

Though an order under S. 145, Criminal P. C., confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. The possession of the party, which succeeds in proceedings under S. 145, Criminal P. C., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion. Therefore, even if the unsuccessful party in proceedings under S. 145, is able on some occasions either surreptitiously or forcibly to cultivate the lands in possession of the successful party, these would be no more than isolated acts of trespass—and offences punishable under S. 188, I. P. C., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under S. 145 in their favour. A.I.R. 1939 Pat. 611=18 Pat. 544=6 B. R. 203=41 Cr. L.J. 191=21 P.L.T. 45=185 Ind. Cas. 529.

——**S. 145 — Final order — Binding nature.— Proceedings under S. 145 and order against father—Sons, if bound.**

The sons are bound by the proceedings taken and the order passed under S. 145, Criminal P. C., against the father. A.I.R. 1936 Nag. 192=I.L.R. (1936) Nag. 205=38 Cr. L. J. 307=166 Ind. Cas. 709.

——**S. 145—Final order—Binding nature.**

Where an order is passed under *S.* 145, Criminal P. C., against the father who claimed property on behalf of his sons, but mutation of the property is subsequently made in the name of the sons and the sons apply under S. 145, the sons must be deemed to be parties to the previous proceedings and are bound by the order passed in such proceedings. Such an order is, therefore, a bar to the subsequent application by the sons under S. 145. 177 Ind. Cas. 247=1938 O.W.N. (C.C.) 828=39 Cr.L. J. 868.

——**S. 145—Final order—Binding nature.**

——In proceedings taken under S. 145 an adverse order passed aginst a Hindu father in possession of the property bought on behalf of the joint Hindu family is binding on his undivided sons though they were not parties to the proceedings. A suit, therefore, by such undivided sons for possession of the properties—subject-matter of the proceedings—brought more than three years on such order is barred under Art. 47. 122 Ind. Cas. 171=30 M.L.W. 201=1929 M.W.N. 518=2 M. Cr. C. 183=52 Mad. 787=A.I.R. 1930 Mad. 48=57 M L.J. 228.

——**S. 145—Final order—Binding nature.**

——A party's son having no possession or title is not bound by order against his father. 4 Pat. 799=90 Ind. Cas. 513=A.I.R. 1926 Pat. 103.

——**S. 145—Final order—Binding nature—Order passed against the father is binding on the sons.**

An order under S. 145 was passed against **A**, the manager of the family of the plaintiffs, in favour of the defendants. **A** died, and the plaintiffs dispossessed the defendants forcibly. They were convicted and the defendants were put back in possession by the Criminal Court. The plaintiffs thereupon sued for a declaration that they were the oweners in possession, **Held**, that whether the order under S. 145 was passed aginst **A** in his personal capacity or as manager of the family, the plaintiffs are bound thereby and the suit is governed by Art. 47 of the Limitation Act; **Held**, futher that the plaintiffs cannot claim to enlarge the time by framing the suit as one for declaration. 71 Ind. Cas. 402=45 All. 306=21 A.L.J. 102=4 L.R. A. Civ. 113=A.I.R. 1923 All. 151.

——**S. 145 (6)—Final order—Binding nature.**

It cannot be argued that because Sub. S. (3) of S. 145, Criminal P. C., provides for local publication therefore, the question of possession is set at rest once for all and the final order under Sub. S. (6) is binding on the whole world. A.I.R. 1938 Pat. 1=18 P. L. T. 886=4 B. R. 211=39 Cr. L. J. 268=173 Ind. Cas. 107.

——**S. 145 (6)—Final order—Binding nature.**

There was a dispute over certain land in which an order under S. 145 (6), Criminal P. C., was passed in favour of one party. In a subsequent dispute over the same land between the same parties or between parties deriving their interest from them, the Magistrate reversed the order made in the former dispute:

Held, the proceedings in the former dispute were binding upon the parties concerned in the proceedings in the latter dispute and the order of the Magistrate was wrong. Consequently, as provided by S. 145, Sub-S. (6), the party declared to be entitled to possession in the former case was entitled to be protected against disturbance of such possession until evicted therefrom in due course of law. Otherwise,

it would be possible for the opposite party to continue to harass his opponents by instituting successive proceedings under S 145. The party alleging that they were aggrieved had their remedy in a Civil Court, where the question of title and possession could be settled as between the contending parties. A.I.R. 1936 Cal. 659=63 C. L. J. 7=38 Cr. L. J. 79 =165 Ind. Cas. 878.

——**S. 145—Final order—Binding nature**—Dispute between trust and third parties—Order under S. 145—Whether binds trust.

The application of S. 145, Criminal P.C., does not depend upon whether the claim is made by a private owner or on behalf of a trust and if there is a **bona fide** dispute between a trust and a third person and the other contitions of the section are satisfied, there is no reason why it should not fall within the cognizance of the Magistrate under S. 145, nor is there any reason why to an order passed by a Magistrate in such a case Art. 47, Lim. Act, should not be applied.

Per **Varadachariar, J.**—The statement that one **dharmakartha** does not derive his title from his predecessor and is, therefore, not bound by his acts must be taken with considerable qualification inasmuch as the binding character of transactions entered into by a trustee has to be judged, not on the ground whether one trustee claims under another but on the ground whether the transaction was one justifiable under the circumstances in which it was entered into. A.I.R. 1936 Mad. 188 =43 M.L.W. 496=70 M. L. J. 441=(1936) M.W.N. 457=161 Ind. Cas. 234.

——**S. 145—Final order—Binding nature.**

The binding character of an order passed under S. 145 is not under all circumstances to be confined to persons who were actually made parties to the proceedings but may under certain circumstances extend to persons other than the parties themselves. 11 Bom. L. R. 377, Rel. on. 33 C.W.N. 1002=125 Ind. Cas. 858 =31 Cr. L. J. 945=1930 Cr. C. 15=A.I.R. 1930 Cal. 63.

——**S. 145—Final order—Binding nature.**

Where a person was not only aware of proceedings under S. 145 but has acted in collusion with one party in order to deprive the other party of the fruits of their success in S. 145 case,

Held; that the order under S. 145 was binding on such person and any resistance to execution of the order will justify conviction under S. 188. 33 C.W.N. 1002= 1930 Cr.C. 15=A.I.R. 1930 Cal. 63.

——**S. 145—Final order—Binding nature—When one party is declared to be in possession the right of the tenants to be in possession was not disturbed.**

Where a proceeding under S. 145 was drawn in respect of certain land, a portion of which was in possession of tenants who had attorned to some of the second party and where the Magistrate had declared the possession of the first party in respect of the whole of the disputed property,

Held, that in a summary proceeding of this kind the right of the tenants to be maintained in possession of the land of which they were in occupation was not affected and the order of the Magistrate was modified inasmuch as the lands in possession of the tenants were concerned the possession of the first party was declared through those tenants. 33 C.W.N. 574=30 Cr. L. J. 982=119 Ind. Cas. 31=1929 Cr. C. 344=A.I.R. 1929 Cal. 632.

——**S. 145 —Final order—Binding nature.**

Persons not parties to the proceedings are not bound by order under S. 145, which is not against them, and their is remedy not by application in revision against the order. 87 Ind. Cas. 923=26 Cr. L.J. 1035=A.I.R. 1925 Nag. 448.

——**S. 145—Final order— Binding nature.**

An order under S. 145, Cr. P. Code, against one member of a joint Hindu family is not binding on other members even when that member has made an application under that section as the head and manager of the joint family and a suit by another member, succeeding by survivorship to the member against whom the order was passed, after 3 years of the order is not barred. 66 Ind. Cas. 678=8 O.L.J. 410=A.I.R. 1921 Oudh 191.

——**S. 145—Final order - Form and contents.**

Finding as to the apprehension of a breach of the peace at the time of institution of proceeding is sufficient. In the final order recorded by the Magistrate with regard to the question of possession, it is not necessary that there should be any finding on the question of the breach of the peace. Absence of a finding on the question of forcible dispossession of the first party is not necessary, if it contains the findings as to the possession of the first party. 71 C.L.J. 152=54 C.W.N. 427.

——**S. 145—Final order—Form and Contents—Finding as to danger of breach of peace—Absence of—Final order—Legality.**

The mere existence of a dispute between the parties does not justify the exercise of jurisdiction conferred by S. 145, Cr. P. Code, on the Criminal Courts. The only justification for an order by a Criminal Court under S. 145 is the danger to the public peace. The absence of any finding to the effect that there was any such apprehension vitiates the order. 228 Ind. Cas. 130 = 48 Cr. L.J. 159=A.I.R. 1947 Pesh, 8.

——**S. 145—Final order—Form and contents.**

Where the Magistrate had already stated in his preliminary order that he was satisfied that there was a likelihood of a breach of the peace and there is nothing in the final order to show that the circumstances or his opinion had altered, the fact that there is nothing to show in the final order that he was satisfied that there was a likelihood of a breach of the peace does not make the final order under S. 145, Criminal P.C., defective. A.I.R. 1940 Nag. 265=1940 N.L.J. 375=41 Cr. L.J. 799=189 Ind. Cas. 774.

——**Ss. 145, 439—Final order—Form and contents.**

Where in an inquiry under S. 145, Criminal P.C., the Magistrate, in his preliminary order, has specifically found that the dispute was likely to cause a breach of the peace, it is not necessary for the Magistrate to repeat in the final order, that such an apprehension existed. The essential requisite to give the Magistrate jurisdiction under S. 145 is that he should be satisfied that a dispute exists regarding land or water before he makes the preliminary order. Once he is satisfied, his subsequent action relates to procedure and not jurisdiction and in this aspect is not liable to be upset on revision by the High Court.

Once a preliminary order has been properly made by a Magistrate, it is open to the opposite party to show to the Magistrate by evidence that in fact there is no present danger of a breach of the peace. The High Court will not interfere lightly with the finding of a Magistrate when it is based on evidence and the duty of weighing evidence is one purely for the trial Court. A.I.R. 1939 Lah. 108=I.L.R. (1938) Lah. 611=41 P.L.R. 217=40 Cr. L.J. 519=181 Ind. Cas. 59.

——**S. 145—Final order—Main order is to be based on possession at date of preliminary order.**

There is no provision allowing for extention of the period of two months laid down in S. 145, Criminal P.C., whatever the cause of delay may be. The proviso

to S. 145 is only permissive and not a mandatory one. The Magistrate may treat the party forcibly and wrongfully dispossessed within two months as if he had been in possession. The main order is to be based on possession at the date of the preliminary order and the words used with reference to it are positive. A.I.R. 1936 Nag. 271=38 Cr. L.J. 375=I.L.R. (1937) Nag. 174=167 Ind. Cas. 359.

——S. 145—Final order—form of.

Final order under S. 145 (6) should state the party which was in possession on the crucial date. 1931 M.W.N. 1317.

——S. 145—Final order—Disobedience—Complaint after delay of nine months—Reason for delay given—Action on complaint, if to be taken.

Where an order under S. 145, Criminal P. C., was disobeyed, but a complaint about the disobedience was made only after a lapse of nine months and the Magistrate was satisfied that there was disobedience of the order and the reasons for delay in making the complaint were given:

Held, that action should be taken on the complaint. A.I.R. 1934 Nag. 114=16 N.L.J. 178=35 Cr.L.J. 820=148 Ind. Cas. 1014.

——S. 145—Final order—Disobedience—Auction purchaser of judgment-debtor's property put in possession by Civil Court—Judgment-debtor assaulting him and claiming right of private defence—Judgment-debtor, if protected.

It is preposterous to claim for a judgment-debtor, whose property has been sold in execution of a decree, a right to assault the auction-purchaser who has been put in possession of the property by the Civil Court and was protected by the Criminal Court in keeping that possession when he goes to the land armed with the delivery of possession and supported by the orders of the Criminal Courts. A.I.R. 1934 Pat. 565=36 Cr.L.J. 146=15 P.L.T. 819=152 Ind. Cas. 591.

——S. 145—Final order—Necessity to pass.

——S. 145 (6)—Despite the fact that the preliminary order was passed an order under S. 145 (6) should be passed. 1939 M.W.N. 336=49 M.L.W. 473.

——S. 145—Final order—Necessity to pass.

In proceedings under S. 145, Criminal P.C., it is not open to the Magistrate to say that he is unable to come to a conclusion as regards possession on the evidence adduced by the parties and to order attachment of the property. He should take such further evidence as he thinks necessary after considering the effect of evidence produced by the parties. 1937 M.W.N. 326.

——S. 145—Final order—Necessity for passing.

——Magistrate is bound to find who was in possession on the date of the preliminary order. 1932 M.W.N. 72 (1).

——S. 145 — Final order — Power to sell—S. 145 (8), (4)—S. 145 (8), is independent of S. 145 (4), Proviso—Land with crop attached—Magistrate can deal with crop a part from S. 145 (8).

S. 145 (8) is quite independent of the proviso to S. 145 (4). Sub - S. (8), is a special provision for cases where there is crop or other produce which is subject to speedy and natural decay. There may be cases in which there is no attachment under the proviso to Sub-S. (4) and yet some order of the Magistrate is necessary if there is any crop or other produce of the land which is subject to speedy and natural decay. Sub - S. (8) is primarily intended to provide for such cases. If the land with the crop is attached, the Magistrate has full power to deal with the crop apart from the provisions of Sub - S. (8). A.I.R. 1943 Pat. 124=21 Pat. 743=9 B.R. 231=44 Cr. L. J. 414=205 Ind. Cas. 429.

——S. 145—Final order—If amounts to final adjudication of rights of parties.

An order under S. 145 is passed as the result of a summary proceeding about the possession of the parties, and the aggrieved party can always have recourse to the Civil Court to establish his right. A.I.R. 1936 All. 322=(1936) A.L. J. 370=37 Cr.L.J. 694=1936 A.W.R. (H.C.) 439=58 All. 920=162 Ind. Cas. 736.

——S 145—Final order—possession—S. 145 (6)—Railway authorities establishing right under S. 122, Railways Act (IX of 1890), to eject trespasser on Railway property—Person ejected, if forcibly and wrongfully dispossessed—Magistrate, whether can pass order under S. 145(6) declaring Railway authorities entitled to possession.

Where the Railway authorities have established their right under S. 122 (2), Railways Act, to eject a person as a trespasser from Railway property, in other words, to dispossess him, it can in no way be said that he was forcibly and wrongfully dispossessed by the Railway authorities. Hence the Magistrate is justified in passing an order under S. 145 (6) declaring the Railway authorities entitled to possession of that property. A.I.R. 1940 Sind 167=42 Cr.L.J. 27=I.L.R. (1940) Kar. 504=190 Ind. Cas. 746.

——S. 145—Final order—Possession—Applicant found in actual possession of land in dispute—Whether can be directed to restore cemeteries to their old state and allow Muhammadans to have access to them.

It is beyond the powers of a Sub-Divisional Magistrate to give a direction under S. 145, Criminal P. C., requiring the applicant who is found to be in actual possession of the land in dispute to restore the old cemeteries to their old state and allow access to Mussalmans if they should desire to go near the cemetery to invoke the blessing of God. A. I. R. 1939 Mad. 791=1939 M.W.N. 737 (1)=50 M.L.W. 338 (2)=(1939) 2 M. L. J. 111=41 Cr. L. J. 18=184 Ind. Cas. 451 (1).

——S. 145—Final order — Order passed by Magistrate including land outside proceedings — Order, if proper.

Where in proceedings under S. 145, Criminal P. C., the Magistrate passes an order which includes lands outside the proceedings, he acts in excess of his jurisdiction and the order is liable to be set aside. The proper course for him is to confine his order to the plots mentioned in the proceedings. A.I.R 1939 Pat. 565=40 Cr. L.J. 629=5 B. R. 710=182 Ind. Cas. 54.

——S. 145 — Final Order — Order passed by Magistrate in proceedings under S. 145, in 1923 to the effect that mortgage of disputed property was created in favour of plaintiff—Order based on compromise as contained in statement of parties and incomplete without reference to them—Suit by plaintiff on mortgage subsequent to amendment of section in 1929:

Held, that the order of the Court was excepted from registration without any qualification before the amendment of 1929, and being thus admissible in evidence, could be relied upon by the plaintiff in support of his case. A.I.R. 1938 Mad. 531=47 M.L.W. 435=(1938)1 M.L.J. 536=(1938) M.W.N. 394=178 Ind. Cas. 667.

36. Forum.

—S. 145—Forum.

——S. 147 as well as S. 145 clearly requires that the Magistrate drawing up the proceeding shall require the parties concerned to attend his Court. It is therefore illegal for the Sub-Divisional Magistrate to direct the parties to appear before another Magistrate. 2 C.L.J. 614, Dist. 62 Ind. Cas. 179=2 P.L.T. 186=22 Cr.R.L.J. 483=A.I.R. 1921 Pat. 333.

—S. 145—Forum—Jurisdiction—Dispute as to land between two channels—Boundary—Province of Agra and Oudh.

A dispute occurred regarding a plot of land situated between the two distinct channels of a stream forming the boundary between two districts, held, that the Magistrate of the district where the stream flowed had jurisdiction to take cognizance. 16 Cr.L.J. 527=29 Ind. Cas. 543.

37. Foundation of Jurisdiction.

—S. 145—Foundation of jurisdiction—Apprehension of breach of peace—Necessity.

Action under S. 145, Cr.P. Code, is not justified unless there is apprehension of breach of the peace. The section cannot be brought into force at all until the Magistrate declares in writing that in his opinion a dispute exists which is likely to cause a breach of the peace. A.I.R. 1950 Ajmer 65=51 Cr.L.J. 1279.

—S. 145—Foundation of jurisdiction.

Proceedings under S. 145 cannot be started on the basis of a police report more than three months old there being no likelihood of a breach of the peace when the Magistrate actually drew up the proceedings. 2 P.L.T. 650 approved. 34 C.W.N. 899=1930 Cr.C. 1115=A.I.R. 1930 Cal. 715=129 Ind. Cas. 610.

—S. 145—Foundation of jurisdiction.

——Where there is no likelihood of breach of the peace occurring, proceedings under S. 145 are incompetent, 100 Ind. Cas. 117=7 A.I.Cr.R. 357=31 C.W.N. 242=28 Cr.L.J. 245=A.I.R. 1927 Cal. 944.

—S. 145—Foundation of jurisdiction.

——The Magistrate is only justified in applying S. 145 when he anticipates that unless he interferes there will be a breach of the peace. He may so anticipate by reason of general information or by a particular representation by a person whose possession is likely to be forcibly disturbed; then such person is in a position similar to a person who makes a complaint. But such a person is not a complainant and his petition is not a complaint. 26 Cr.L.J. 1333=89 Ind. Cas. 309=18 S.L.R. 278=A.I.R. 1926 Sind 85.

—S. 145—Foundation of jurisdiction.

——The only two essential conditions which not only confer jurisdiction on the Magistrate, but make it imperative on him to take the preventive proceedings contemplated by S. 145 are, firstly that there should be a dispute over land or water, and secondly, that such dispute is likely to cause a breach of the peace. 89 Ind. Cas. 156=26 Cr.L.J. 1292=A.I.R. 1926 Sind 53.

—S. 145—Foundation of jurisdiction—Positive evidence as to likelihood of breach must exist—Religious nature of dispute leads to no inference—Past conduct of parties is good evidence.

The object of S. 145 is to bring an end by a summary process, disputes relating to land etc., which are in their nature likely, if not suppressed, to end in breaches of the peace. But the mere circumstance that the dispute is one of a religious nature is not enough. There must be positive evidence on the record that the breach of the peace is likely to occur if proceedings under this section are not taken. Where it appears that the land which in 1880 was shown as a part of the Mahomedan grave-yard has been gradually brought under cultivation to the prejudice of the Mahomedan community by the owners who were Brahmins and no breach of the peace has occurred during the last 40 years, held, that it was hardly likely that any such untoward result should now ensue if the property is not attached under S. 146. 75 Ind. Cas. 990=25 Cr.L.J. 78=A.I.R. 1924 Lah. 678.

—S. 145—Foundation of jurisdiction.

——The apprehension of a breach of the peace is the first condition necessary to give the magistrate jurisdiction under this section, and if it is found that there is no longer any such apprehension the Magistrate's jurisdiction ceases. 76 Ind. Cas. 963=38 C.L.J. 284=25 Cr.L.J. 291=A.I.R. 1923 Cal. 577.

—S. 145—Foundation of jurisdiction—Non-filing of written statement does not take away jurisdiction of Magistrate to try case—Case ready for trial can be transferred—Proceedings against parties claiming exclusive plots are maintainable.

In order to give jurisdiction to a magistrate to proceed under S. 145 all that is necessary is that he should be satisfied of there being likelihood of a breach and he should make a note stating his grounds of his so being satisfied and require the parties to attend and to put in written statements of their claims. If a party fails to put in written statement, that would not take away the jurisdiction of the Magistrate to proceed with the case; 11 W.R.Cr. Rul. 9, Ref. It is not illegal for a Magistrate to transfere the case when the parties are ready for trial and some have even filed written statements, 2 P.L.T. 186 Dist. Where each party claims exclusive possession of half of the plot in dispute and not joint possession of the whole together proceedings under S. 145 are maintainable. 1 P.L.T. 594 Dist. 73 Ind. Cas. 173=4 P.L.T. 308=2 Pat. L.R.Cr. 6=24 Cr.L.J. 557=A.I.R. 1923 Pat. 369.

—S. 145—Foundation of jurisdiction.

—A Court has no jurisdiction to take any action under the section without recording a preliminary finding as to dispute or to ignore the procedure under the section. The enquiry under the section is strictly limited to the actual fact of possession. An adjudication on the merits is opposed to the express provisions of the section and is without jurisdiction. 74 Ind. Cas. 68=1 Rang. 53=2 Bur. L.J. 32=24 Cr.L.J. 740=A.I.R. 1923 Rang. 21.

—S. 145—Foundation of jurisdiction—No final order can be passed unless there is a likelihood of breach of peace.

A Magistrate has no jurisdiction to make any enquiry as to possession, still less any final order,

unless and until he is satisfied of the likelihood of a breach of the peace, and it is absolutely essential that the fact and the grounds of his being so satisfied should appear in his first order directing the issue of notice, and the grounds stated must be such as to satisfy a Court of revision before which the case may be brought by any of the parties. The Police report, the personal talk to parties and personal inspection of the land in dispute are not such grounds. 12 C.P.L.R. 2 Cr. Foll. 64 Ind. Cas. 288=22 Cr.L.J. 768=A.I.R. 1921 Nag. 100.

——S. 145—Foundation of jurisdiction—Proceedings drawn under S. 144 cannot be directed to be substituted by proceedings under S. 145.

A District Magistrate's order to a Sub-Divisional Magistrate directing the latter to substitute S. 145 in the place of S. 144 is illegal for it is the Magistrate instituting the proceeding that should satisfy himself upon the material before him as to the existence of a dispute likely to cause a breach of the peace. But where the Sub- Divisional Magistrate himself draws up proceednge under S. 145, the High Court will not set aside the proceedings. 68 Ind. Cas. 34=2 P.L.T. 392=A.I.R. 1921 Pat. 410.

——S. 145—Foundation of jurisdiction—Breach of the peace—Evidence—Police report.

A Magistrate does not act without jurisdiction when he initiates proceedings under S. 145 of the Cr. P. Code upon a Police report that there is a dispute likely to cause a breach of the peace. 1 Pat. L.T. 738=60 Ind. Cas. 61=22 Cr. L.J 205.

——S. 145—Foundation of jurisdiction—Police report not disclosing breach of peace—Question of title.

Where the Police report, the basis of proceedings under S. 145, Cr. P. Code did not disclose that there was any apprehension of the breach of the peace, the magistrate's order is without jurisdiction. A magistrate in a proceeding under S. 145 is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has got no power to decide the question of title or to look into it apart from the question of possession. 1 Pat. L. T. 387=21 Cr. L. J. 748=58 Ind. Cas. 252.

——S. 145—Foundation of jurisdiction — Legal enquiry—Evidence recorded by Sub-Magistrate-Sub-Divisional Magistrate acting on—Order if void.

A Sub-Divisional Magistrate passed a preliminary order under S. 145 (1) and directed a Sub-Magistrate to hold a local enquiry, take evidence on both sides and make his report. The Sub-Divisional Magistrate then examined some witnesses and passed a final order. Held, that the order of the Sub-Divisional Magistrate was not without jurisdiction. The essential requisite to give jurisdiction to a Magistrate under S. 145 (1) of the Cr. P. C., is that he must be satisfied about the existence of a dispute likely to cause a breach of the peace. His subsequent action is a matter of procedure and not of jurisdiction. 36 M. 275, Foll; 31 M. 82, Diss. 37 M.L.J.589=10 L.W. 447=20 Cr. L.J 773=53. Ind. Cas. 613.

——S. 145 (1)—Foundation of jurisdiction —Preliminary order—Condition precedent.

The existence of a dispute likely to cause a breach of the peace is necessary to give jurisdiction to the Magistrate to pass an order under S. 145 (1) of the Cr. P. Code. The fact that the complaint shows that the complainant was out of possession of the property in dispute for over two months does not vitiate the proceedings under S. 145. 19 Cr. L.J. 444=44 Ind. Cas. 972.

——S. 145—Foundation of jurisdiction—Proceedings under—Nature of—Acquittal of one of the parties under S. 447, I. P. C.—No bar.

Proceedings under S. 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of police proceedings in order to prevent the commission of offence, and the fact there have been criminal charges brought by one or the other of the parties against each other, so far from being a bar to action under Chap. XII constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent. The fact that one of the parties to a proceeding under S. 145, Cr.P.C. had already been prosecuted and acquitted under S. 147 of the I.P.C. is no bar to the proceedings. 19 Cr. L. J. 389=3 U. B. R. (1917) 33=44 Ind. Cas. 741.

——S. 145—Foundation of jurisdiction—Dispute relating to land—Breach of the peace—Statement of grounds of belief, sufficiency of—Possession on the date of the preliminary order, finding as to—Question of jurisdiction—Order of Magistrate under S. 145—High Court's power of interference.

In proceedings under S. 145, if the report points out a dispute relating to land likely to lead to a breach of the peace and the Magistrate believes it and issues the preliminary order on such report only he acquires sufficient jurisdiction to act under the section and he need not set any further reasons for his being statisfied as to the existence of a dispute. His order under the section is final and the High Court will not scrutinise the said reasons. Where the dispute between the parties was about the possession of the land in question on the date of the preliminary order and the Magistrate recorded a finding that possession was with one of the contesting parties, the possession so found refers to the date of the said preliminary order and the Magistrate's proceedings cannot be challenged for an error of jurisdiction. An order under the section passed by a competent Magistrate should not be lightly interfered with by the High Court, having regard to S, 435 (3). 5 L.W. 165=18 Cr.L.J. 23=36 Ind. Cas. 855.

——S. 145 (4)—Foundation of jurisdiction—Presumption—Jurisdiction—Possession.

The jurisdiction of a Magistrate to initiate proceedings under S. 145 is not determined by the date of dispossession of one of the parties claiming the land, but by an apprehension, based on reliable information, that a dispute likely to cause a breach of the peace exists between two parties concerning some land situate within the local limits of the jurisdiction of the Magistrate. A Magistrate can decide the question of actual possession on grounds other than the presumption referred to in S. 145 (4). 11 A.LJ. 305=14 Cr.L.J. 223=19 Ind. Cas. 319.

——S. 145—Foundation of jurisdiction—Breach of peace—Proceedings under S.145.

Both the Crown and the parties want a decision as to their present rights and a decision which will be effectual to prevent a breach of the peace. While

certain proceedings under S. 147 were pending, the parties agreed to refer the dispute to arbitration. The Magistrate made an order that further proceedings were unnecessary and they were, therefore, stayed. After a year, the arbitration proceedings became ineffectual and the Magistrate without recording a fresh proceeding continued the proceedings under S. 147: **Held**, that the Magistrate had no jurisdiction as there was no likelihood of a breach of the peace after the arbitration proceedings ceased. Jurisdiction of a Magistrate under Chap. XII of the Code is based solely on the imminence of a breach of the peace. 15 C.W.N. 271 =11 Cr.L.J. 729=8 Ind. Cas. 892.

38. Fresh Proceedings.

——S. 145—Fresh proceedings.

——A Magistrate is precluded from taking fresh proceedings, when there was already a previous order.

A Sub-Divisional Magistrate passed an order under S. 145 declaring first party to be entitled to retain possession as against the opposite party. Some time after, the opposite party began to disturb possession of the first party. The Magistrate thereupon made an order drawing up new proceedings under S. 145, even though the parties and lands were identical.

Held, that it was the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed and that the initiation of fresh proceedings by the Magistrate was improper and must be set aside. 71 Ind. Cas. 225=27 C.W.N. 171=37 C.L.J. 39=24 Cr.L.J. 97=A.I.R. 1923 Cal. 95.

——S. 145—Fresh proceedings.

Proceedings under S. 145 cannot be renewed after the dispute has been settled and an order made that the case be struck off. Under such circumstances a new proceeding would not be justified only on the materials upon which the proceeding, which was struck off, was based. 71 Ind. Cas. 512=3 Lah. 401= 24 Cr.L.J. 160=A.I.R. 1923 Lah. 81.

——S. 145—Fresh proceedings.

When once an order under S. 145 (5) is passed, the Magistrate is not competent to revive the proceeding, but can only take action to start a fresh proceeding upon fresh materials under Cl. (1) of the section. Much less can the order reviving the proceeding be passed behind the back of the second party. 62 Ind. Cas. 177=2 P.L.T. 267=1921 P. H. C. C. 167=22 Cr.L.J. 481=A.I.R. 1921 Pat. 176.

——S. 145 (1)—Fresh proceedings—Prior order—Subsequent proceedings—Civil suit—Not filed.

When a party has been declared to be in possession as a result of proceedings under S. 145 fresh proceedings under the same section cannot be started against him unless it can be shown that the order has been duly vacated or possession has been amicably surrendered. But if no order under S. 145, Cr. P. Code is made in respect of a larger area which includes the smaller area covered under the previous proceedings which were not challenged by Civil suit, the order will be set aside regarding the common area but will stand good regarding the lands not covered by the previous adjudication. 1 P.L.W. 642, Foll. 1 Pat. L.T. 557=58 Ind. Cas. 337.

——S. 145—Fresh proceedings.

For institution of proceedings, overt acts or preparation by the parties showing an imminent danger of the breach of the peace are necessary; merely an imaginary event that might lead to a breach of the peace is not sufficient. For fresh proceedings after once cancelling a proceeding, similar requirements are necessary. 2 Pat. L.W. 25=18 Cr.L.J. 763=41 Ind. Cas. 139.

——S. 145—Fresh proceedings.

Where a Magistrate in a dispute relating to certain lands excluded some specified plots from the scope of the inquiry and cancelled the proceedings in respect of those plots and another Magistrate who succeeded him in office passed orders declaring one of the parties in the possession of such excluded plots, the order of the latter Magistrate is one passed without jurisdiction as he had no legal authority to go into the question of possession of those plots. 17 Cr.L.J. 286=34 Ind. Cas. 1006.

——S. 145 Cl. (5) and (6)—Fresh proceedings—Consent order—Effect.

In proceedings under S. 145 the Magistrate passed an order by consent of parties that the land should be in the possession of both. **Held**, such an order fell under Cl. (5) and not Cl. (6) and so barred subsequent proceedings between the same parties under the same section. 15 C. W. N. 568=12 Cr. L. J. 32=9 Ind. Cas. 167.

——S. 145—Fresh proceedings—Institution of proceeding without apprehension of breach of the peace without jurisdiction—Instituting fresh proceedings in spite of and during pendency of the rule issued. by the High Court to set aside order passed in previous proceeding highly improper.

A District Magistrate having on the 5th September 1905, passed an order purporting to have been under S. 145, Cr.P.C., the High Court on the 21st December 1905 issued a rule upon him to show cause why the said order should not be set aside. The said rule came on for hearing and was made absolute on the 2nd February 1906. In the meantime, however, on the 12th January 1906, a Deputy Magistrate, subordinate to the District Magistrate, on a petition by the opposite party to the said rule and without an enquiry as to whether there was an apprehension of a breach of the peace or not, instituted another proceeding under S. 145, Cr. P. Code, in respect of the same subject-matter. **Held**—that during the pendency of the rule in the High Court, proceedings in the lower court with reference to the matter in dispute must be considered to have been stayed and it was not only irregular but highly improper to institute fresh proceedings. **Held**, further, that while the order of the District Magistrate was yet in force there was no reason to suppose that there was any apprehension of a breach of the peace. When a rule is issued by the High Court on the District Magistrate staying further proceedings all subordinate Magistrates are bound to obey the orders of the High Court and no subordinate Magistrate would be justified in carrying on proceedings with reference to the property in dispute which is the subject-matter of the rule or institute fresh proceedings. 4 C.L.J. 418.

——S. 145—Fresh proceedings.—Where fresh proceedings are taken under S. 145 after proceedings are struck off, fresh materials are necessary and the Magistrate must set forth such new materials in his order, and it is useless to refer to a report called for at the time of drawing up the new proceeding and furnished after it was drawn up. 6 C.W.N. 923.

39. Government of India Act.

——S. 145—Government of India Act, S. 107.

The High Court under S. 107 of the Govt. of India Act, 1915, can set aside proceedings instituted without jurisdiction by a subordinate court under S. 145 notwithstanding S. 435 (3) of the Cr. P. Code and can

make consequential or incidental orders under the same section. Thus it can give direction for disposal of property attached and dealt with by the subordinate courts. 32 C.L.J. 270=48 Cal. 522=22 Cr.L.J. 213=60 Ind. Cas. 325=A.I.R. 1921 Cal. 30 (S.B.).

——S. 145—Govt. of India Act, S. 107—Rival lessees from competing claimants.

The High Court can interfere with orders under S. 145, only under S. 107 of the Govt. of India Act. A Magistrate can take action under S. 145 when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace. 27 M. L. T. 234=11 L.W. 459=21 Cr. L. J. 73=54 Ind. Cas. 473.

——Ss. 145, 435—Government of India Act, 1915, S. 107.

The High Courts having no statutory power of superintendence have no power under S. 435 to call for the record of the proceedings taken under Chap. XII of the Code, by a competent Magistrate. A chartered High Court can under S. 107 of the Government of India Act, 1915, interfere with the order under S. 145 of the Cr. P. Code by a Magistrate acting without jurisdiction or in excess. It cannot do so merely for either an irregularity in proceedings unless it is a material one amounting to refusal to exercise or a usurpation of jurisdiction or prejudicing either party to it, or an erroneous decision on the point of law or fact. Prejudice cannot be construed merely from an erroneous decision on a question of law or fact; but the irregularity must have prevented the party from having a fair trial. It means his disability to place before the Court his version of facts and the law applicable. No hard and fast rule can be laid down for a Magistrate whether he must give effect to a recent decision or proceeding of a Criminal Court or a Civil Court. But in proceedings under S. 145 he is bound to respect a Civil Court's decree. If he does not do so he acts without jurisdiction. He can pass orders if he finds that the possession is disturbed after the decree or has changed hands. In such cases he must refer to the Civil Court's decree and assign reasons in his order for doing so. 17 Cr. L. J. 369=1 Pat. L. J. 336=1 Pat. L. W. 95=(1917) Pat. H. C. C. 1=35 Ind. Cas. 801 (F. B.)

40. Immovable Property.

Synopsis.

a. Crops
b. Forest
c. 'Lac'
d. Land
e. 'Matt' and Cattle in it
f. Mining rights
g. Minerals
h. Movable property
i. Offerings
j. Rent
k. Right to lay warps
l. Temple
m. Trees

a. Crops.

——S. 145—Immovable property—Crops.

If rents and profits are also to be dealt with as cases of disputes as to immovable property crops even when removed are more closely akin to immovable property than rents and profits and as such they come within the purview of S. 145, Cr. P. Code. 1946 A.M.L.J. 38.

——S. 145 (2) — Immovable property — 'Crop' whether includes harvested crop.

From the wording of Sub-S. (1) of S. 145, it is clear that the word 'crop' means both standing and harvested crop and it has the same meaning in Sub-S. (2).

But if the crop has been removed and is wholly unconnected with and dissociated from the land in dispute, then the Magistrate is deprived of jurisdiction to deal with it under S. 145 (2). I.L.R. (1945) Kar. 72.

——S. 145—Immovable property—Crops.

Standing crops are immovable property within the meaning of Cl. (2) of S. 145. But crops that have been severed from the land are not immovable property at all and therefore a dispute relating to the crops which have had been already cut and stored before issue of notice under S. 145 is not covered by S. 145. 7 L.R.A. Cr. 193=27 Cr. L. J. 1363=98 Ind. Cas. 483=A.I.R. 1927 All. 99.

——S. 145—Immovable property—Crops—Jurisdiction of Magistrate—Order good in part and bad in part.

The Magistrate has power under the section to deal with movable property which represents the produce of the land in dispute, if the produce is attached to or if the same is cut and lying on the land, but not when the produce has been removed or dissociated from the land. An order but not a conviction is severable and the bad part can be severed from the good part which can be maintained. 2 Pat. L.W. 54=18 Cr. L. J. 756=2 Pat. L. J. 637=41 Ind. Cas. 132.

——S. 145—Immovable property—Crops, dispute as to.

The right to make collections and appropriate the crops or produce of a village, or shares in a village comes within the purview of S. 145, Cr.P.C. 2 Pat. L.W. 67=18 Cr. L. J. 652=40 Ind. Cas. 300.

b. Forest.

——S. 145 (4) — Immovable property — Forest — Attachment—Elephant in it if attached.

An elephant cannot be attached under S. 145 but if a forest which contains an elephant is attached the elephant should be delivered only to the person in whose favour the final order is passed. 13 Cr.L.J. 222 =(1912) M.W.N. 540=14 Ind. Cas. 318.

c. 'Lac.'

——S. 145—Immovable property—Lac—Right to collect.

Where the Dt. Magistrate on a dispute as to the right to grow and collect **lac** on plum trees standing on lands in the holdings of the tenants attached and sold a part of the **lac** under S. 145 **held**, that he had no jurisdiction over the property in dispute and the **lac** stored and the sale proceeds should be kept in the custody of the Criminal Court pending a decision by a Civil Court on the question of the title to the **lac**. 32 C. L. J. 270=48 Cal. 522=22 Cr.L.J. 213=60 Ind. Cas. 325=A.I.R. 1921 Cal. 30 (S. B.).

——S. 145 (3)—Immovable property—Power to order "lac" trees to be attached.

Where in the collection of "lac" there was a dispute and proceedings were started held that they were without jurisdiction and that the matter did not come within S. 147 and even if it did no order for attachment could be made. "Lac" is not "land" within S. 145 of the Code. 22 Cr. L. J. 131=24 C.W.N. 1039=32 C.L.J. 255=59 Ind. Cas. 643.

d. Land.

——S. 145, Cl. (2)—Immovable property—Land—proceeds arising out of building—Offerings to deity.

Offerings to a deity are not proceeds arising out of a building and so do not come within the scope

of Cr. P. Code, S. 145, Cl. (2). A declaration under S. 145 that a person is in possession of such offerings made by a Magistrate is without jurisdiction. 37 C. 578, F. 38 Cal. 387=13 C.L.J. 445=16 C.W.N. 574=12 Cr. L.J. 3=9. Ind. Cas. 6.

e. 'Matt' and cattle in it.

——Ss. 145 and 146— Immovable property—'Matt' and cattle in it.

A Magistrate ordered attachment of a matt under Cl. (4) of S. 145 and directed a police officer to take charge. The latter attached matt and also took possession of cattle in it. The Magistrate finally ordered attachment under S. 146. The attachment of cattle was legal, as they could only be made over to the person who was entitled to the matt which matter was to be determined by a competent Court. 1 Pat. L.J. 356=18 Cr.L.J. 287=2 Pat. L.W. 367=38 Ind. Cas. 319.

f. Mining rights.

——Ss. 145 and 439—Immovable property—Mining rights whether land—Jurisdiction—Superintendence—S. 145 of the Cr.P. Code covers all profits derivable from land including mining rights. 11 Cal. 413 and 12 Cal. 539 Ref.

Where a Magistrate has jurisdiction to take cognizance of a case and devotes his judicial mind to a consideration of the points which he is required to determine any error in law with regard to the interpretation of the words of the section which he is applying is not an error which would, in the ordinary course, be subject to an appeal. Such errors are not subject to superintendence. 4 Pat. L.J. 154=20 Cr.L.J. 199=49 Ind. Cas. 647.

g. Minerals.

——S. 145 — Immovable property—Minerals—The right to bore for is not covered by S. 145.

Where a dispute concerns the rights of the respective parties to bore for minerals over a specific area and does not concern land or involve any ques- of actual possession, the Court has no jurisdiction to go into intricate questions of title and possession, and if in such a case there is a likelihood of a breach of the peace proceedings under S. 107 of the Code are more appropriate than under S. 145. 32 C.L.J. 54=59 Ind. Cas. 403=22 Cr.L.J. 99.

——S. 145—Immovable property — Minerals underneath ground:—Minerals underneath the ground are tangible immovable property. 12 C W.N. 840.

h. Movable property.

—— S. 145 (4)—Immovable property — Movable property— Possession of part of immovable property directed to be given.

A Magistrate is not competent to pass any order in regard to movable property though contained in immovable property. 42 All. 214=18 A.L.J. 171 =21 Cr.L.J. 242=55 Ind. Cas. 194.

i. Offerings.

——S. 145 (1) and (4)—Immovable property—Offerings at a 'Karbala'—Right to—Dispute.

A dispute with respect to the collections and offerings at a 'Karbala' cannot be the subject-matter of a proceeding under S. 145, Cr.P.C. 38 Cal. 387; 37 Cal. 578, Foll. S. 145, does not cover a dispute about the collection of offerings in a temple as such offerings are neither land nor water. 5 Pat. L.J. 246=1 Pat.L.T. 608=21 Cr.L.J. 572=57 Ind. Cas. 92.

——S. 145—Immovable property—offerings.

The right to perform the puja of idol or to have a share of the offerings made to the idol cannot be said to be a right of user of any land as provided in S. 145. If there is such a dispute between the parties, which the Magistrate considers may lead to any breach of the peace he may take such step as he considers necessary under S. 107. 52 Cal. 959=42 C. L J. 127=27 Cr. L. J. 239=92 Ind. Cas. 223=A.I.R. 1926 Cal. 437.

j. Rent.

——S. 145—Immovable property—Rent in kind.

Where the rents in kind are exclusively collected by the lambardar and the other co-sharers are only entitled to a certain share, the dispute about the shares of the co-sharers is not a dispute about possession which is admittedly with the lambardar so as to make the provisions of S. 145 applicable. The case does not come under Cl. (2) as the words "crops or other produce of land" refer only to the crops or other produce while still attached to the land. 69 Ind. Cas. 90=25 O.C. 137=23 Cr.L J. 650 =A.I.R.1922 Oudh 199.

——S. 145 (1) and (2)—Immovable property—Right to rent—Rent—Collection—Dispute regarding, between Lakherajdar and Patnidar—Decision in the absence of tenants—Produce and rent.

In respect of several plots of land all held by tenants on a yearly rent of half of the produce, there was a dispute between the Lakherajdar and the Patnidar as to the right to collect rent. As regards some of the plots there was a dispute as to what tenants were in possession. Held, that as regards the plots about which there was a dispute as to the tenants in possession, the Magistrate should not have made any order in the absence of the tenants who might be very seriously prejudiced by an order in favour of one or the other of parties to the proceeding. Though if the question was one of dividing a hitherto undivided share, the section might not apply, still in the present case the section applied as it was merely a question of rent and it so happened that the rent half the share of the produce. 19 C.W.N. 959=16 Cr.L.J. 590=30 Ind. Cas. 142.

—S. 145—Immovable property—Rent — Right to collect—Possession—for sale dispossession.

Where there is a dispute between members of a Mahomedan family owning fractional shares in the properties of the family, the person in receipt of rents and to whom tenants pay rent is the person in actual possession. A dispute as to the right to collect rents is a dispute within the section. A right to fractional share may be a right to tangible immovable property even when the shares are not definitely ascertained. Where more than two months have elapsed from the death of the last person in possession, there is no forcible dispossession within two months within S. 145. 17 M.L.T. 225=(1915) M.W.N. 267=16 Cr.L.J. 284=28. Ind. Cas. 332.

—S. 145—Immovable property—Rent—Right to collect.

A right of collecting rent is a right concerning "tangible immovable property or land" and a dispute as to such a right is within S. 145 of the Code. 16 C. 513; 15 C. 527, Foll. 18 Cr.L.J. 156=37 Ind. Cas. 524.

k. Right to lay warps.

—Ss. 145 and 147—Immovable property—Right to lay warps—Dispute.

The right to lay warps is not a right to the possession of land but is a right to the use of it and the Court should deal with matter not under S. 145 but under S. 147 of the Cr.P. Code. 19 Cr. L. J. 977 =47 Ind. Cas. 877.

1. Temple.

—S. 145 (2)—Immovable property—Temple—"Building"—Meaning.

A dispute as to possession of a temple and for such indicia of its possession as the holding of its key is cognisable by a Magistrate under S. 145 (2), Cr.P. Code as a temple is a "building" under S. 145 17 Cr.L.J. 235=34 Ind. Cas. 651.

m. Trees.

—S. 145—Immovable property—Trees—Omission to pass preliminary order—Effect—Order in respect of trees severed from land—Validity.

The mere omission by Magistrate to record a preliminary order as per Cl. (1) of S. 145 is not a fatal defect unless prejudice has been caused thereby. In order to give jurisdiction to a Magistrate under the section it is essential that he should be satisfied that a dispute likely to cause a breach of the peace exists and such dispute must refer to land or water or the boundaries thereof lying within his jurisdiction. (33 C. 352, R. 23 Ind. Cas. 487, Fol.). Trees severed from the land do not come within the purview of S. 145, Sub-S. (2) and no order under S. 145 can be made with respect to such trees. 22 P.W.R.Cr. 1917=18 Cr.L.J. 461=39 Ind. Cas. 301.

—S. 145—Immovable property—Trees—Order—Form of.

The right to tap a tree may be the subject of proceedings under S. 145, Cr.P. Code. Where in proceedings under S. 145 the Magistrate in addition to declaring that a certain tree is in the possession of one of the parties, directed that a passage be left in the wall for the purpose of tapping, it was held that the first portion of the order is valid and the second portion referring to the passage is ultra vires and without jurisdiction. 3 Pat. L.J. 316=19 Cr.L.J. 656=45 Ind. Cas. 848.

41. Inconsistent Order.

—S. 145 (6)—Inconsistent order—Finding that one party is in possession of whole of disputed land—Order that only portion should be in the possession of that party—Jurisdiction.

Where in a proceeding under S. 145 of the Code the Magistrate found that one party was in possession of disputed land but nevertheless directed that some portion should remain in tact and the other portion only should be in the possession of that party, Held, that the order was without jurisdiction. 17 C.W.N. 793=14 Cr.L.J. 391=20 Ind. Cas. 215.

42. Information.

—S. 145—Information.

——Omission to mention source of information in preliminary order though known does not oust jurisdiction. 75 Ind. Cas. 736=25 Cr.L.J. 48= A.I.R. 1925 Oudh 46.

—S. 145—Information.

——A Magistrate is entitled to initiate proceedings, if he receives information from any source whatever that there is likelihood of a breach of the peace relating to possession of immovable property. 87 Ind. Cas. 421=6 P.L.T. 215=3 Pat. L.R.Cr. 127= 26 Cr.L.J. 965=A.I.R. 1925 Pat. 553.

—S. 145—Information.

——To make the proceedings legal under S. 145, information on which Magistrate purports to act must satisfy him that at date of drawing up proceedings there is likelihood of breach of peace. 64 Ind. Cas. 507=2 P.L.T. 650=23 Cr. L. J. 27= A.I.R. 1921 Pat. 445.

—S. 145—"Information"—Meaning of.

The word 'information', is wide enough to cover the knowledge derived by a Magistrate by reading petitions filed in another proceeding by the parties exhibiting an imminence of breach of peace. It is not limited to any particular way in which the Magistrate's attention should be drawn. 1 Pat. L.T. 369=21 Cr.L.J. 625=57 Ind. Cas. 449.

—S. 145—"Information"—Petition by an officer of one of the interested party, no information.

Semble:—A petition by a person in the employ of the petitioner alleging that a dispute likely to cause a breach of the peace exists, if uncorroborated, is not such "information" within the meaning of S. 145, Criminal Procedure Code, as to give jurisdiction to a Magistrate to initiate proceedings under the section. Per Davies, J.:—Where the dispute alleged to exist is as regards 230 villages, the Magistrate will be acting ultra vires in clubbing together all the villages and treating them as one. Each village should be dealt with separately and the Magistrate should find before he passes the final order as to which party is in possession of each specific village. 16 M.L.J. 419=29 M. 561= 1 M.L.T. 405.

43. Inquiry.

——S. 145—Inquiry.

Evidence.
Mode of recording evidence.
Power of attachment.
See also, Criminal P. C., S. 146.
Power to appoint Receiver.
See also, Criminal P. C., S. 146.
Power to delegate.
See also, Criminal P. C., S. 148.
Power to refer to arbitration.
Procedure.

——S. 145—Inquiry — Evidence. — Proceeding under—Evidence to be relied on.

In proceedings under S. 145, Criminal P. C., it is safer to rely on documentary evidence than on oral evidence. A.I.R. 1945 Sind 110=I.L.R. (1945) Kar. 78=47 Cr.L.J. 78=221 Ind. Cas. 112.

——S. 145—Inquiry—One party offering to give up claim on opposite party's taking special oath —Refusal to do so can be taken into consideration along with other evidence.

Where, in a proceeding under S. 145, one of the parties offers to give up his claim to property in dispute if the opposite party would take special oath but the opposite party refuses to do so, the refusal, although it cannot be treated as anything conclusive, is yet a matter which the Court is entitled to take into consideration along with the other evidence and it is open to the trial Court to draw such inference from this conduct of the party as it thinks fit. A. I. R. 1940

Pat. 113=21 P.L.T. 306=6 B.R. 81=41 Cr.L.J. 101=184 Ind. Cas. 817.

——Ss. 145, 146—Inquiry—Proceeding to be decided on balance of evidence—Evidence of first party, although weak, yet preferable to evidence of second party—Magistrate should pass order in favour of first party.

In a proceeding under S. 145, Criminal P. C., it would not be proper to set up any absolute standard of proof and to say that evidence not up to this standard will not be acted on by the Court for the purpose of an order under that section. The proceeding under S. 145 can be decided on the balance of evidence and if the Magistrate can see his way to express an opinion that the evidence of one side is superior to the evidence on the other side, then he is entitled to and should, if possible, form a definite opinion on the question of fact who is in possession. An order under S. 146 attaching the property is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. It would be regrettable if it were necessary to pass such an order when the first Court has been able to make up its mind in favour of one party. If the Magistrate thinks that the evidence for the first party, weak though it might be, is preferable to the evidence for the second party, it is the Magistrate's duty to give a decision in favour of the first party. A.I.R. 1940 Pat. 113=21 P.L.T. 306=6 B.R. 81=41 Cr.L.J. 101=184 Ind. Cas. 817.

——S. 145—Inquiry under Sub S. (4), whether obligatory after passing order under Sub-S. (1)—order under Sub- S. (6), if must follow subsequently.

Sub-Ss. (1), (4) (5) and (6) of S. 145, Criminal P. C., are complimentary. Once an order has been passed under sub-S. (1), it is obligatory for a Magistrate to make the inquiry provided for in sub-S. (4) subject only to the obligation under sub-S. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-S. (4) "the Magistrate shall them....." are mandatory. The word 'then' refers to the stage when in compliance with the order under sub-S. (1), the parties have put in their written statements and attended the Court. On the completion of the inquiry under sub-S. (4), a final order under sub-S. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-S. (6). An order under sub-S. (6) cannot be made without having held any inquiry under sub-S. (4). A.I.R. 1940 Sind 33=41 Cr.L.J. 486=I.L.R. (1940) Kar. 162=187 Ind. Cas. 636.

——Ss. 145, 203—Inquiry—Evidence recorded in another revenue case pending in Court, if can be considered in S. 145 proceedings.

S. 203, Criminal P. C., has nothing to do with proceedings under S. 145 and where an application is made under S. 145, the Magistrate ought to proceed with the case according to the provisions of S. 145. The only case in which a Magistrate can refuse to take action under S. 145 is when he is not satisfied that there is a danger of a breach of the peace. In case he is satisfied by the police report that there was danger of a breach of the peace, his duty is to proceed under S. 145, Criminal P. C., and to issue notices to the parties. If notices are issued to the parties and written statements filed by them, it is again his duty under sub-S. 4 of S. 145 to receive all such evidence as might have been produced by the parties. The procedure of the Magistrate in considering the evidence given in another case as evidence in S. 145 case even though the other case was pending in his own Court as a Revenue Court is entirely unauthorised and illegal. A.I.R. 1939 Oudh 15=1938 O.W.N. (C. C.) 1099=40 Cr.L.J. 33=1938 A.W.R. (C.C.) 99=178 Ind. Cas. 252.

——S. 145 — Inquiry —Magistrate examining certain number of witnesses on each side in proceedings under S. 145, but ignoring evidence and attaching land under S. 146—High Court setting aside order and directing to consider evidence as whole—Magistrate being transferred, case transferred to another Magistrate—one party producing before such Magistrate long list of witnesses—Magistrate, whether bound to summon all—Magistrate summoning only those witnesses examined before—Legality.

Held:—The Magistrate has power to issue process on these witnesses under sub-S. (9) of S. 145; but it cannot be said that any obligation lies upon him to summon any witnesses other than those originally produced by the parties in the proceeding, and if he summons only those witnesses who were examined previously, there is no irregularity or illegality. A.I.R. 1939 Pat. 281=5 B.R. 319=40 Cr.L.J. 276=179 Ind. Cas. 896.

——S. 145. Inquiry—Duty of Magistrate to take evidence for forming opinion.

Under S. 145, Criminal P. C., the Magistrate's duty is to decide whether there is likely to be a breach of the peace and whether one party, although recently dispossessed, is to be regarded as in possession. To do this he must take such evidence as he finds necessary and it rests with him and not with the parties to decide what evidence is necessary to be called. The recent amendment to Cl. (4) which requires the Magistrate to receive all such evidence as may be produced by the parties and to consider the effect of such evidence does not mean anything more than that he must recieve evidence actually put before him by the parties but does not require him to summon witnesses at the instance of the parties who are unable to bring these witnesses to Court. In S. 145, there is no such provision as is to be found in Cl. (2) of S. 252. A.I.R. 1938 Rang. 229=39 Cr.L.J. 708=176 Ind. Cas. 266.

——S. 145—Inquiry—Right claimed mentioned in wajib-ul-arz—Presumption that it has been exercised within 3 months of enquiry, if arises.

In proceedings under S. 145, Criminal P.C., where it is established that a right claimed by a party is mentioned in the wajib-ul-arz, it is for the party denying it to establish that such a right had been abandoned. In the absence of any reliable evidence regarding abandonment, it must be held that the right has been exercised within 3 months of the institution of the enquiry. 170 Ind. Cas. 392=39 P.L.R. 491=38 Cr. L.J. 881.

——Ss. 145 (9), 439—Inquiry—Issuing of summons to witnesses—Discretion of Court—Revision—High Court, when will interfere.

S. 145 (9), Criminal P. C., leaves it entirely to the discretion of the Magistrate whether he will or will not summon any witnesses. The duty of the Court in the matter of summoning witnesses is set forth differently according as the matter before the Court is an enquiry into a case triable

by a Court of Session or a summons case or a warrant case, and the duty varies as between the prosecution and the accused. There is no justification for the supposition that in every case, it is the duty of the Court to issue process to summon any witnesses whom either party wishes to summon. In petty cases, it is entirely a matter for the discretion of the Magistrate whether he will summon witnesses or not. There is no general duty upon a Court in any proceeding to issue process to compel the attendance of witnesses. Special rules are laid down according to the nature of the enquiry with which the Magistrate is dealing. The question before the Court of Revision is whether any serious and substantial injustice has been done to the applicants. If none has happened, the Court will not interfere. A.I.R. 1936 All. 322=58 All. 920 =(1936) A.L.J. 370=37 Cr. L.J. 694=1936 A.W.R. (H.C.) 439=162 Ind. Cas. 736.

——**S. 145—Inquiry—Duty of Magistrate.**
——It is incumbent on the Magistrate to receive all such evidence as may be produced by the petitioners. 1934 M.W.N. 693.

——**Ss. 145, 356, 537—Inquiry—Mode of recording evidence—Omission to take down evidence in vernacular—Effect.**
Under S. 356 (1), Criminal P. C., in a proceeding under S. 145 of the Code, the evidence of each witness must be taken down in the vernacular by the Magistrate himself or under his superintendence. But an omission to comply with this provison of the Code is only a mere irregularity curable under S. 537 of the Code and does not vitiate the trial.
In the face of the pronouncement of the Privy Council in A.I.R. 1927 P. C. 44, it is no longer open to the Courts in India to hold that the mere fact that an imperative statutory rule of procedure has been broken is enough to vitiate the trial or proceeding. The Courts should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused. A. I. R. 1931 All. 3=53 All. 172= (1930) A. L. J. 1504=32 Cr. L.J. 372=129 Ind. Cas. 269.

——**Ss. 145, 356, 537—Inquiry—Failure to record evidence in vernacular—Validity.**
The mere fact that in a proceeding under S. 145, Criminal P. C., the Magistrate had not recorded the evidence of the witnesses in the manner laid down in S. 356 of the Code, but had only kept a memorandum of the evidence in English, is not an illegality vitiating the proceedings but a mere irregularity which could by cured by S. 537 of the Code. A.I.R. 1931 All. 2=32 Cr. L.J. 368=129 Ind. Cas. 265.

——**S. 145—Inquiry—Power of attachment.**
See (1) Cr. P. Code, S. 145—Attachment. (ii) Cr. P. Code S. 146.

——**S. 145—Inquiry—Power to appoint Receiver**
See also, Criminal P. C., S. 146.

——**S. 145 (4)—Proceedings under S. 145 are** for speedy remedy—Such purpose is not served by appointment of a Receiver.
In view of the express provision in S. 146, Criminal P. C., if it were intended that a Magistrate should have power to appoint a Receiver under Sub Cl. (4) of S. 145, it would have been so stated and the absence of such special provision precludes the Magistrate from appointing a Receiver under S. 145 (4). The Magistrate can only attach the property but it is not stated in the Code as to how the attachment is to be effected. If the land in dispute is land paying revenue to Govt. and analogy of S. 88 were to be followed, the Magistrate must attach it through the Collector. The word "attach" merely means to bring under the control of the Court, and the Magistrate is entitled to effect that object in any way which is within his power. Certainly, the appointment of Receiver with the powers of a Receiver under the Civil P. C. is not one of those ways, because unless that power is expressly given, a Magistrate cannot exercise it. It is not advisable to employ the term "Receiver" owing to the possibilities of mis-understanding that may arise, yet it is clear that if the Magistrate's attachment is to be effected, he must put some person into possession of the property, who will have authority to maintain his possession. The person put in possession of the property can be awarded the legitimate costs incurred by him for managing the property.
An additional reason against the appointment of such a Receiver under Sub-Cl. (4) of S. 145, Criminal P. C., is this that the proceedings under S. 145 are intended to be carried through without delay and the time during which the subject of the dispute needs to be under attachment is so short as certainly not to justify the appointment of a Receiver having the powers of a Receiver under the Civil P. C. A.I.R. 1938 Ran. 88=39 Cr. L. J. 484=174 Ind. Cas. 958.

——**S. 145—Inquiry—Receiver.**
There is no provision in Criminal P. C. for the appointment of a Receiver during pendency of a dispute under S. 145, Criminal P. C. 1933 M.W.N. 917.

——**S. 145—Inquiry—Receiver—Lease** by Receiver to party in collusion—Power of Court to set aside lease summarily.
Where a Receiver appointed by the Court in a proceeding under S. 145, Criminal P.C., applied to the Court for permission to lease the properties without disclosing the fact that he intended to lease the properties to one of the parties and as he got permission, granted a lease of the properties to one of the parties until the decision of the Civil Courts.
Held, that as the Receiver had committed a fraud upon the Court, the Magistrate had power to set aside the case summarily. A.I.R. 1933 Mad. 67 (2)=33 Cr. L. J. 956=36 M.L.W. 651=(1932) M.W.N. 1154= 140 Ind. Cas. 281.

——**S. 145—Inquiry—Power to delegate.**
It is illegal for a Magistrate drawing up proceedings under S. 145, to direct parties to appear before another Magistrate. Illegality cannot be cured. 24 P.L.T. 326.

——**S. 145—Inquiry—Power to delegate.**
Sub-Magistrate cannot depute the investigation under Cl. (1) to any Subordinate Magistrate. 1934 M.W.N. 687 (2).

——**S. 145 (4)—Inquiry — Delegation of recording evidence to Subordinate Magistrate—Legality.**
A Magistrate holding an enquiry as to possession under S. 145, Cl. (4) Criminal P.C., is bound to take the evidence himself and cannot delegate to a Subordinate Magistrate the duty of recording such evidence. Any order passed by him without himself taking any evidence, and depending solely on the report of the Subordinate Magistrate should be deemed to be one

passed without jurisdiction. A.I.R. 1932 Mad. 368=35 M.L.W. 390=33 Cr. L. J. 536=(1932) M.W.N. 425= 138 Ind. Cas. 68.

——S. 145—Inquiry—Power to transfer.

Where a City Magistrate, on the presentation of a petition under S. 145, Criminal P.C., examined the petitioner on oath and ordered a Police enquiry to be made and on receipt of the report, transferred the case to another Magistrate as he was very busy:

Held, that he must be deemed to have taken cognizance of the case and the transfer was not invalid. A.I R. 1933 All. 264=(1933) A. L. J. 188=34 Cr. L. J. 414=55 All. 301=142 Ind. Cas. 537 (F. B.).

—S. 145(3)—Inquiry—Procedure—Inquiry proceeding before receipt by Court of service returns in respect of some individuals—Proceedings if vitiated.

It cannot be held that proceedings started under S. 145, Cr. P. Code, are vitiated as being in contravention of S. 145 (3), by the mere fact that the inquiry proceeded before the service returns were received by the Court with regard to certain individuals when no prejudice can be said to have been caused to those individuals. 229 Ind. Cas. 536=48 Cr. L. J. 440=13 B.R. 390=A.I.R 1948 Pat. 77.

——S. 145—Inquiry—Procedure—Proceedings under —Permission to party to appear by Pleader—Magistrate cannot subsequently insist upon personal appearance.

In proceedings under S. 145, a Magistrate cannot compel a party to appear in person particularly when he has already permitted that party to appear by Pleader. It is open to him to summon the party as a witness if he is wanted as a Court witness or witness for the other side but the Magistrate cannot insist upon his executing a bond for personal appearance as a party. I.L.R. (1947) Mad. 234=(1946) 1 M. L. J. 443=59 L.W. 300=1946 M.W.N. 356=1946 M.W.N. (Crl.) 64=226 Ind. Cas. 417=47 Cr. L. J. 936=A.I.R. 1946 Mad. 447.

——S. 145—Inquiry—Procedure—Dispute between landlord and different sets of tenants claiming possession of different plots—Failure to deal with cases of tenants individually—Legality.

In a case in which a landlord claims a large number of plots to be in his possession while different sets of tenants claim different plots in their respective possession, the finding of the magistrate that the tenants are in possession cannot be interfered with on the ground that the magistrate considered the case of all the tenants together and did not deal with their cases individually, when no prejudice has been caused to the landlord thereby. 227 Ind. Cas. 157=1946 P.W.N. 85=13 B.R. 8=A.I.R. 1946 Pat. 389=47 Cr. L. J. 1013=27 P.L.T. 484.

——S. 145 (4)—Inquiry—Procedure—Crop attached under S. 145 (4) and sale ordered—Proceedings under S. 145 drawn up subsequently—Procedure, held irregular.

The Magistrate, on December 19, 1941, after hearing the parties, attached the crops on the disputed land under S. 145 (4) and ordered the same to be sold. The proceedings under S. 145 could not, however, be formally drawn up and signed until February 14, 1942 because there was some dealy in obtaining the necessary details regarding the identification of the land:

Held, that at best there was an irregularity in the procedure adopted by the Magistrate, but the petitioner, having himself taken the benefit under the order, could not be heard to complain of it. A.I.R. 1943 Pat. 124= 21 Pat. 743=9 B.R. 231=44 Cr. L. J. 414=205 Ind. Cas. 429.

—S. 145—Inquiry—Procedure to be followed.

In proceedings under S. 145, Criminal P.C., Courts should only follow the procedure prescribed for summons cases where it is convenient to do so. There is no provision in the Code which prescribes that the same procedure should be followed and the provisions of S. 145 clearly indicate that the same procedure cannot always be followed throughout. A.I.R. 1940 Oudh 22=1939 A.W.R. (C.C.) 277=41 Cr. L. J. 96 (2)=1939 O.W.N. (C.C.) 974=184 Ind. Cas. 751.

—S. 145—Inquiry—Procedure—Passing of order after inquiry into possession, when necessary.

Once a Magistrate has found in proceedings under S. 145, Criminal P. C., that there is an apprehension of a breach of the peace, it is his duty to inquire into the possession of the parties and to pass orders accordingly either under S. 145, or under S. 146. It becomes unnecessary for him to pass such an order with regard to possession only on his being satisfied either that there is no longer any apprehension of a breach of the peace or that no dispute between the parties exists or has existed. The mere fact that one of the parties was absent on the date fixed does not entitle a Magistrate to dismiss proceedings under S. 145 when there has been a definite finding that there is an apprehension of a breach of the peace. A.I.R. 1940 Oudh 22=1939 A.W.R. (C.C.) 277=41 Cr. L. J. 96 (2)=1939 O.W.N. (C.C.) 974=184 Ind. Cas. 751.

—S. 145—Inquiry—Procedure.

——The provisions in S. 171, Companies Act, that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court is not so meant to override an express enactment in S. 145, Criminal P. C., by which a Magistrate, if satisfied that a dispute likely to cause a breach of the peace exists, is bound to call on the parties to attend his Court and put in their claims as regards actual possession. A.I.R. 1933 Cal. 433 (2)= 34 Cr. L. J. 640 (2)=37 C.W.N. 932=143 Ind. Cas. 795.

——S. 145, Cl. (4)—Inquiry—Refusal to examine witnesses—Discretion of Magistrate not always a question of jurisdiction:—A Magistrate, acting under S. 145 Cr. P. C., has a discretion in the matter of examination of witnesses. He is not bound to examine all the witnesses adduced by the parties, but may limit the number for good and sufficient reasons. In 5 C. 685 it was not intended to lay down such a broad rule that the Magistrate had no discretion, but was bound under the circumstances to examine every witness produced in a proceeding under S. 145, Cr. P. C., and that if he omitted to do so, he acted without jurisdiction. The discretion, however, is one which must be exercised with due care and caution and with a careful regard to the circumstances of each particular case. 3 C. L. J. 478.

——S. 145, Cl. (4)—Inquiry—Refusal to issue summonses—Power to interfere under 24 and 25 Vic., Ch. 104—Proceedings under Chapter XII of the Code not similar necessarily to summons cases as regards procedure:—The Magistrate refused to issue summonses to the witnesses of a party to a proceeding under Ch. XII of the Criminal Procedure Code, and the result was that the party was deprived of a hearing on the only question for the determination of the Court and thus there was a denial of justice. **Held,** that the Magistrate acted without jurisdiction; that even if he cannot be said to have acted without jurisdiction, the High Court could interfere in the exercise of the general powers of supervision vested under 24 and 25 Vic. Chap. 104, S. 15. But a refusal to

summon or examine a witness or witnesses, in proceedings under Ch. XII of the Code, is not necessarily a ground for interference by the High Court. Nor can it be laid down as a rule of law that proceedings under Ch. XII of the code should be regarded, as to procedure as summons cases. 11 C. 762. 21 C. 29 explained. 7 C.W.N. 404=30 C. 508.

——**Ss. 145, 146, 148—Inquiry—Refusal to grant** time for regular proceedings to be followed—Attachment under S. 146 when the parties did not file written statements or produce evidence—Illegality:—In a proceeding under S. 145, Cr. P. C., the parties appeared on the day of hearing but did not file any written statements, or produce any evidence. They prayed for time which the Magistrate did not grant. He then heard the parties and, being unable to satisfy himself as to which of them was in possession, attached the subject of dispute under S. 146. **Held** that the Magistrate in so doing refused to exercise jurisdiction. He ought to have granted time to allow regular proceedings to be followed or he might have informed himself of the facts of the case either by local inquiry under S. 148, Cr. P. C., or in other ways. As he did neither, his order under S. 146 is bad in law and ought to be set aside. 12 C.W.N. 896.

——**S. 145, Cl. (4)—Inquiry—Trial as in a civil suit—Settlement proceeding order, if to be given effect to**:—The Magistrate should not deal with a proceeding under S. 145, Cr. P. C., as if it is a civil suit. Where the Magistrate tried a case under S. 145, Cr. P. C., as if it was a civil suit, framed several issues and discussed them at length, but did not deal with the question of possession except that in only one passage in his judgment he observed that oral evidence as to actual possession was in favour of the second party but in his final order declared the first party to be in possession in order to give effect to a certain order of the Settlement Department: **Held**—That the Magistrate's order was without jurisdiction. The only question the Magistrate had to decide in the case was, who was in actual possession of the land in dispute and as he had not done so, his order was entirely without jurisdiction. 12 C.W.N. 773=35 C. 795.

——**S. 145, Cl. 4—Inquiry — Witness — Process—Magistrate's duty**:—32 C. 1093=2 C. L. J. 280.

44. Interpretation.

——**S. 145—Interpretation—"Likely"**

The word 'likely' in S. 145 indicates some degree of futurity and may be treated as synonymous with 'probable'. A.I.R. 1930 Cal. 715=34 C.W.N. 899=58 Cal. 388=32 Cr. L. J. 398=129 Ind. Cas. 610.

——**S. 145—Interpretation—"Produce"—Molasses form produce of land and being subject to decay can be ordered to be sold.**

Molasses can be treated as the produce of the factory within the meaning of S. 145 (8) where the land about which there is dispute consists of factory building including vats. A sugar mill produces molasses. The word "produce" is not necessarily confined to what is grown on the ground. It refers also to a finished article or semi-finished article made from raw material. Where, therefore, the produce is subject to speedy and natural decay, the magistrate's order for its sale is justified and the magistrate has jurisdiction to pass such order. The sale proceeds should be made over to persons in possession of molasses, only if they give reasonable security. Security need not be in cash. Recognized Government securities as War Bonds are sufficient. 1930 Cr. C. 257=6 O. W. N. 1070=124 Ind. Cas. 441=31 Cr. L. J. 688=5 Luck. 462=A.I.R. 1930 Oudh. 165.

——**S. 145—Interpretation—"Profits" — Offerings made to shrines in temples are not "profits" within S. 145'**

Offerings made by pilgrims at the shrine do not come within the definition of "profits" in S. 145. Where the dispute relates merely to offerings made, then the dispute is about movable property, and a declaration under S. 145, that one of the parties is in possession of such offerings is an order made without jurisdiction. 37 Cal. 578 and 38 Cal. 387, Ref. 103 Ind. Cas. 415=23 N. L. R. 84=28 Cr. L. J. 687=A.I.R. 1927 Nag. 333.

——**S. 145—Interpretation — Word "shall" in S. 145 is mandatory—When police report discloses case under S. 145, Magistrate is bound to apply S. 145.**

Where the Magistrate started proceeding under S. 144 upon a police report disclosing a **bona fide** dispute as to the possession of a property likely to cause a breach of the peace,

Held that the Magistrate was bound to proceed under S. 145 when the police report clearly showed that proceedings under S. 145 should be started as the word "shall" in S. 145 is mandatory. A.I.R. 1922 Pat. 435 (F.B.), Ref. 114 Ind. Cas. 466=7 Pat. 269=30 Cr. L. J. 302=11 P.L.T. 134=A.I.R. 1929 Pat. 46.

——**S. 145—Interpretation—"Wrongful"—Meaning—Entry by force even by one having legal right to possession is wrongful.**

Per **Marten**, J.—The word "wrongful" does not involve the idea that the dispossessor has no legal right to the possession of the property. Even a rightful owner, for instance, a landlord who is entitled to possession in a case where his tenant is wrongfully holding over, can only take possession peaceably. If his possession is opposed, however wrongfully, then the landlord has no right to break down the doors, to assault the inmates and to turn them **vi et armis** out of the building. He must go to the Civil Court and get the necessary warrants or ejectment orders to enable, if necessary, the proper authorities to effect a forcible entry or a forcible ejectment according to law. There is clear distinction between forcible entries which are rightful and forcible entires which are wrongful, and that depends on whether the person entering was entitled to use force, and not merely on whether he had a legal right to possession. If, for instance, a landlord came armed with a writ or a warrant in his favour to eject his former tenant then although force might in the end be used, it would not be a wrongful dispossession. If, on the other hand, he took the law into his own hands and used force without any such legal sanction by means of a warrant, then that would be an instance where he would have forcibly and wrongfully dispossessed his former tenant.

Per **Pratt J.**—The phrase "forcibly and wrongfully" has the same meaning as forcible entry without due warrant of law under the English statute. A forcible entry must be wrongful unless it is in execution of a legal process. The word "wrongfully," therefore, means no more than "otherwise than in due course of law" in S. 9 of the Specific Relief Act. 94 Ind. Cas. 709=27 Bom. L. R. 1353=27 Cr. L. J. 661=A. I. R. 1926 Bom. 91.

——**S. 145—Interpretation—"Wrongful".**

Dispossession may be "wrongful" and yet not 'forcible'. "Wrongful" does not connote absence of right or title. A dispossession otherwise than in due course of law is

wrongful, nor is it necessary that actual force or violence should have been used to some person or persons before a dispossession can be said to be "forcible". When the dispossession is effected by a show of Criminal force sufficient to intimidate those in possession and to deter them from resistance, the latter may well be said to have been forcibly dispossessed. 63 Ind. Cas. 333=33 C. L. J. 353=25 C.W.N. 601=A.I.R. 1921 Cal. 553.

45. Joint Inquiry.

——S. 145—Joint inquiry—Landlord claiming to be in possession of several plots—Several tenants putting rival claims—One enquiry is not illegal—Failure of Magistrate to consider case of each individual tenant—Order cannot be interfered with in absence of prejudice.

One inquiry under S. 145 in a case in which the landlord claims a large number of plots to be in his possession while different sets of tenants claim different plots in their respective possession is not illegal or necessarily irregular; and when there is such a combination of claims of different sets of **raiyats** against one landlord in one inquiry, the question of prejudice will have to be gone into:

Consequently, the failure of the Magistrate to consider the case of each individual tenant in such a case will not be a ground for intefering with an order under S. 145 when no prejudice is caused thereby. A.I.R. 1946 Pat. 389=27 P.L.T. 484=227 Ind. Cas. 157=47 Cr. L. J. 1013.

——S. 145—Joint inquiry—Claim by landlord for possession of number of plots—Various tenants claiming different plots separately—Amalgamation of all plots in one proceeding, if legal.

It is not necessarily illegal or irregular to combine a large number of plots in a proceeding under S. 145, Criminal P. C., where the dispute is between a landlord who claims a large number of plots on one side and different sets of tenants who claim different plots on the other. But when this is done, particular care is required to ensure that the parties are not prejudiced by the amalgamation of a number of plots in one proceeding. A.I.R. 1939 Pat. 353=20 P.L.T. 145=5 B.R. 894=40 Cr. L. J. 749=183 Ind. Cas. 286.

——S. 145—Joint inquiry—Londlord claiming large number of plots to be in his possession but different sets of tenants claiming different plots separately—One enquiry under S. 145—Legality.

One enquiry under S. 145, Criminal P.C. in a case in which the landlord claims a large number of plots to be in his possession while different sets of tenants claim different plots in their respective possessions separately, is not illegal or necessarily irregular. But when there is such a combination of the claims of different sets of **raiyats** against one londlord in one enquiry, the question of prejudice will have to be examined. In a case like this, where a body of tenants rightly or wrongly claim a large area of lands as having been settled with them, there is always the danger that from general evidence, conclusion will be drawn in respect of specific lands. It is, therefore, essential for Magistrate to apply his mind to the case of each individual holding. A.I.R. 1938 Pat. 511=5 B.R. 81=40 Cr. L. J. 17=178 Ind. Cas. 333.

——S. 145—Joint inquiry—Writs for delivery of possession taken out by landlord in execution of rent decrees against various holding—Dispute and action under S 145—Only one proceeding common to all holdings—Landlord alone appearing and filing written statement of his claim—Proceedings, held not proper.

In execution of his rent decrees in respect of various holdings consisting of many plots, the landlord took out writs of delivery of possession. On resistance by the tenants, the Police lodged information with the Magistrate calling for action under S. 145, Criminal P. C. The Magistrate did not draw up one proceeding in respect of each holding but a single proceeding covering the whole number of **khatas** comprising the several holdings dealt with. The proceeding called on the parties, in the usual form to attend the Court of the Magistrate in person or by Pleader and to put in written statements of their respective claims. The landlord put in a written statement of his claim but not one of the tenants put in any written statement claiming any part of the disputed land. The Magistrate did not proceed **ex parte** and hear evidence on the side of the landlord nor did he grant time to the tenants to file their written statements. He went into evidence without first ascertaining which of the tenants were claiming what lands; and the decided the proceeding as if the entire lands in suit had been claimed by the whole body of the tenants jointly:

Held, on revision setting aside the order that the Magistrate should have dealt with the case of each holding separately and should have given the tenants opportunity of producing evidence to show which of the holdings was claimed by each one. A.I.R. 1937 Pat. 413=3 B.R. 659=38 Cr. L.J. 842=18 P.L.T. 824=170 Ind. Cas. 90.

——S. 145—Joint inquiry.

——In an enquiry under S. 145, Criminal P. C., when there are separate items in dispute altogether claimed by one person on one side and severally by many persons on the other side, the Magistrate must consider the claims of each and should give a definite finding as to the fact of possession on the date of preliminary order. 1933 M.W.N. 1260.

——S. 145—Joint inquiry — Trial of numerous claims held together is not illegal, if the subject-matters are linked together.

Proceedings were initiated between two sets of persons both of whom claimed a large area of somewhat over 300 bigas situated in the domain of the Maharaja of Darbhanga. The first party claimed to be in possession as tenants of the Raj from long past, the second party claimed to have recently been settled on the land by the Raj and to be in possession thereof. The lands were not co-terminus, but they were divided into some 23 different plots. They were not claimed jointly or as a whole by all of the eight parties of the first party, but each party claimed to be in possession of certain of these plots.

Held, there is nothing to prevent a Magistrate from joining numerous claims of this description together and in dealing with the matter at one hearing. The only objection which can really be taken to such a course is if it can be shown, that the objector is adversely prejudiced by such proceeding, and the fact, that the Magistrate does not in his judgment state which of the first party is actually, according to his finding, in possession of which part of the property in dispute, does not concern the second party at all. 85 Ind. Cas. 40=1 Pat. L. R. Cr. 135=26 Cr. L. J. 424=A.I.R. 1923 Pat. 545.

46. Joint Possession.

——S. 145—Joint possession—Parties in joint possession—Legality of proceedings.

If the parties are in joint possession, the proceedings under S. 145 cannot be taken. But where the parties are disputing their individual claims to the property as reversioners and are not in joint

possession, the proceedings under the section are not uncalled for. A.I.R. 1945 Oudh 62=1944 A.W.R. (C.C.) 295=1944 O.W.N. (C.C.) 479.

——**S. 145—Joint possession — Applicant stating that he purchased one-third share in land which was undivided and that he was in possession of his one-third undivided share—Application should be rejected.**

A.I.R. 1942 Sind 117=I.L.R. (1942) Kar. 120=43 Cr. L. J. 876=202 Ind. Cas. 617.

——**S. 145—Joint possession—Undivided share in land or produce.**

S. 145 is not ordinarily intended to apply to disputes as regards undivided shares in land or in the produce of land, because Sub-Ss. (4) and (6) of S. 145 contemplate that one of the parties shall be or shall not be put in possession of the subject-matter of the dispute. A.I.R. 1942 Sind. 117=I.L.R. (1942) Kar. 120=43 Cr. L. J. 876=202 Ind. Cas. 617.

——**S. 145—Joint possession—Person claiming to be in possession of entire village—He cannot be declared to be entitled to possession of undivided share only.**

Where a person claims to be in possession of the entire village, it is not permissible under S. 145, Criminal P. C., for a Magistrate to declare him to be entitled to possession of an undivided share of the village. A.I.R. 1940 Mad. 904=1940 M.W.N. 801=(1940) 2 M.L.J. 355=52 M.L.W. 346 (1)=42 Cr. L. J. 67=191 Ind. Cas. 53.

——**S. 145—Joint possession.**

——**One party claiming to have and actually found to be in exclusive possession adverse to other party—Other party setting up title to joint possession—S. 145, if rendered inapplicable.**

It is true that when it has been found that the contesting parties are actually in joint possession, no order should be made under S. 145. The position is different where one of the parties claims to have and is actually found to have exclusive possession adverse to the other party. The mere fact that the other party sets up a title to joint possession does not then render S. 145 inapplicable. A.I.R. 1940 Nag. 265=1940 N. L. J. 375=41 Cr. L. J. 799=189 Ind. Cas. 774.

——**S. 145—Joint possession—Proprietary right—One party claiming entire right**—The other party claiming 8 annas right—Magistrate holding it as civil dispute—Magistrate is wrong—The dispute falls under S. 145, Criminal P. C. 19 P.L.T. 211.

——**S. 145—Joint possession.**

——Where the opposite party alleged that they were in joint possession of the property in dispute with the applicants and were members of joint Hindu family, the Magistrate had no jurisdiction to initiate proceedings under S. 145, Criminal P. C. 1937 O.W.N. (C.C.) 214.

——**S. 145—Joint possession.**

——Batai **share of** Zemindar — **Applicability of S. 145 to dispute relating to.**

S. 145, Criminal P. C., does not apply to a dispute relating to an undivided share in land or to an undivided share in the produce of the land, because S. 145, Sub-Ss. (4) and (6), Criminal P.C. contemplates that one of the parties shall be or shall not be put in possession of the subject-matter of the dispute and a party cannot be put in possession of an undivided share of land or its produce. But a **batai** share of **Zemindar** in the produce is not an undivided share and S. 145 applies to disputes relating to such a share. In the case of land which is owned by a **Zemindar** and cultivated by him with his **haris** he must, before division of the produce or **batai**, be deemed to be in possession of the land and of the produce of the land, and that the **haris** are merely his agents for the cultivation, and that until the crop is divided between the **Zemindar** and the **haris**, and it is really the **Zemindar** who has custody of the crops and divides them. This position is not altered merely because there is a **Jagirdar** who is entitled also to his share. A.I.R. 1936 Sind. 143=37 Cr. L. J. 1030=164 Ind. Cas. 969.

——**S. 145—Joint possession—Co-sharer in exclusive possession of defined area—Other claiming joint right—S. 145 applies but not where possession is joint.**

If property is found to be actually in the joint possession of parties, S. 145 cannot apply but when one party, even if a co-sharer, is in exclusive possession of a defined area, and the other party claiming a joint right therein wants to disturb his possession, the provisions of the section would apply. A.I.R. 1935 Nag. 44=17 N.L.J. 216=1935 Cr. Cas. 254.

——**S. 145—Joint possession.**

S. 145, Criminal P.C., contemplates a dispute between two parties, each of which asserts a right to hold actual possession of the property as against the other. S. 145 does not cover cases where one party claims to hold joint possession and the other party contests such right. In such cases, an order allowing one party to remain in possession till evicted by law is bad and is without jurisdiction. But even in cases covered by joint possession, where one party is, by some arrangement, actually in physical possession of a certain part of the property, the Magistrate would have jurisdiction to decide who was in actual possession of that part. Where there is actual physical possession of definable and demarcated property, action under S. 145, Criminal P. C., can be taken. A.I.R. 1934 Nag. 196=35 Cr.L.J. 1384=30 N.L.R. 300=151 Ind. Cas. 728.

——**Ss. 145, 146—Joint possession.**

S. 145, Criminal P.C., is not inapplicable to a case of dispute relating to immovable property merely because one set of persons claim exclusive possession over the major portion of it while the other set of persons claim to be in joint possession along with them of the entire land.

The only condition for a proceeding under S. 145 terminating in a finding under Sub-S. (4) and an order under Sub-S. (6) or an order under S. 146, is that the Magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. 1932 Pat. 366=13 P.L.T. 609=34 Cr.L.J. 115=12 Pat. 87=140 Ind. Cas. 902.

——**S. 145—Joint possession.**

In proceedings under **S.** 145 the first thing to be decided is whether there is a dispute likely to lead to a breach of peace, and secondly which party of the disputants is in actual possession. Previously both parties were in joint possession. But after the dispute the property was kept under attachment by order of Court till the parties established their exclusive right to it. Afterwards one of the parties produced the partition **chitthi** which allotted the disputed property to him, while the other offered no evidence as to possession. The Magistrate put the former in possession.

Held, that the order should not be set aside. 6 O.W.N. 17=30 Cr.L.J. 381=114 Ind. Cas. 810=A.I.R. 1929 Oudh 82.

——S. 145—Joint possession.
——Where the Magistrate finds that the property is joint and presumably in the joint possession of both the parties, he cannot make an order under S. 145 or under S. 146. 75 Ind. Cas. 69=24 Cr. L. J. 869=5 P. L. T. 45=A. I. R. 1923 Pat. 546.

——S. 145—Joint possession.
——Where there is a good and valid claim to joint possession the Magistrate has no jurisdiction to take proceedings under S. 145. 67 Ind. Cas. 203= 23 Cr. L, J. 379=A.I.R. 1922 Pat. 423.

——S. 145—Joint possession.

A Magistrate under S. 145 can only decide which party is in possession but he cannot pass any order in respect of property in which the parties claim to be jointly interested. 36 Cal. 986=11 Cr. L.J. 28= 4 Ind. Cas. 696. 28.

——S. 145—Joint possession — Proceedings under.

In proceedings under S. 145 of the Cr. P. Code, the dispute must be between parties each of whom claims exclusive possession of the property in dispute. Where the dispute is between parties, one of whom claims joint possession of the disputed property, proceedings under S. 145 cannot be drawn up. 4. C.W.N. 426; (1919) Pat. 479, Foll. 1 Pat. L.T. 594=21 Cr. L. J. 790=58 Ind. Cas. 518.

——S. 145—Joint possession—Order declaring one party in possession—Jurisdiction.

Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself, both parties being members of the same family and the Magistrate declared the second party to be in possession of the disputed land. Held, that the order was without jurisdiction. 4 C.W.N. 426, Foll. 23 C.W.N. 1051.

——S. 145 (5)—Joint possession—Legality of order.

An order declaring that the first party is in possession of one-third of the disputed plots and that the second party is in possession of the remaining portion, is rather a decree in a civil suit adjudicating the rights of contending parties. An order under S. 145 should be merely to declare whom the Magistrate finds to be in actual possession of the property in dispute regarding which proceedings have been taken to prevent a breach of the peace. No proceedings under S. 145 ought to be drawn in a case where the parties are in joint possession although they hold specific shares therein. 4 C.W.N. 426, Foll. (1919) Pat. H. C. C. 479=21 Cr. L. J. 224=54 Ind. Cas. 1008.

——S. 145—Joint possession.

S. 145, Cr. P. Code has no application where the contesting parties are entitled to joint possession. Burn J.—The mere fact that both parties claim joint possession will not take away the jurisdiction of the Magistrate if in fact only one was in possession. 27 M.L.T. 234=11 L.W. 459= 21 Cr. L. J. 73=54 Ind. Cas. 473.

——S. 145—Joint possession—Recognition of—Actual possession to be found.

Ss. 145 and 146 of the Cr. P. Code authorise no recognition of joint possession and no order can be passed forbidding one of the parties to interfere with the joint enjoyment by both, 32 Ind. Cas. 669; 9 C.W.N. 485; 11 C.W.N. 512, Ref. Under S. 145 the Court must record a finding as to which party was in possession, at the date of its preliminary order. 19 Cr. L. J. 977=47 Ind. Cas. 877.

——S. 145—Joint possession—Power of Magistrate.

Where a magistrate before commencing proceedings under S 145 orders the crops on land to be deposited with a third person and after enquiry found that the parties had been in joint possession and that there was no likelihood of a breach of the peace and ordered the crop to be taken by the parties in equal moiety, Held, that the magistrate had jurisdiction to pass such an order and that the High Court will not interfere. 1 Pat. L.W. 543=18 Cr. L. J. 616=39 Ind. Cas. 984.

——S. 145—Joint possession—Application.

S. 145, Cr. P. C., applies though the land in dispute is held under joint title, if one of the joint owners is in actual and exclusive possession. 20 C.W.N. 518=17 Cr. L. J. 251=34 Ind. Cas. 971.

——S. 145—Joint possession of property in dispute—Jurisdiction of Magistrate.

Where both parties to a dispute relating to immovable property are found to be in joint possession thereof, a magistrate has no jurisdiction to issue an order under S. 145 forbidding either the one party or the other from disturbing the possession of the other till evicted in due course of law. 4 C. W. N. 426; 26 Ind. Cas. 644, Foll. 17 Cr. L. J. 76=32 Ind. Cas. 668.

——S. 145—Joint possession—Petitioner in possession on behalf of both parties—Jurisdiction to pass order.

An order under S. 145 cannot be passed by a Magistrate where the petitioner is in possession on behalf of both the parties and wants merely a declaration to that effect. 4 C.W.N. 426 Fol; 31 M. 318; 2 Weir, 99, Diss. 2 L. W. 107=16 Cr. L. J. 52=26 Ind. Cas. 644.

——S. 145 (1)—Joint possession.

Where the Magistrate finds that both parties are jointly entitled to the land, he cannot hold that one of them is in possession to the exclusion of the other and so maintain that one party's possession. 11 A. L. J. 696=14 Cr. L. J. 495=20 Ind. Cas. 751.

——S. 145—Joint possession.

A Magistrate can under S. 145 try a question of actual possession only and not one of joint title or of actual joint possession. 40 Cal. 982= 14 Cr.L.J. 269=17 C.W.N. 944=19 Ind. Cas. 541.

——S. 145 (6)—Joint possession—Public, if may be declared to be in possession.

The public cannot be declared to be in possession of any piece of land as in that case both parties are included and possession is joint and hence Court's jurisdiction is ousted. 17 C.W.N. 205=17 C.L.J. 397=13 Cr.L.J. 789=17 Ind. Cas. 533.

——S. 145—Joint possession.

A Magistrate has jurisdiction to pass an order under S. 145 Cr. P. C. in favour of one tenant as against others setting up their tenancy as the case is one of exclusive possession claimed by each set of landlords through their respective tenants. 38 Cal. 889=15 C.L.J. 184=12 Cr.L.J. 408=11 Ind. Cas. 592.

——S. 145—Joint possession—Jurisdiction.

The section does not apply where parties have joint rights in a certain fishery, and neither of

them can be considered as claiming exclusive possession and a dispute arises with regard to its possession. 11 C.W.N. 512, Ref. (Obiter).— But S. 145 may apply owing to Sub-S. (2) if what was in dispute was not a share in the fishery, but a share in its profits. 11 C.L.J. 412=11 Cr.L.J. 370=6 Ind. Cas. 544.

47. Joint Property.

——Ss. 145 and 146—Joint property.

From the terms of sub-Ss. (1) to (6) of S. 145, Cr. P. Code, it is clear that S. 145 applies only in cases where the dispute is about actual possession and not about joint possession. Where both the parties are found to be in joint possession a Magistrate has no power to pass an order of attachment under S. 146, Cr. P. Code. (1947) O.A. (C.C.) 353=1947 A.W.R. (C.C.) 353=A.I.R. 1948 Oudh 130=1947 O.W.N. 564=49 Cr. L. J. 202.

——S. 145—Joint property—Dispute relating to portion in exclusive possession of one of joint owners.

Even in cases of joint property where a portion of such property is in exclusive possession of one of the joint owners and there is dispute between the parties regarding possession of the portion which is likely to cause a breach of the peace, proceedings may be taken under S. 145, Cr. P. Code. 48 P.L.R. 499=A.I.R. 1947 Lah. 227=48 Cr. L. J. 844.

——S. 145—Joint property.

Seeing that S. 145 merely contains the words "a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof" and seeing that neither in S. 145 nor in S. 146 is there any provision which clearly limits the dispute, which can be dealt with under Ch. 12 to a dispute by "two opposing parties having adverse rights to its exclusive possession" it cannot be said that because the dispute was not one between two opposing parties having adverse rights to exclusive possession of the land but was a dispute between two parties having joint rights to the land in dispute, each of which was claiming exclusive possession, S. 145 cannot apply. 11 C.W.N. 512, Diss. from. 32 Bom. L. R. 340=1930 Cr. C. 548=125 Ind. Cas. 718=31 Cr. L. J. 933=A.I.R. 1930 Bom. 172.

——S. 145—Joint property.

——S. 145 applies only to disputes about actual physical possession and not to disputes about joint possession. 110 Ind. Cas. 807=29 Cr. L. J. 775=11 A. I. Cr. R. 44=A.I.R. 1928 Lah. 818.

——S. 145—Joint property.

——Where the joint owners of a lease of the right to collect rent of certain lands are actually in separate possession of certain shares of the right but there is a dispute as to the possession of a certain other share of which each party claims exclusive possession. S. 145 is applicable. The criterion in such cases is whether the parties claim exclusive possession. 5 All. 607, 23 Cal. 80, 10 C.W.N. 1088 and 36 Cal. 986 Dist. 27 Cal. 259, 17 M.L.T. 225, 1 P.L.T. 594 and 1923 Pat. 369 Foll. 88 Ind. Cas. 707=6 P. L. T. 454=26 Cr. L. J. 1187=1926 P.H.C.C. 142=A.I.R. 1925 Pat. 618.

——S. 145—Joint property.

——S. 145 contemplates cases where one party claims to be in actual possession of the subject in dispute as against his opponent. A case of possession by co-owners of the whole of property held in common cannot be considered in law to be a case of actual possession on the part of one co-owner as against another. So S. 145 does not apply. 63 Ind. Cas. 321=24 O.C. 167=22 Cr. L.J. 625=A.I.R. 1921 Oudh. 6.

——S. 145—Joint property.

——Ss. 145 and 146 have no application to a case in which the property in dispute is held jointly by the parties, and the matter of the dispute is as to the respective shares of the parties in the property. 61 Ind. Cas. 174=22 Cr. L.J. 350 (Cal.)

——S. 145—Joint property—Dispute as to possession between manager and member of Joint family.

The possession of the manager of a joint Hindu family as against another member can be protected by proceedings under S. 145, Cr. P.C. 4 M.L.T. 301=18 M. L.J. 343=31 M. 318. See also 5 C.W.N. 562.

——S. 145 (1)—Joint property—Applicant's possession joint—Proper order.

When a Magistrate comes to the conclusion in proceedings under S. 145, that the applicant's possession is joint and not exclusive and that he would not, therefore, be in a position to make an order of exclusive possession in favour of any party, the proceedings can be terminated by cancelling his order S. 145 (1). A.I.R. 1945 Sind 110=1.L.R. (1945) Kar. 78=47 Cr. L.J. 78=221 Ind. Cas. 112.

——S. 145—Joint property:—Where in a suit for partition certain properties have been declared to be joint and partition has been ordered to be effected, the properties must, until the person is disturbed by actual partition in the suit, be treated as having been declared by the civil court to be joint. No order under S. 145, Cr. P.C., can be made, whilst the suit is still pending in regard to such properties. (1904) 8 C.W.N. 485.

——S. 145—Joint property—Definite piece of land in dispute—Jurisdiction:—Where a dispute related to a definite plot of land, but the question was whether this plot was included in a piece of land which was in the exclusive possession of one of the parties or in another which was the joint property of both the parties in dispute:—Held, that the Magistrate had jurisdiction to proceed under S. 145, Cr. P. C. A Magistrate cannot proceed under S. 145, Cr. P.C., where disputed property is itself an undivided share in land or rent or profit issuing from an undivided share, because in such a case the subject-matter of the dispute is uncertain and its boundaries are undefined as S. 145, Cr. P.C., only contemplates dispute as to definite pieces of land or the rents and profits issuing from definite pieces of land. 4 C.W.N. 467, 7 C.W.N. 118, 23 C. 80 explained. Quoere:—Whether an order by a Magistrate giving a party to a proceeding under S. 145 Cr. P.C., possession of a greater extent of land than is claimed by him, can be questioned as made without jurisdiction. 7 C.W.N. 462.

——S. 145—Joint property—Exclusive possession, claim to:—Proceedings under S. 145, Cr. P.C., cannot be instituted with respect to a dispute between two parties having joint rights to the land in dispute each claiming exclusive possession thereof. 11 C.W.N. 512.

48. Jurisdiction.

——S. 145—Jurisdiction.

See also CRIMINAL P. C., S. 145—Preliminary order —When can be passed.

——S. 145—Jurisdiction—Right to relief under—Necessary allegations.

In order to vest a Criminal Court with jurisdiction under S. 145, Cr. P. Code, it is necessary that the party complaining of disturbance of his or her possession which is likely to give rise to a breach of the peace, must show that the complainant was in possession at the time of instituting complaint or within two months of the initial order required to be passed under S. 145, Cr. P. Code. 230 Ind. Cas. 229=1947 A.W.R. (C.C.) 40=1947 O.A. (C.C.) 40=1947 O.W.N. 139=1947 A.Cr. C. 61=A.I.R. 1947 Oudh 159.

——S. 145—Jurisdiction—Order as to possession —Condition precedent to and effect of—Finding as to possession—Effect of—Jurisdiction of Civil Court to go behind.

The foundation of jurisdiction for a criminal Court to pass an order under S. 145, Cr. P. Code, is only laid when a party is actually found to be in actual possession of the property on the date on which his possession was likely to be disturbed and to cause a breach of the peace. It is not open to a Civil Court to go behind or to question the finding of the Criminal Courts as to possession, although the Civil Court can decide that a person found or deemed to be in possession had no right or title whatsoever to be or to remain in possession, and to put any other person in possession if the latter's right or title to possession is found. The legal effect of the finding of the Criminal Court which declares possession is to place the person found to be in possession in a position which will be protected, until evicted in due course of law. 226 Ind. Cas. 292=A.I.R. 1947 Lah. 173.

——S. 145—Jurisdiction—Order dealing with lands not included in the proceedings—Legality—If void as a whole or in part—Rule.

Where an order under S. 145, Cr. P. Code, does not conform to the proceedings issued in the case, that is to say, where it extends to lands outside the proceedings, the order is liable to be set aside ; and where it is impossible to be sure with regard to any of the really contested area whether that was included within the proceedings or not, the whole order may be bad. But it cannot be laid down as an absolute proposition of law that where the lands are distinguishable and the evidence of possession adduced in relation to them are also easily separable, they being of a different character, the Magistrate's order with regard to the lands in respect of which possession has been found with the party and which has really come within the ambit of the proceedings will not be sustained. In such case the order may be vacated to the extent to which it is in excess of the proceedings. (1946) P.W.N. 278=13 B.R. 539=231 Ind. Cas. 90=A.I.R. 1947 Pat. 175=48 Cr. L. J. 683.

——Ss. 145, 12—Jurisdiction—Headquarters Magistrate—Local jurisdiction.

Unless the powers of a Magistrate have been restricted to a defined local area, he has jurisdiction in the entire district. The Headquarters Magistrate can therefore, try a case under S. 145 in respect of any local area in the district unless it is shown that his jurisdiction has been restricted. A.I.R. 1945 Nag. 56=1944 N. L. J. 508= I.L.R. (1944) Nag. 836=46 Cr. L. J. 654=220 Ind. Cas. 77.

——S. 145—Jurisdiction—First Class Magistrate—Jurisdiction, whether confined to his *ilaqa* or extends to whole District.

Where a First Class Magistrate has been invested with powers over a whole District, the mere fact that the District Magistrate has, for the sake of convenience, divided the District into *ilaqas* and a particular *ilaqa* has been allotted to a First Class Magistrate does not deprive him of jurisdiction to hear a case under S. 145, arising out of another *ilaqa* of the District.

Where no order under S. 145 (1), Criminal P. C., has been passed, the first proviso to S. 145 (4) cannot be resorted to. A.I.R. 1933 Lah. 143=34 P.L.R. 365= 142 Ind. Cas. 430.

——S. 145—Jurisdiction.

The characteristics of a Court of competent jurisdiction are : (*i*) power to deal with offences or matters of the class in question ; and ; (*ii*) power conferred to deal with the offenders or persons of the class in question. A.I.R. 1932 All. 446=34 Cr. L. J. 156=(1932) A.L.J. 503=141 Ind. Cas. 131.

——S. 145—Jurisdiction—Order without—Magistrate attaching whole property under S. 145 at the instance of the Collector is without jurisdiction and must be quashed.

The Civil Court decreed joint possession to the petitioners and the opposite party, an appeal against which decree was pending before the Privy Council. The opposite party applied for partition which was made by a revenue officer and possession of portion of the land was given to the opposite party. The partition proceedings were subsequently quashed by the Financial Commissioner who directed that the *status quo ante* be restored. The Collector, however, did not wish to do so and at his instance the Magistrate attached the whole of the land and appointed a receiver under S. 145, holding that there was a dispute about the whole area.

Held, that the proceedings taken by the Magistrate were without jurisdiction and must be quashed. 110 Ind. Cas. 807=11 A.I.Cr. R. 44=29 Cr. L. J. 775=A.I.R. 1928 Lah. 818.

——S. 145—Jurisdiction.

Under S. 145 a Magistrate has jurisdiction to find possession but not the mode of possession or how the possession is to be exercised, and any order so determining the mode of possession is without jurisdiction. 30 C.W.N. 873=97 Ind. Cas. 73=A.I.R. 1926 Cal. 1022.

——S. 145—Jurisdiction.

Where a Magistrate passes an order as to the mode of possession his order does not give a cause of action for a suit which, if not brought within the statutory period, makes that portion of the order binding between the parties, the order being without jurisdiction. The intention of the law of limitation is that if no suit is brought within the statutory period the remedy is lost and in case of an order of a competent Court it remains binding between the parties. 30 C.W.N. 873=97 Ind. Cas. 73=A.I.R. 1926 Cal. 1022.

——S. 145—Jurisdiction.

S. 145 (1) requires that a Magistrate has to satisfy himself " that a dispute likely to cause a breach of peace exists concerning any land " and has then to " make an order in writing, stating the grounds of his being so satisfied". Failure to comply with the provision makes the Magistrate's order without jurisdiction. 88 Ind. Cas. 601=7 L.L.J. 173=26 Cr. L. J. 1177=26 P.L.R. 187= A.I.R. 1925 Lah. 368.

——S. 145—Jurisdiction.

An order based upon a written statement of one of the parties supported by his own evidence is not without jurisdiction, nor is it without jurisdiction, merely because the Magistrate does not accept the decision in a previous case of rioting as to possession. 75 Ind. Cas. 535=

5 P.L.T. 69=2 Pat. L. R. Cr. 104=A.I.R. 1924 Pat. 509.

——S. 145—Jurisdiction—Order based on no enquiry, but on incidental findings in proceedings under S. 144 is without jurisdiction.

Where the Magistrate merely stated that, as proceedings were previously taken under S. 144 and incidentally in the course of those proceedings it was found that the counter-petitioners were in possession of the property, it was not desirable to proceed with the enquiry under S. 145.

Held, the order of the Magistrate clearly contravened the provisions of the Code. The order under S. 145 is without jurisdiction when no evidence is taken and no enquiry held before the final order is made by the Magistrate. 72 Ind. Cas. 541=1922 M. W. N. 484=24 Cr. L. J. 429=A.I.R. 1922 Mad. 437=43 M.L.J. 716.

——S. 145 — Jurisdiction — Order without—The Magistrate cannot take proceedings under the section when land in dispute not within his jurisdition.

Application was made to the District Magistrate praying for action to be taken under S. 145. The District Magistrate took the petition on file and without himself taking action under S. 145 (1) transferred it to Sub-Divisional Magistrate under him for disposal. The Sub-Divisional Magistrate made an order under S. 145 (1). But the land concerned was not within the local limits of his jurisdiction.

Held, that the District Magistrate was wrong in transferring the case to a Sub-Divisional Magistrate who had no jurisdiction over the land concerned. The District Magistrate had no power to alter the boundaries of any sub-division of his Distict permanently, temporarily, or for the purpose of any particular case. The Sub-Divisional Magaistrate's order therefore was without jurisdiction, 41 Mad. 246, Appr. 52 Mad. 241=114 Ind. Cas. 625=30 Cr. L. J. 340=28 M.L.W. 664=1928 M.W.N. 921=1 M.Cr. C. 320=A.I.R. 1928 Mad. 1230=55 M.L.J. 693.

——S. 145—Jurisdiction to make an order under—When arises.

The jurisdiction of a Magistrate to make an order depends upon there being a likelihood of a breach of peace, and when a Magistrate finds that there is no likelihood of the breach of peace, he has to cancel the order under S. 145 (1). It is not open to him thereafter to pass an order that a party shall remain in possession till evicted in due course of law. 4 A.I.Cr. D. 346=1950 A.W.R. 356=1950 A.L.J. 282.

——S. 145—Jurisdiction—Magistrate deciding question not raised in notice—Action, held, outside jurisdiction.

Where in proceedings under S. 145, Criminal P. C., the Magistrate decides questions not raised in the notice to the parties, the Magistrate exceeds his jurisdiction and his order must be set aside. A.I.R. 1936 Oudh 188=1935 O.W.N. (C.C.) 373=37 Cr. L. J. 1058=164 Ind. Cas. 1120.

——Ss. 145 (4), 350—Jurisdiction or "Enquiry"—Proceeding under S. 145—Whether part-heard proceeding under S. 145—Transfer of trying Magistrate—"Successor".

Proceedings under S. 145, Cr. P. C. are enquiries within the meaning of the Code of Criminal Procedure. Under that code 'enquiry' means not only an enquiry into an offence but extends to enquiry into matters which are not offences. When in the course of a proceeding under S. 145, Cr. P. C., one Magistrate is transferred, and another comes in his place, the latter, if of competent jurisdiction, can deal with the proceeding under S. 350, Cr. P. C., S. 350, Cr. P. C., ought to be construed with all reasonable liberality. 13 C.W.N. 420=1 Ind. Cas. 336=9 Cr. L. J. 278.

——S. 145—Jurisdiction—Inquiry as to possession—Evidence taken by Subordinate Magistrate on direction.

The Magistrate dealing with a case under S. 145, Cr. P. C., is not competent to direct evidence to be taken by a Subordinate Magistrate; and an order passed on evidence taken not by himself but by the Subordinate Magistrate is one passed without jurisdiction and is liable to be set aside. 3 M.L.T. 108=17 M.L.J. 535=31 M. 82.

——Ss. 145, 439—Jurisdiction, conditions of.

A special jurisdiction is conferred on the criminal courts under S. 145, Cr. P. C., under special circumstances and with a special object. Where either the circumstances do not exist, or the order does not attain the object of the section the order is without jurisdiction and may be set aside by the court of revision. The existence of an apprehension of breach of the peace is the special circumstance; prevention of breach of the peace is the special object. If there is no such apprehension the court has no jurisdiction under the section. Nor has it jurisdiction to pass an order which does not serve to prevent the breach of the peace. Non-joinder, therefore, of persons whose presence is necessary for the purpose of preventing the apprehended breach of the peace makes the order one passed without jurisdiction, which the High Court can set aside in the exercise of its revisional powers. 5 C.W.N. 428=28 Cal. 446.

——S. 145—Jurisdiction of Magistrate—Decree of civil court—Decree dubious—Construction—Revision.

The functions of a Magistrate when acting under S. 145, Cr. P.C., are of a quasi executive character, having for their effect and jurisdiction the prevention of a breach of the public peace. For that purpose the Magistrate could only decide the fact of possession at the date when the dispute arose and not the right to possession. The High Court can interfere in its revisional jurisdiction with an order under S. 144 only where the Magistrate exceeded his jurisdiction. When the right to possession has been declared within a time not remote from the Magistrate's taking proceedings under S. 145 to maintain an order which has been passed by a competent court, and therfore, to take proceedings which necessarily must have the effect of modifying, or even cancelling such orders, is to assume a jurisdiction which the law does not contemplate. This, however, applies only where there is no doubt whatever as to what the civil court has done, that is, where it cannot be disputed that a certain party has been declared owner and put in possession by a civil court. When it is fairly open to dispute as to what the decree has decided, it was competent to the Magistrate to construe the decree for the purpose of deciding on the evidence the fact of possession at the time, if in his opinion, the dispute is likely to lead to a breach of the peace, *e.g.*, in this case where the dispute was whether the decree related to the land itself or to the limited right to levy assessment on it. 25 C. 179 and 26 C. 625, foll. 6 Bom. L. R. 246.

——S. 145—Jurisdiction—Land, dispute as to—Report by Police officer of a different district—Jurisdiction of Magistrate.

Where the land in dispute was situated partly in one district and partly in another, *held*, that the Magistrate

of one district could properly institute proceedings under S. 145 of the Cr. P. C., on a Police report drawn up by a Police officer of another district in respect of such portions of the land as lay within his jurisdiction. 29 Cal. 885=6 C.W.N. 378.

49. Large areas.

——S. 145—Large areas.

The Succession (Property Protection) Act has a larger scope than S. 145, Cr. P. Code, and affords a more appropriate remedy in cases involving disputes regarding succession to large estates involving breaches of the peace. 66 Ind. Cas. 76=23 Cr. L. J. 236=A.I.R. 1922 Pat. 372.

——S. 145—Large areas—Right to carry on boring operations—Complicated question of title—Constructive possession—Duty of Magistrate.

Per Newbould, J.—S. 145 is applicable where the report shows that there is a likelihood of a breach of peace and the dispute concerns land. If the Magistrate is unable to find possession, he will act under S. 146, if necessary. *Per Chaudhuri, J.*—When a party claims under a document or agreement, the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a Civil suit is not of itself a sufficient possession on which the Magistrate's order under S. 145 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right. The Magistrate is not the proper forum for determining such question. In such a case the Magistrate is to proceed under S. 107, Cr. P. C. Proceedings under S. 146 of the Code with regard to a large mouza will cause great injustice to the persons in actual occupation. It is not the function of a Criminal Court to go into complicated questions of title and possession including that of adverse possession and of constructive possession of wide areas inferred from actual possession of limited areas. 22 Cr. L. J. 99=32 C.L.J. 54=59 Ind. Cas. 403.

——S. 145—Large area—Fishery—Local investigation—Possession—Attachment.

Where there is a dispute as regards the possession of a fishery extending over several miles in length and the Magistrate is unable to satisfy himself as to the possession of the whole length in question, he should ascertain so far as he can the possession of some portion or portions thereof. As to the portion of which he is able to find a party in possession, he should proceed under S. 145 and only as to the remainder he should proceed under S. 146. There is no hard and fast rule of law that in every case under S. 145 a local investigation must be held whether the parties desire it or not. 20 Cr. L. J. 17=48 Ind. Cas. 497.

50. Likelihood of breach of peace.

——S. 145—Likelihood of breach of peace. *See* CRIMINAL P. C., S. 145—PRELIMINARY ORDER—WHEN CAN BE PASSED.

51. Local inquiry.

——S. 145—Local inquiry.

Order under S. 145, Cr. P. Code, must be passed after discussion of the evidence, Prominent mention of Magistrate's inspection and also of the fact that in the course of his inspection he found hundreds of people in the place, who were all in favour of the second party, is no ground upon which possession may be found in favour of the second party. 28 Cr. L. J. 603=102 Ind. Cas. 779=8 A.I.Cr. R. 251=8 P.L.T. 755=A.I.R. 1927 Pat. 301.

——S. 145—Local inquiry—Decision based on local inspection without recording the result of the same is bad.

Where the Magistrate twice made local inspections and without making any record of the result of his observations, used his conversations at the time of his local inspections in the course of his judgment in subsitution of and in order to supplement the evidence which has been recorded by him:

Held, that the Magistrate had, in fact, turned himself into a witness in the case and, that further, his failure to record the result of his local inspections which would have given both parties a chance of challenging the correctness of his observations, vitiated his decision. 81 Ind. Cas. 33=25 Cr. L. J. 545=A.I.R. 1922 Pat. 294.

——S. 145—Local inquiry—Action of Commissioner appointed to survey is not 'local inquiry' but a mere ministerial act.

The direction was merely "to survey the disputed lands and report within 15 days." All that the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act. Whether the duty of survey was entrusted to a pleader commissioned or to an amin makes no difference; stress cannot be laid on the fact that the person selected to do the work bore the title of pleader commissioner. It cannot be held that the survey of the lands, after enquiry from all the parties as to what land was in dispute, amounted to a "local enquiry" within the meaning of S. 148, Criminal Procedure Code. It was a mere ministerial act. 65 Ind. Cas. 616=3 Pat. L.T. 17=23 Cr. L. J. 152=1 Pat. 75=A.I.R. 1922 Pat. 224.

——S. 145—Local inquiry—Order based on unrecorded local inspection and judgment in another criminal case must be set aside.

In proceedings under S. 145 the final order made by the trial Magistrate on the basis of a local enquiry of which there was no note or memorandum, and on the further basis of a judgment in a case under S. 148, I. P. C.,

Held, that the final order based as it was upon no evidence must be set aside. 34 C.L.J. 127=25 C.W.N. 1007=65 Ind. Cas. 855=A.I.R. 1921 Cal. 272.

——S. 145—Local inquiry—Enquiry as regards possession must be like that in a summons case.

Cl. (4) of S. 145 exempts only the right of the parties from being dealt with, but so far as the possession is concerned the enquiry is to be as full as that of a summons case entitling each party to adduce evidence. Where the Magistrate went to the locality and none of the parties examined witnesses on their behalf, but the Court picked out six witnesses from a crowd and decided the case upon their evidence:

Held, that the procedure amounted to an error of jurisdiction. 62 Ind. Cas. 177=2 P.L.T. 267=(1921) P.H.C.C. 167=22 Cr. L. J. 481=A.I.R. 1921 Pat. 176.

——S. 145—Local inquiry will not be legal substitute for evidence.

Where a magistrate converted a proceeding under S. 145 into one under S. 144 and before the date fixed for the filing of statements paid a surprise visit and based his order on the impressions gathered during the local inspection, *held*, that local inspection would not be a legal substitute for evidence especially where the inquiry

on the spot is *ex parte* and where the evidence in the case is practically ignored. 1 Pat. L. T. 569=61 Ind. Cas. 712=22 Cr. L.J. 424.

——Ss. 145 (4) and 148—Local inquiry—Order on local investigation without evidence.

In a proceeding under S. 145, the Magistrate on the application of both the parties held a local investigation and without taking any evidence made the final order, *held*, that the order was without jurisdiction. 46 C. 1056=23 C.W.N. 750=20 Cr. L. J. 688=52 Ind. Cas. 608.

——Ss. 145 and 148 (1)—Local enquiry—Report—Delegation of inquiry.

Where in a proceeding under S. 145 of the Cr. P. Code, a local enquiry is directed to be made, the result of the local enquiry becomes a part of the proceeding and the party affected by it is entitled to be made acquainted with the result thereof and given an opportunity to object to it. The Magistrate deputed to hold a local enquiry under S. 148 (1), Cr. P. Code, should hold the enquiry himself and should not delegate it to somebody else. 20 Cr. L. J. 107=48 Ind. Cas. 987.

——Ss. 145 and 148 (2)—Local inquiry—Evidence of person deputed to make a local inquiry.

In a case under S. 145 an application for time for filing written statements by the parties was rejected and the Magistrate decided the case on the report of the person deputed to make a local inquiry. *Held*, The Magistrate's action was legal. 14 Cr. L. J. 302=19 Ind. Cas. 958.

52. Nature of proceedings.

——S. 145—Nature of proceedings. *See also* CRIMINAL P. C., S. 145 (1) OBJECT AND SCOPE. (2) PRELIMINARY ORDER—WHEN CAN BE PASSED.

——S. 145—Nature of proceedings—Application to take cognizance under—Nature of—Dismissal for default—Legality.

An application to a Magistrate to take cognizance of a dispute under S. 145, Cr. P. Code, is not a complaint. It could not be dismissed in default under any provisions contained in S. 145 to S. 148, Cr. P. Code. A dismissal merely on the ground of the applicant's absence would be an illegal order. 1950 A.W.R. 367=1950 A.L.J. 292.

——S. 145—Nature of proceedings.

Dispute regarding land can also be dealt with under S. 144, Criminal P. C., provided that in the opinion of the authorised Magistrate, 'there is sufficient ground for proceeding under this section and immediate apprehension or speedy remedy is desirable,' Orders passed under this section, however, are merely 'temporary orders in urgent cases of apprehended danger, and cannot remain in force for more than two months (unless in certain cases the Provincial Govt. by notification in the *Official Gazette* otherwise directs). They are further not always passed in strict comformity with legal rights of private parties, but may in proper cases constitute an interference with private rights required in a temporary emergency. Nor is it to be expected, having regard to the temporary and urgent character, that they would be passed after taking evidence of possession in the manner laid down in S. 145 (4), so as to entitle the Magistrate judicially to pronounce on the fact of possession. A.I.R. 1942 Pat. 331=23 P.L.T. 243=8 B.R. 670=43 Cr. L. J. 637=200 Ind. Cas. 316.

——S. 145—Nature of proceedings—Orders under—Whether partake nature of interim proceedings in Civil Court.

Orders under S. 145, Cr. P. C., relate essentially to the possession of land and partake something of the nature of *interim* proceedings in a Civil Court and the order itself partakes something of the nature of a decree, so that a judgment which relates to such orders is not necessary to be applied without some modification to ordinary criminal proceedings for offences leading to a conviction or an acquittal. A.I.R. 1938 Sind 132=I.L.R. (1939) Kar. 18=176 Ind. Cas. 549.

——S. 145—Nature of proceedings—Parties should be given sufficient time to adduce evidence, proceedings under S. 145, being of *quasi* civil nature.

At the moment the case was called on the *muktear* engaged by the first party was absent; the first party went to fetch him. The Court waited for full 20 minutes and then proceeded to take evidence on behalf of the second party:

Held, that the first party should be given an opportunity of adducing evidence in support of his claim, the proceeding under S. 145 being *quasi*-civil proceeding. 76 Ind. Cas. 975=25 Cr. L. J. 303=A.I.R. 1925 Cal. 263.

——S. 145—Nature of proceedings.

Proceedings under S. 145 take place on behalf of the Crown on a report made to the Magistrate. The proceedings are against all other parties concerned and processes should issue at Government expense. The parties originally mentioned and any others who may come in later should be ranged on one side as the first party, the second party and so forth. 81 Ind. Cas. 933=25 Cr. L. J. 1109=A.I.R. 1925 Nag. 142.

——S. 145—Nature of proceedings.

The Civil Court cannot by injunction stay proceedings in a criminal Court. But proceedings under S. 145, Cr. P. Code, do not come within the scope of this principle. 2 Ind. Cas. 266 (Cal.).

53. Notice.

——S. 145—Notice—Absence of.

Where no preliminary order, as required by S. 145, sub-s. (1) is served on a party, nor is he given an opportunity to prove his possession over the subject of the dispute, he cannot be subjected to the final order passed by the Magistrate. Admission of a dispute by both the parties concerned is certainly evidence of the existence of that dispute. 90 Ind. Cas. 541=2 O.W.N. 704=26 Cr. L. J. 1581=A.I.R. 1925 Oudh 605.

——S. 145—Notice—Non-compliance with requirements of the section amounts to grave irregularity.

In a proceeding purporting to be under S. 145, notice was not served upon the parties or their pleaders, nor was it served upon the locality, as is required by S. 145, nor written statement was filed by parties nor any evidence, oral or documentary, was adduced:

Held, that the non-compliance of the aforesaid requirements constituted such a grave irregularity that, when it has caused a failure of justice or a prejudice to any party, will make the order under S. 145 vitiated and the jurisdiction of the Magistrate is affected and that the High Court has jurisdiction to set aside the order. 4 P.L.W. 183, Foll. 72 Ind. Cas. 345=4 Pat. L. T. 723=1 Pat. L. R. Cr. 130=24 Cr. L. J. 345=A.I.R. 1922 Pat. 77.

——S. 145—Notice.

The provisions of S. 145 (1) are mandatory and consequently if no notice is issued as required and there is no finding that there was a danger of breach of peace, the order under S. 145 becomes *ultra vires*. A.I.R. 1924 Lah. 91, Rel. on. 12 Lah. L. J. 147=1930 Cr. C. 991=128 Ind. Cas. 313=A.I.R. 1930 Lah. 895.

——S. 145—Notice.

Where in a proceeding under S. 145 there is a total lack of evidence or even of circumstances from which a presumption can reasonably be drawn that a party had knowledge of the proceedings the Magistrate's procedure in going on with the case *ex parte* amounts to much more than a technical irregularity and it is impossible to hold that the party was, or may not have been prejudiced thereby. A.I.R. 101 Ind. Cas. 450=28 Cr. L. J. 418= A.I.R. 1927 Nag. 234.

——S. 145—Notice.

Where one of the members of one of the parties is not served with a notice the proceedings are bad so far as that member is concerned but the invalidity of the proceedings against one member does not necessarily invalidate the whole proceeding. 7 P.L.T. 156=26 Cr. L. J. 1287=89 Ind. Cas. 151=A.I.R. 1926 Pat. 67.

——S. 145 (1) and (4)—Notice.

In a proceeding under S. 145, Cr. P. C., the first party was absent though there was a written return of service on him by the peon. The Magistrate passed an order in favour of the second party upon taking evidence of that party and subsequently on the first party having filed an application to the Magistrate for re-hearing of the case on allegation of non-serivce of the notice of the order under Cl. (1) of S. 145 the Magistrate refused to do so on the ground that the case could not be revived. *Held*, that the Magistrate should not have rejected the application for re-opening of the case without satisfying himself about the truth or otherwise of the allegation of the first party as to the notice not having been served. The High Court directed that the matter be reheard by the Magistrate. 21 Cr. L. J. 818=24 C.W.N. 902=32 C.L.J. 14=58 Ind. Cas. 928.

——S. 145—Notice.

Omission to publish the notice under sub-section (3) is not fatal to the Magistrate's jurisdiction, under the section. Nor does a notice without the grounds or without specifying the land in dispute, though irregular, vitiate the proceedings particularly where the parties perfectly knew the property in dispute. 81 Ind. Cas. 963= 25 Cr. L. J. 1139=A.I.R. 1925 Oudh 152.

——S. 145—Defect in procedure—Notice.

Where the parties concerned had full knowledge of the proceedings from start to finish, an omission to serve notice on them and to affix a copy of the Court's order as required by the sub-S. (3) is an irregularity curable by S. 537. 76 Ind. Cas. 303=25 Cr. L. J. 159=A.I.R. 1924 Nag. 171.

——S. 145 (1) and (3)—Notice—Order without.

In an enquiry under S. 145, Cr. P.C., both sides must be heard and if one of the parties to the enquiry is not served and the Magistrate proceeds with the case, there is a defect of jurisdiction and his order is liable to be set aside in revision by the High Court. 53 Ind. Cas. 615, Foll. 20 Cr. L. J. 816=53 Ind. Cas. 720.

——S. 145 (6)—Notice—Order without.

An order under S. 145 (6) of the Cr. P. Code made without any notice to the party affected is entirely without jurisdiction. (1917) P.H.C.C. 200=19 Cr. L. J. 112= 5 Pat. L. W 254=43 Ind. Cas. 336.

——S. 145 (1)—Notice—Defective.

Where there is a dispute likely to cause a breach of the peace and the parties are aware of it, the Magistrate does not lose jurisdiction under S. 145 simply because the notice issued does not state that a dispute likely to cause a breach of the peace exists. 16 Cr. L. J. 224=27 Ind. Cas. 848.

——S. 145—Notice—Omission to give.

The Magistrate has no jurisdiction to decide the question of actual possession without giving the claimants an opportunity of being heard. An omission to record reasons for holding that there is a likelihood of a breach of the peace though a culpable irregularity does not oust the jurisdiction of the Magistrate. 12 L.W. 315= 59 Ind. Cas. 378.

——S. 145—Notice—Decision without.

Where it appears that a party to the dispute has had no opportunity of appearing and putting in his written statement, the proceeding will be set aside in revision. 20 Cr. L. J. 775=53 Ind. Cas. 615.

——S. 145 (4)—Defects in procedure—Notice—Decision without.

A Magistrate should not supplement an omission in the final order passed under S. 145 without giving the opposite party notice of it. 19 Cr. L. J. 732=22 C.W.N. 552= 46 Ind. Cas. 412.

——Ss. 145 (3) and (4)—Notice—Decision without.

Want of service of notice under S. 145 (3), Cr. P. Code, is a grave irregularity which vitiates the proceedings. The High Court has jurisdiction to set aside an order under S. 145, Cl. (4) where the provisions in Cl. (3) are not complied with and the parties are prejudiced thereby. Cases reviewed. 4 Pat. L.W. 183=19 Cr. L.J. 71=43 Ind. Cas. 103.

——Ss. 145, 147—Notice of proceedings under S. 147—Inquiry and order under S. 145 without fresh notice.

Where a Magistrate gave notice under S. 147, Cr. P.C., and on its being objected that the section did not apply, proceeded under S. 145, Cr. P. C., as the proper section applicable to the case without giving any notice to the parties as required by Cl. (1) of S. 145 :

Held, that the Magistrate acted without jurisdiction. 5 M.L.T. 103=2 Ind. Cas. 310=9 Cr.L.J. 565= 19 M.L.J. 18.

——S. 145, Cl. (4)—Notice—Order without notice and inquiry—Irregularity—Jurisdiction.

Where a Magistrate fails to follow the procedure prescribed in S. 145 before passing an order under that section, his omission to do so is something more than an irregularity and his order must be deemed to be an order made without jurisdiction. 27 C. 981 ; 7 C.W.N. 174 ; 24 B. 527, Foll. 1903 A.W.N. 102=25 A. 537.

——S. 145, Cl. (3)—Notice—Service of—Irregularity amounting to want of jurisdiction.

A Magistrate drew up a proceeding under S. 145, Cr. P. C., but he did not serve any notice upon the first party in accordance with Sub-Sec. (3) of S. 145, Cr.P.C., nor did he fix a notice in some conspicuous place at or near the subject of dispute nor receive a written statement from either party before he passed his final order under S. 145. There was no appearance on behalf of the first party and no opportunity was given to cite witnesses or to put in any documentary evidence. But on examining one witness on behalf of the second party the Magistrate held that there was a likelihood of a breach of the peace and declared the second party to be in possession. *Held*, That the proceedings of the Magistrate were very irregular and must have prejudiced the first party. That the irregularities were so great as to amount to a want of jurisdiction and to justify the interference of the High Court to set aside the proceeding. 12 C.W.N. 848= 8 C.L.J. 71=35 C. 774.

——S. 145, Cl. (3)—Notice on spot, omission to issue—Jurisdiction—Irregularity—Charter Act (24 and 25 vict. C. 104), S. 15—Superintendence, powe-

of, when and how to be exercised—S. 145, Cl. (4)—"Then," meaning of.

The provision as to publication of the order mentioned in sub-section (3) of S. 145, Cr. P.C., is directory and a matter of procedure only and omission to comply with it does not destroy the jurisdiction of the court which arises as soon as the provisions of sub-section (1) of the section have been complied with. The object of publishing a notice on the subject of dispute is to reach all persons interested therein and unless it be shewn that some one interested has been materially prejudiced by the omission to serve the notice, the High Court ought not to interfere under S. 15 of the Charter Act. The omission to publish a notice under S. 145, Cl. (3), Cr. P. C., in some conspicuous place at or near the subject of dispute is not an illegality which deprives the Magistrate of his jurisdiction. The power of superintendence which the High Court possesses under S. 15 of the Charter Act vests in it a power somewhat analogous to that of the King's Bench Division in the Supreme Court in England to interfere by mandamus. Such power of interference is discretionary and ought, in relation to cases under S. 145, Cr. P. C., to be exercised with every caution. If the subordinate court has proceeded with irregularity, the High Court will not interfere unless some one has been materially prejudiced hereby; if, however, the subordinate court has acted without jurisdiction, the High Court will interfere. The term 'then' in sub-sec. (4), S. 145, Cr. P. C., has reference only to the time or order of the Magistrate's proceedings. 33 Cal. 68=9 C.W.N. 1046=2 C.L.J. 241.

——S. 145, Cls. (3), (4)—Notice—Publication of notice necessary, preliminary—Jurisdiction—Revision.

The publication of a notice locally under sub-s. (3) of S. 145, Cr. P. C., is a condition precedent to the exercise of a Magistrate's jurisdiction in an inquiry as to possession under Cl. (4) of that section. 9 C.W.N. 909.

——S. 145, Cl. (3)—Notice—Possession—Ex-parte order—Service, proof of—Order passed on the evidence of person not called by either party.

A Magistrate should not accept the written return merely of the serving peon as a sufficient service of his order under Cl. (1) of S. 145, Cr. P. C. An order for possession under S. 145, Cr. P.C., passed on the evidence only of a person who was not called by either party was bad. 8 C.W.N. 719.

——S. 145—Notice—Service of—Denial of receipt—Duty of court to investigate.

When a party to the proceeding under S. 145, Cr. P.C., denies receipt of notice of an order drawn up under Cl. (1) the Magistrate is bound to be satisfied before proceeding with the matter, that the notice of the proceeding and the copy of the order drawn up by him were duly served on the party. 8 C.W.N. 76.

——S. 145, Cl. (3)—Notice of place of trial.

In a proceeding under S. 145, Cr. P. C., the second party failed to ascertain where the Magistrate, who had been moving about from place to place, was holding his camp and so failed to procure the attendance of his witnesses at the trial. *Held*, that an order passed by the Magistrate directing the first party to continue in possession was bad, inasmuch as the second party had no notice of the place of trial in sufficient time to procure the attendance of his witnesses. 7 C.W.N. 705.

——S. 145, Cl. (3)—Notice—Omission to issue notice under clause (1), effect of.

Omission to issue notice under clause (1) of S. 145, of the Cr. P.C., goes to the root of the jurisdiction of the Magistrate, and orders passed without such notice are without jurisdiction. 30 Cal. 155=6 C.W.N. 737 (F.B.).

——S. 145, Cl. (3)—Notice—Party absent—Warrant of arrest—Jurisdiction.

A Magistrate has no jurisdiction to issue a warrant to compel the attendance of a party in a proceeding under S. 145. 5 C.W.N. 71.

54. Object of Section.

——S. 145—Object of section.

S. 145, Cr. P. Code, was enacted with the primary object of preventing breach of the peace when such breach was apprehended. The section cannot be used by a party with the object of getting an advantage over the other side by getting into possession of the property and driving the other side to figure as a plaintiff and prove his title. 50 Cr. L. J. 967=A.I.R. 1949 All. 621=1949 A.W.R. 442 (1).

——S. 145—Object—Dispute between two parties——Members of one party in possession under one title—Order of Magistrate upholding their possession is not bad merely because he did not consider separate possession of each member.

Where there is dispute between two parties over some land and the members of one party were in possession under one title and separate possession amongst them was a matter of private arrangement, the order of the Magistrate upholding their possession is not bad merely because he has not considered the separate possession of each particular member of the party or because some members of that party have died during some stage or other of the proceeding. A.I.R. 1946 Pat. 330=12 B.R. 290=25 Pat. 19=47 Cr.L.J. 328=222 Ind. Cas. 611.

——S. 145—Object—Material question for decision is question of possession at date of order under sub-s. (1)—Magistrate is bound to uphold possession of party in possession on that date.

In a proceeding under S. 145, the material question for decision is the question of possession at the date of the order under sub-s. (1) of S. 145. The Magistrate is bound to uphold the possession of the party who was in possession on that date. Where one of the parties who claim possession on the basis of a lease has not admitted that they have given up possession after the expiry of the lease, it would be obviously improper to drop proceedings or set aside the order of the Magistrate when the dispute between the parties still subsists on the ground that the lease is determined by efflux of time. A.I.R. 1946 Pat. 330=12 B.R. 290=25 Pat. 19=47 Cr. L. J. 328=222 Ind. Cas. 611.

——S. 145—Object.

There are two steps in S. 145, Cr. P.C., which are not always kept clearly separate by Magistrates. In the first place a Magistrate has to be satisfied that there is a dispute likely to cause a breach of the peace. Secondly, when a Magistrate has come to that conclusion, he has to decide which party was in possession and to hand over possession to that party A.I.R. 1944 All. 210 =1944 A.W.R. (H.C.) 114=45 Cr. L. J. 769=I.L.R. (1944) All. 285=(1944) A.L.J. 190=215 Ind. Cas. 45.

——S. 145—Object and scope—Mere fact that land in dispute is small area, and that the fact that dispute is of civil nature, whether helps party.

In an inquiry under S. 145 the fact that the land is small in area is a neutral consideration and does not help either party and to say that the dispute is one of a civil nature begs the whole question. If either party has a good case, that pary will obtain a proper decision from a Civil Court; but till such a decision can be obtained, proceedings under the criminal law are taken to avoid a breach of the peace. A.I.R. (1939 Lah. 108=I.L.R.

(1938) Lah. 611=41 P.L.R. 217=40 Cr. L. J. 519=181 Ind. Cas. 59.

——S. 145—Object is to avoid breach of peace—Joint possession is contrary to its object.

The actual purport of S. 145 is to declare possession with the sole object of avoiding breach of peace. But when both parties are in joint possession, to declare them so to be in possession is contrary with the object of S. 145, Criminal P. C., as such an order would in no way be conducive to public tranquillity. The proper procedure in such a case would be to take action under S. 107, Criminal P. C., against the party intending to oust the other's possession. A.I.R. 1935 Nag. 44=17 N.L.J. 216=1935 Cr. Cas. 254.

——S. 145—Object of.

The provisions of S. 145 are directed to enable a Magistrate to pass orders as to retention of possession with the object of preventing a breach of the peace. These orders have no effect as to title, but a special exception is made in favour of persons who have been very recently dispossessed. 6 O.W.N. 957=1929 Cr. C. 641=A.I.R. 1929 Oudh 526.

——S. 145—Object of—Cases, besides the one under S. 145, relating to same subject-matter pending—S. 145 case must be finished first.

The idea of S. 145 is that it is a short and summary manner of awarding possession until other cases connected with the subject-matter of the proceedings under S. 145 are decided so that there may not be breach of the peace. 114 Ind. Cas. 677=30 Cr. L. J. 344=A.I.R. 1928 Rang. 314.

——S. 145—Object of.

In proceedings under S. 145 it does matter that the Magistrate's order should be passed quickly and it does not matter if the finding in regard to possession is wrong. 110 Ind. Cas. 228=29 Cr. L.J. 676=10 A.I.Cr. R. 411.

——S. 145—Object.

It is not one of the objects of S. 145 to protect or maintain any body's possession. The sole object of the proceeding is to prevent an imminent breach of the peace and the decision in regard to it must be made at once. 81 Ind. Cas. 933=25 Cr. L. J. 1109=A.I.R. 1925 Nag. 142.

——S. 145—Object.

The object of S. 145 is to finally terminate the dispute between the parties so far as the Criminal Court is concerned so as to effectively put a stop to any breach of the peace. It is with this object that the decision of the Magistrate under S. 145 is declared to be final and conclusive until it is set aside by a competent Civil Court which determines the right of the parties. 86 Ind. Cas. 806=6 P.L.T. 710=26 Cr. L. J. 870=A.I.R. 1925 Pat. 593.

——S. 145—Object of.

The very object of the proceeding under S. 145 of the Code is to put an end to disputes as to possession of immovable properties so as to prevent a breach of the peace. This object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. The effect of an order rejecting the written statement of certain parties is that his decision under S. 145 will not be binding upon them. 81 Ind. Cas. 442=5 P.L.T. 458=25 Cr. L. J. 906=A.I.R. 1924 Pat. 783.

——S. 145—Object of—Portracted investigation is not within the view of the sections as it tends to defeat its object. 66 Ind. Cas. 419=3 Pat. L. T. 433=23 Cr. L. J. 275=A.I.R. 1922 Pat. 226.

——S. 145—Object of—Dispute as to management of property—Jurisdiction.

The object of the section is limited strictly to the prevention of violent self-help even by a true owner. The questions to be decided are (1) whether the dispute is a dispute concerning land or water or the boundaries thereof, within the meaning of the section, (2) whether the acts found to have been exercised are such as to justify a finding of possession. The mere fact, that the word 'management' is used to describe the acts of possession would not exclude the jurisdiction of the Magistrate. 2 Pat. L. W. 94=18 Cr. L. J. 858=(1917) Pat. H.C.C. 350=41 Ind. Cas. 826.

——S. 145—Object of.

The scope of S. 145 is merely a determination of actual possession for preventing breach of the peace pending a decision on the merits by a Civil Suit and the section does not provide for eviction by a Magistrate or for a decision by him of any claims to a right to hold possession or to reap crops. 18 Cr. L. J. 660=28 P.W.R. Cr. 1917=40 P.R. (Cr.) 1917=40 Ind. Cas. 308.

55. Parties.

——S. 145—Parties.

Misjoinder and non-joinder.

Who are concerned.

——S. 145—Parties—Persons in actual possession made parties—Failure to implead Zamindar also—Will not by itself render the proceedings invalid. 1950 A.L.J. 209=1950 A.W.R. 388=A.I.R. 1950 A. 274=51 Cr. L. J. 769.

——S. 145 (1)—Parties—Original parties dropping out and real parties appearing before Magistrate during enquiry—Fresh preliminary order—If necessary.

If during the progress of an enquiry under S. 145, Cr. P. Code, the person who had moved the Magistrate to start the proceeding, or the person, against whom the proceeding was initiated, drops out, and the persons really concerned in the dispute appear before the Magistrate, the dispute on account of which an apprehension of a breach of the peace had arisen, would still be there and the Magistrate will have to make an order to prevent the same. The dispute being the same and still subsisting, it is not at all necessary to issue a fresh order under S. 145 (1). A.I.R. 1949 All. 623=50 Cr. L. J. 949=1949 A.Cr. C. 157=1949 A.W.R. 553.

——Ss. 145 and 439—Parties—Omission to add party.

S. 439, Cr. P. Code, does not apply to a proceeding under S. 145 which is outside S. 435. On a difference of opinion on revision of such a proceeding the opinion of the senior Judge prevails under Cl. 36 of the Letters Patent, 27 Cal. 892; 40 Cal. 477, 500, relied on; 15 C.L.J. 337, 39 Madras 750, Approved. 15 Bom. 452, Diss. *Semble.*—If it be held that Cl. 36 applies only to original or appellate jurisdiction the Court should act in the absence of any provision to the contrary upon the principle underlying the clause. Per *Huda, J.* The power of the High Court to interfere under S. 107 of the Government of India Act 1915 in cases under S. 145, Cr. P. C. is not confined to questions of jurisdiction alone. It may also interfere when the Magistrate has acted with illegality or material irregularity and a party has been prejudiced thereby. 33 Cal. 68, Foll. Per *Newbould, J.*—The omission to add a party in a proceeding under S. 145 of the Code is not an error of jurisdiction. 30 Cal. 155, Foll. There was no material irregularity resulting in such prejudice as would justify the Court's interference. Per *Shamsul Huda, J.*—Where the refusal of the Magistrate to add a party on his application to the proceeding has

resulted in a serious failure of justice the Court will set aside the order under S. 145. There was such failure of justice in the case. 47 Cal. 438=21 Cr. L. J. 25=31 C.L.J. 183=24 C.W.N. 97=54 Ind. Cas. 169.

——S. 145—Parties.

Although a person is not one of the parties to the dispute but is in possession of part of the land he is a necessary party to the proceedings and should be asked to file a written statement. Where this is not done and where the Magistrate's order does not specifically state that there is a danger of breach of the peace, the High Court on revision will interfere. 85 Ind. Cas. 918=26 Cr. L. J. 630=A.I.R. 1925 Oudh 484.

——S. 145, Cl. (5)—Parties—Person interested, to be allowed to show cause.

Where proceedings have been drawn up under S. 145, Cr. P. C., with respect to a certain plot of land, a person who is the tenant of a part of the property in dispute ought to be allowed an opportunity to show under paragraph 5 that there is no dispute. 14 C.W.N. 708=11 C.L.J. 414=37 C. 285=11 Cr. L. J. 371.=6 Ind. Cas. 545.

——S. 145—Parties—If can be compelled to appear in Court in person or execute bonds for such appearance.

Parties in proceedings under S. 145, Cr. P. Code, cannot be compelled to appear in Court or execute bonds for appearance. The parties can appear by pleader. If they do not appear and let in evidence, then the case will be disposed of *ex parte*, after taking the evidence let in by the other side. I.L.R. (1947) Mad. 234=226 Ind. Cas. 417=59 L.W. 300=1946 M.W.N. 356=47 Cr. L. J. 936=A.I.R. 1946 Mad. 447=(1946) 1 M.L.J. 443.

——S. 145 (1)—"Parties concerned"—Persons not mentioned in original order but who appear on its notification—If become parties to proceedings.

The "parties concerned" may be persons who are not mentioned in the original notice. Persons who are not mentioned in the order under S. 145 (1), Cr. P. Code, but who appear on the notification of that order and file written statements describing themselves as persons interested in the proceedings, become parties to the proceedings, and an order can be made in their favour. 227 Ind. Cas. 157=1946 P.W.N. 85=13 B.R. 8=A.I.R. 1946 Pat. 389=47 Cr. L. J. 1013=27 Pat. L. T. 484.

——S. 145—Parties—Misjoinder and non-joinder—If affect jurisdiction.

Under S. 145, Cr. P. Code, questions of the misjoinder or non-joinder of parties are questions of procedure by which the jurisdiction of the Magistrate is not affected. 30 C. 155, Foll. 25 Pat. 19=12 B.R. 290=222 Ind. Cas. 611=47 Cr. L. J. 328=A.I.R. 1946 Pat. 330.

See also: 7 P.L.T. 156=26 Cr. L. J. 1287=89 Ind. Cas. 151=A.I.R. 1925 Pat. 67.

——S. 145—Parties—Misjoinder and non-joinder.

The inquiry under S. 145, Criminal P. C., is in its nature a summary one and a Magistrate can be expected to wait till every possible interest is represented in the inquiry. If the parties actually in dispute are impleaded, failure to implead those who may be interested in the subject-matter but are not actually claiming a present right to possession does not vitiate the proceedings. A.I.R. 1945 Oudh 12=1944 O.W.N. (C.C.) 287=1944 A.W.R. (C.C.) 196=46 Cr. L. J. 680=220 Ind. Cas. 418.

——S. 145—Parties—One set of co-sharer-landlords, whether can represent entire body in proceedings under S. 145.

In a case of co-sharer-landlords possession of one is the possession of all and one set is capable of representing the entire body in a proceeding under S. 145, Criminal P. C. A.I.R. 1939 Pat. 353=20 P.L.T. 145=5 B.R. 894=40 Cr. L. J. 749=183 Ind. Cas. 286.

——Ss. 145, 537—Parties—Dispute between two persons—Complaint by agent of one of them—Notice to agent of other—Masters not called upon to file written statements—Case proceeding between agents—Magistrate ordering possession of property to be given from one master to another—Order, if valid—Irregularity, if cured by S. 537.

Where from a complaint of the agent of a person and the Police report, it is found that the real dispute is between the master of the complainant and another person, but the Court issues notice to the agent of the latter and the case proceeds between the agents, and without notices being sent to the masters to file their written statements, the Magistrate attaches the property in possession of the master of the opposite party and orders possession to be given to the master of the complainant, the order is invalid and the proceedings should be quashed. Section 537, Criminal P. C., does not cure the omission to implead the master of the opposite party. A.I.R. 1934 All 853=(1934) A.L.J. 650=36 Cr. L. J. 114=4 A.W.R. (H.C.) 896=152 Ind. Cas. 500.

——S. 145—Parties—Dispute between tenant and sub-tenants—Superior landlord, if party.

S. 145, Criminal P. C., is concerned with persons in actual possession, the word 'actual' being used in contra-distinction to constructive possession. Hence, in a dispute between a tenant and his sub-tenants, the superior landlord is not a party to the dispute within the meaning of S. 145. That does not, however, mean that he had no *locus standi* to present a petition under that section in respect of such a dispute as he is interested in the land and his tenants and there can be no legal objection to a Magistrate taking notice of a dispute merely because his attention has been drawn to the dispute by an absentee landlord. A.I.R. 1942 Mad. 534 (1)=55 M.L.W. 297 (2)=(1942) 1 M.L.J. 592=1942 M.W.N. 372=43 Cr. L. J. 741=201 Ind. Cas. 477.

——S. 145—Parties—Tenants in possession, if necessary parties to dispute under S. 145.

The essence of proceedings under S. 145, Criminal P.C., is the determination of the question as to who is in possession. Although a Magistrate is entitled to rescind a preliminary order under S. 145 if he is satisfied that no likelihood of a breach of the peace exists, but in discharging parties to the proceedings who claim to be in possession on the ground that they claim to be in possession as tenants only and are, therefore, not necessary parties, the Magistrate is acting with great irregularity and in a manner not contemplated by the provisions of the section. He is, in fact, envisaging a decision on the question who has the right to possession, which is a matter for a Civil Court and not for a Criminal Court at all. To say that tenants in possession are not necessary parties is to preclude persons who claim to be in possession from giving evidence that they are in possession. A.I.R. 1937 Nag. 93=38 Cr. L. J. 395=I.L.R. (1937) Nag 288=167 Ind. Cas. 500.

——S. 145—Parties—Application to be made.

No notice issued to a person to produce evidence—Nor such person producing any evidence—At the stage of arguments such person applying for being impleaded as a party—Application should be refused. 1936 O.W.N. (C.C.) 147.

——S. 145—Parties—'Parties concerned' means not only persons actually disputing but includes persons concerned in claiming to be in possession—

—Order in favour of party not mentioned in original notice is valid. A.I.R. 1946 Pat. 389=27 P.L.T. 484 =227 Ind. Cas. 157=47 Cr. L.J. 1013.

——S. 145—Parties—All parties claiming right, if should be made parties to proceedings—Dispute between rival lessees—Co-sharers, if necessary parties.

The enquiry under S. 145, Criminal P. C., is confined to the fact of actual possession irrespective of the merits of the claims of the parties concerned. A claim, therefore, merely to a right to possession, as distinguished from a a claim to be in possession, would be outside the scope of the enquiry. It is, therefore, not necessary that all parties interested in or claiming a right to the property in dispute or entitled to it should be made parties to the proceedings.

Consequently, where the dispute is between two rival lessees claiming to be in actual possession and there is nothing to show that there was any other party who also claimed to be in actual possession and notices under S.145 are issued to them alone and not to the co-sharers, there is no defect in the proceeding. A.I.R. 1936 All. 531 =(1936) A.L.J. 796=37 Cr. L. J. 886=1936 A.W.R. (H.C.) 626=164 Ind. Cas. 180.

——S. 145—Parties—Minor.

Where a minor was made party to the order which was drawn up under Sub-S. (1) but no notice was served on him :

Held, though the minor was a proper party being interested in the dispute, he was not a necessary party especially as he would not be a party likely to cause a breach of the peace. 7 P.L.T. 156=26 Cr. L. J. 1287=89 Ind. Cas. 151=A.I.R. 1926 Pat. 67.

——S. 145—Parties—Power of Magistrate—In communal dispute the Magistrate may choose representatives.

In Cr. P. Code, there is no rule of procedure like the one contained in O.1. R.8 of the C. P. Code, by which a representative suit may be brought or a representative defence may be set up in a case under S. 145, and therefore in a dispute between two communities the Magistrate would be justified in choosing out who should be the right people to represent each community and after hearing whom he should either permit a community to do a certain thing or to prevent it from doing it till a Civil Court has decided upon the rights of parties. 86 Ind. Cas. 59=23 A.L.J. 41=6 L.R.A. Cr. 94=26 Cr. L.J. 683=A.I.R. 1925 All. 316.

——S. 145—Parties—Non-joinder.

The omission to implead a tenant in possession of a portion of the disputed land does not make the proceedings defective. 65 Ind. Cas. 567=3 Pat. L.T. 291=23 Cr. L. J. 125=A.I.R. 1922 Pat. 371.

——S. 145—Parties—Non-joinder of necessary parties—Prevention—Jurisdiction.

An apprehension of breach of the peace is a condition precedent to the passing of an order under S. 145, Cr. P.C. And an order under that section can properly be passed only for the purpose of preventing such apprehended breach of the peace. Where there is no breach of the peace apprehended, or where the order is clearly not calculated to prevent the breach of the peace which is apprehended, the order must be treated as passed without jurisdiction. Non-joinder of a party whose presence is necessary for the purpose of preventing breach of the peace makes the order ineffectual for the only purpose for which the order could be passed, and such order is liable to be set aside by the High Court as passed without jurisdiction. 5 C.W.N. 428=28 C. 446.

——S. 145—Parties.

Party may be added provided he was concerned originally in the dispute which was the foundation of the proceeding and there is no necessity for a fresh proceeding. And if a party is added before the enquiry begins, there is no irregularity whether there was then an apprehension of a breach of the peace is a matter chiefly for the exercise of the Magistrate's discretion. For a person to be concerned in a dispute relating to the land, he need not be actually present near the land or have a notice of the proceeding when started 20 C.W.N. 978=17 Cr. L. J. 449 =36 Ind. Cas. 129.

——S. 145—Parties to the dispute—Servant on monthly wages.

The words "parties concerned in such a dispute" in S. 145, include persons interested in or claiming a right to the property in dispute. An order for possession against a servant engaged on monthly wages and in custody of the disputed property does not bind his successor or master. 5 L.W. 118=18 Cr. L. J. 44=36 Ind. Cas. 876.

——S. 145—Parties—Legal representatives—Bringing on record.

The Cr. P. C. does not provide for bringing representatives of accused parties on record. All that the Court has to see is that the application has not abated by reason of the death of one of the parties. 16 M.L.T. 248=27 M.L.J. 613=(1914) M.W.N. 790=15 Cr. L. J. 676= 25 Ind. Cas. 1004.

——S. 145 (1)—Parties—Party claiming right of easement, whether to be impleaded.

A party who does not claim anything beyond the right to worship on one day in the year and the right to make due and proper prepration for the holding of that worship by erecting huts for the puja has a right of easement and not possession and hence he cannot be made a party to proceedings under S. 145. 17 C.W.N. 205=17 C.L.J. 397=13 Cr. L. J. 789=17 Ind. Cas. 533.

——S. 145—Parties—Necessary parties.

In an enquiry under S. 145, a receiver not in actual possession is not a necessary party. 9 M.L.T. 502=12 Cr. L. J. 185=9 Ind. Cas. 1009.

——S. 145 (5)—Parties—Person interested in disputed land.

In a proceeding under S. 145 a person interested in the land in dispute as a tenant of a part of the property should be allowed to show absence of dispute under para 5 of the section. 37 Cal. 285=14 C.W.N. 708=11 C.L.J. 414= 11 Cr. L. J. 371=6 Ind. Cas. 545.

——S. 145—Parties—Dispute as to possession of land—Manager or agent, if order can be made in favour of.

There is jurisdiction in the court under S. 145, Cr.P. C., to make an order in favour of a person who claims to be in possession of the disputed lands as agent to, or manager for the proprietors, when the actual proprietors are not residents within the appellate jurisdiction of the High Court. 7 C.W.N. 208 overruled. 7 C.W.N. 825= 31 C. 48. (F.B.).

——S. 145, Cl. (1)—Parties—Manager of resident principal made party—Possession—Encroachment.

To have made the manager of a resident land-lord a party is a mere irregularity, or at most an error of law, and does not affect the jurisdiction of the Magistrate. Any intermittent encroachment on the part of a tenant on the adjoining jungle of the landlord cannot affect the title or possession of the superior landlord. 16 B. 338 and 13 A.C. 793 ref. to. 32 C. 287.

——S. 145, Cl. (1)—Parties—New proceeding with new parties added, whether can be treated as continuation of previous proceeding.

In a proceeding under S. 145, Cr. P. C., the Magistrate should find out in the first instance which parties are concerned in the dispute which has arisen, and to serve his order upon such parties and when the matter comes before him for trial, he should determine which of such parties, *viz.*, the parties as mentioned in the first paragraph of S. 145 of the Code, is in actual possession. A Magistrate is entitled to allow a third party to come in the course of the proceedings only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists. *Quaere*—Whether, such third party should be made a party to the proceeding. A Magistrate has not the power after recording the proceeding, as he is required to do under the first paragraph of the section, to add, in the course of the investigation, any new party as concerned in the dispute. 24 C. 55 ; 3 C.W.N. 329; 27 C. 892, Foll. A Magistrate cannot treat a subsequent proceeding as a continuation of an earlier one, and he cannot refer back to the possession held by one or other of the parties upon the date of the earlier proceeding in determining which of them should be declared to be in possession on the date of subsequent proceeding. 5 C.W.N. 900.

——S. 145, Cl. (1)—Parties—Receiver of Court made party—Jurisdiction.

A receiver appointed by a court cannot be correctly described as a party interested in a dispute likely to cause a breach of the peace and even if he can be, a Magistrate has no jurisdiction to pass an order on him under S. 145 of the Criminal Procedure Code, without the sanction of the court that appointed him. 7 C.W.N. 390=30 C. 593.

——S. 145, Cl. (1)—Parties—Order in favour of the manager of the proprietors of an indigo concern—Jurisdiction.

An order under S. 145, Cr. P. C., was passed in favour of the manager, who was an employee of the proprietors of an indigo concern. *Held* that the order was without jurisdiction. 7 C.W.N. 203. *See* also 5 C.W.N. 428.

——S. 145, Cl. (1)—Parties to the proceedings—Breach of peace.

The object of S. 145 of the Cr. P. C., is not to settle who is in actual possession of land but to prevent a breach of the peace by declaring one disputant to be in possession and referring the other or others to establish their claims in a civil court. The making of only such persons parties as on the information of the Magistrate were disputants likely to cause a breach of peace and the omission to make other persons who are interested in the land parties does not affect the jurisdiction of the Magistrate or affect the validity of his order. The words "parties concerned in the dispute" mean all persons claiming to be in possession at the time of the initial order of the Magistrate under Cl. (1) of the section including those who not being actual disputants yet claim to be in possession. Actual possession and not a mere *right to* possession is within the scope of the in uiry referred to in the section. The Magistrate has power to add parties even after the initial order under clause (1) until the inquiry begins and he may so add either of his own accord or on the application of parties. To add parties afterwards would lead to much inconvenience and prolong the proceedings, but it is an not irregularity which will vitiate the proceedings. In order to give the Magistrate jurisdiction to inquire, a dispute as to land likely to cause a breach of the peace must exist and he must issue the preliminary order under Cl. (1). Independent dispute as to several lands must be settled by separate inquiries. But if the dispute relates to several parcels, it may be settled in the same inquiry, though some of the disputants claim possession of only some parcels. If parties are added after the inquiry is started, the proceedings need not commence afresh, but the new parties may require the evidence already taken to be taken afresh in their presence. 6 C.W.N. 737=30 C. 155 (F.B.).

——S. 145, Cl. (1)—Parties concerned in such dispute—Claims by tenants of Zemindars—Zemindars not made parties—Effect of—Zemindars not claiming.

Where in a proceeding under S. 145, Cr. P. C., two sets of tenants who claimed possession of the disputed lands were made parties and their landlords were not, though the latter were persons interested in the dispute, still when they had never moved in the matter themselves, an objection as to want of necessary parties made by the tenants was considered not *bona fide* and was not entertained. 6 C.W.N. 206.

——S. 145—Parties—Magistrate's duty to ascertain all parties interested—Effect of all parties not being called—Jurisdiction.

The principal object which a proceeding under S. 145, Cr. P. C., aims at is the prevention of a breach of the peace and such object cannot be achieved if persons who are interested in claiming possession of the land in dispute and persons who are alleged to be in *de facto* possession of a portion of such land are not made parties to it ; and an order made under the section in the absence of such parties is made without jurisdiction. It is the duty of a Magistrate, before he institutes proceedings under S. 145, Cr. P. C., not only to be satisfied that a dispute exists, but also to ascertain,so far as is possible, who are the parties concerned in the dispute. 1 C.W.N. 3 and 24 C. 55, Foll. 6 C.W.N. 101.

56. Pendency of civil suit.

——S. 145—Pendency of civil suit.

Where a civil suit is pending for the determination of the rights of the parties in certain property, proceedings under S. 144 should not be started; if immediate steps are necessary to avert a serious breach of the peace, the parties may be bound down under S. 107. 24 C.W.N. 1039=32 C.L.J. 255=59 Ind. Cas. 643.

——S. 145—Pendency of civil suit.

A Magistrate's order under Chap. XII in proceedings instituted subsequent to a civil suit, cannot be treated as conclusive on the question of possession. 3 L.W. 233=(1916) 1 M.W.N. 184=33 Ind. Cas. 1000.

——S. 145—Pendency of civil suit.

A Magistrate is competent to proceed under S. 145 even if a civil suit is pending under S. 9 of the Specific Relief Act. 36 Cal. 370=13 C.W.N. 530=9 Cr. L. J. 399=1 Ind. Cas. 817.

56-A. Period of Possession.

——S. 145—Period of possession—Possession at date of preliminary order.

Under S. 145, Cr. P. Code, the Magistrate has to decide on enquiry and to give a finding as to whether any and which of the parties was in possession of the property in dispute at the date of the preliminary order. The only exception to this rule is the case where one of the parties has been forcibly and wrongfully dispossessed within two months of the date of the order in which case the Magistrate is to treat such person as having been in possession at the date of the preliminary order under the proviso to sub-s. (4). Except as provided by this proviso, the Magistrate is not concerned with the previous possession or with the question as to how the possession was obtained

though he may take these facts into consideration in deciding the question of possession at the date of the preliminary order. The Magistrate has no power to decide who should be in possession of the property in future without reference to possession at the date of the preliminary order. 51 P.L.R. 301=A.I.R. 1949 E.P. 398=3 A.I. Cr. D. 617 =51 Cr. L. J. 3.

——S. 145 (4), Proviso 1—Period of possession—If extendable.

The period of two months prescribed by the proviso under no circumstances can be extended.

Therefore, when the *B* party were in possession when the petitioner filed his petition under S. 145 and had been in possession for four months when the preliminary order was passed, the *B* party are entitled to possession until evicted in due course of law. A.I.R. 1945 Mad. 216= 1945 M.W.N. 109=(1945) 1 M.L.J. 210=58 M.L.W. 207=46 Cr. L. J. 767=220 Ind. Cas. 451.

——Ss. 145, 144—Period of possession—Two months should be counted backwards from order under S. 144.

Where the proceeding under S. 144 is intended to be no more than a fore-runner of a proceeding under S. 145, the two months to be considered under the first proviso to Sub-S. (4), should in such cases be counted backwards from the date of the order under S. 144. Otherwise, manifest injustice might result to a party forcibly and wrongfully dispossessed in this period but more than two months before the date when the proceeding under S. 145 is actually drawn up. A.I.R. 1942 Pat. 489=44 Cr. L.J. 95=9 B.R. 91=203 Ind. Cas. 521.

——S. 145—Period of possession—Two months' period, when begins.

Two months mentioned in the proviso to Cl. (4) of S. 145 mean two months from the date of the preliminary order and not two months from the date of the complaint. A.I.R. 1941 Oudh 515=1941 O.W.N. 848 (C.C.) (2) =42 Cr. L. J. 710=1941 A.W.R. (C.C.) 247=195 Ind. Cas. 236.

——S. 145—Period of possession—Words of Proviso to Sub-S. (4) mean two months before date of preliminary order under Sub-S. (1).

An inquiry under Sub-S. (4) of S. 145, Criminal P. C., is as to possession on the date of the preliminary order under sub-S. (1) and the words of the proviso "within two months next before the date of such order" are precise and unambiguous. These words afford no scope for holding that in those cases where a Magistrate does not make a preliminary order within two months of the dispossession, the party complaining is still entitled to proceed under S. 145. Those words mean two months before the date of the preliminary order. A.I.R. 1940 Sind. 33=41 Cr. L. J. 486=I.L.R. (1940) Kar. 162= 187 Ind. Cas. 636.

——S. 145 (4), Proviso—Period of possession—Magistrate deciding complainant to be in possession at date of order under sub-S. (1)—Whether should see if any of parties had been dispossessed within two months next before the order.

A perusal of the proviso together with sub-S. (4) of S. 145, Criminal P. C., leaves no room for doubt that the procedure prescribed in the proviso is not mandatory and that if a Magistrate chooses to act under sub-S. (4) that is to say, decides the question which of the parties was in possession at the date of the order made under sub-S. (1), it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order. Where the Magistrate had decided on the evidence before him that the complainants are in possession, no question arises as to who was in possession two months before the passing of the preliminary order. A.I.R. 1939 Oudh 31=1938 O.W.N. (C.C.) 1018 (2) =39 Cr. L. J. 963=14 Luck. 240=177 Ind. Cas. 974.

——S. 145—Period of possession—Period of two months, if should be counted from the date of the complaint or from the date of the preliminary order.

In view of the proviso to sub-Cl. (4) of S. 145, Criminal P. C., a Magistrate cannot make an order under S. 145 if it is found that the person making an application under that section had been dispossessed more than two months before the date on which the Magistrate issued a notice as required by the provisions of S. 145 (1), Criminal P. C. A person complaining of forcible dispossession under S. 145 cannot claim the benefit of that section if the dispossession took place more than two months prior to the date of the preliminary order under Cl. (4), S. 145 and not from the date of the complaint. A.I.R. 1935 All. 35= 36 Cr. L. J. 102=(1934) A.L.J. 1157=4 A.W.R. (H.C.) 929=57 All. 488=152 Ind. Cas. 496.

——S. 145 (4), Proviso—Period of possession—Forcible dispossession within two months of complaint but more than two months before date of preliminary order—Applicability of proviso.

Under the proviso to Sub-S. (4) of S. 145, Criminal P. C., a Magistrate cannot treat a party who has been forcibly dispossessed more than two months before the date of the preliminary order as if he had been in possession on the date of the preliminary order, even if his dispossession had taken place within two months of the date of his complaint. The words 'within two months next before the date of such order' clearly mean within two months of the date of the preliminary order. A.I.R. 1931 Nag. 38=26 N.L.R. 377=32 Cr. L. J. 476=130 Ind. Cas. 153.

——S. 145—Period of possession—Opposite party being admittedly in possession at date of order—S. 146 is inapplicable.

N applied under S. 145 for an order restoring him to possession of a house from which he had been dispossessed by *G*, five days before the date of the petition. *G* replied that he had been in possession of the house for many years and that there was no such dispute as was likely to bring about a breach of the peace. The Magistrate holding that the evidence of either party was untrustworthy held that it was impossible to decide on the evidence whether any or which of the parties was at the date of his preliminary order in possession of the house. He, however, took action under S. 146:

Held, that the portion of the order of the Magistrate where he stated that it was impossible to decide which party was in possession on the date of the preliminary order was wrong as admittedly *G* had been in possession since at least five days before the application by *N*. There was no necessity to decide as to who was in possession on the date of his order:

Held further that it could have been competent for the Magistrate to take action under S. 146 had none of the parties been in possession at the date of preliminary order if it could not be decided as to which of them was in possession at the date. But as *G* was in possession then S. 146 did not apply. The Magistrate could have also restored possession under S. 145 (6) to *N* if he could have held that he was in possession within two months next before the date of the preliminary order. A.I.R. 1930 Lah. 422=126 Ind. Cas. 577.

——S. 145—Period of possession.

A Magistrate cannot take into consideration the effect of an alleged dispossession more than two months prior to the date of his order, he is required to decide which of the parties between whom a dispute exists is in possession of the subject of the dispute at the time when the

Magistrate decides the question of possession. 15 Bom. 152, Foll. 4 Cal. 417, Doubted. 120 Ind. Cas. 90=1930 Cr. C. 68=30 Cr. L. J. 1124=A.I.R. 1930 Sind 52.

——S. 145—Period of possession—Magistrate delaying preliminary order beyond two months, though *bona fide*—Complainant is still entitled to benefit of S. 145.

Where a person who is entitled to complain of forcible dispossession goes before a Magistrate and complains of forcible dispossession, if for no reason or any fault of his, the Magistrate does not pass a preliminary order at once, but delays the passing of the order though it may be *bona fide*, the person who complained to him of forcible dispossession should not be deprived of the benefit of S. 145 by reason of the delay caused in the Magistrate's Court. A.I.R. 1927 Mad. 816, Foll. 52 Mad. 66=28 M.L.W. 504=113 Ind. Cas. 336=2 M. Cr. C. 28=30 Cr. L. J. 144=11 A.I. Cr. R. 551=A.I.R. 1929 Mad. 198=56 M.L.J. 33.

——S. 145—Period of possession.

"Two months" from the date of the order mean two months from the date of the order and not two months from the date of the complaint. A.I.R. 1929 Mad. 198. Diss. from. 6 O.W.N. 957=1929 Cr. C. 641=A.I.R. 1929 Oudh. 526.

——S. 145—Period of possession.

The mere ouster of people with no title to the land without using any physical violence and removing of things which had no right to be on the land, cannot be said to be an unlawful entry on the land, and if person so taking possession is dispossessed by force from the land within 2 months of the order under Sub-S. (2), he is entitled to be restored to possession 44 C.L.J. 593=99 Ind. Cas. 1010=28 Cr. L. J. 210=7 A.I. Cr. R. 383=A.I.R. 1927 Cal. 261.

——S. 145—Period of possession.

When the party dispossessed moves Court to take action and a delay of over two months occurs before Court makes order, the party dispossessing cannot be retained in possession on the ground. 8 A.I. Cr. R. 574=104 Ind. Cas. 110=28 Cr. L. J. 782=A.I.R. 1927 Mad. 816.

——S. 145—Period of possession.

It is not necessary for the plaintiff in whose favour an order under S. 145 has been passed to bring a suit within three years for recovery of possession of the property which was the subject-matter of the proceedings before the Magistrate as the possession of the forcible dispossessor is deemed to be the possession of the person forcibly dispossessed provided the forcible dispossession was within two months of the date of the preliminary order. 1927 M.W.N. 35=99 Ind. Cas. 532=38 M.L.T. 217=A.I.R. 1927 Mad. 304.

——S. 145—Period of possession.

Sub-S. (4) makes it incumbent on the Magistrate to decide which of the parties was in possession on the day the preliminary order was passed and the proviso only applies if any other party had been forcibly dispossessed within two months thereof. 27 Cr. L. J. 68=91 Ind. Cas. 244=A.I.R. 1926 Nag. 371.

——S. 145—Period of possession.

Where on the date when the proceedings under S. 145 were instituted and for more than two months preceding that date, the members of the first party had been, and were in possession having dispossessed the 2nd party, *held*, possession could not be given to the second party under S. 145. 75 Ind. Cas. 76=49 Cal. 177=25 C.W.N. 743=24 Cr. L. J. 875=A.I.R. 1922 Cal. 364.

——S. 145—Period of possession—High Court cannot vacate the order of the Magistrate in favour of the party who was in possession a few days before the preliminary order.

When a party is found to be in possession a few days before the preliminary order and when there is nothing on the record to suggest that there was any change of possession, the Court is not bound in revision to vacate the order in his favour although it is irregular, there being no finding that he was in possession on the date of the order. A Magistrate should maintain the possession of a party who has a decree of a competent Court and who was put in possession in execution. 65 Ind. Cas. 444=23 Cr. L. J. 92=14 M.L.W. 678=1921 M.W.N. 866=A.I.R. 1922 Mad. 356=42 M.L.J. 147.

——S. 145, Cl. (4), Proviso—Period of possession—"Two months"—Computation of.

The material date for the computation of the period of two months is the date of the order by the Magistrate and not the date of complaint. The possible hardship that might arise in view of the delay of a Magistrate in passing the preliminary order is no reason for construing the plain words of the section otherwise than in their ordinary sense. A.I.R. 1931 N. 38=130 Ind. Cas. 153=32 Cr. L. J. 476=26 N.L.R. 377.

——Ss. 145 (1), (4) and 144—Period of possession—Injunction.

In a proceeding under S. 145, a party who entered into possession and retained possession under S. 144 should be declared to be entitled to possession until evicted in due course of law; the period during which the injunction was in force against his opponent cannot be excluded. 18 Cr. L. J. 301=38 Ind. Cas. 333.

——S. 145 (4) and (1)—Period of possession—Wrongful and forcible dispossession.

Where in a proceeding under S. 145, Cr. P. C., one of the parties within two months from the commencement of the proceeding obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party in possession. *Held*, that it was forcible and wrongful dispossession within the meaning of Sub.-S. 4 (1) of S. 145. 20 C.W.N. 978=17 Cr. L. J. 449=36 Ind. Cas. 129.

57. Possession.

——S. 145—Possession—"Actual possession"—Determination of—Principles applicable—Question of title and declaration of title by the Civil Court in favour of one of parties—If and when relevant—Dispute concerning unworked minerals—Distinction between true owner and trespasser in considering evidence of actual possession—If can be made.

Per *Sinha and Das, JJ.*—In a proceeding under S. 145, Cr. P. Code, the Magistrate is concerned only with the question of actual possession, and he must determine that question irrespective of the right to possession. Such a proceeding can be initiated in respect of mineral rights if there is a dispute as regards possession between contending parties leading to an apprehension of a breach of the peace. Of course, it is open to the Magistrate ultimately to drop the proceedings on coming to the conclusion either that there was no apprehension of a breach of the peace or that the claim of one party was a mere pretence. If the Magistrate comes to the conclusion that, in spite of a clear declaration of title in favour of one party by a Court of competent jurisdiction, the judgment-debtor is in actual physical possession of the property, he must declare that possession unless he comes to the conclusion that the dispossession of the true owner took place within two months before the initiation of the proceedings. But,

if the Magistrate finds that there is a clear declaration of title in favour of one party as against another party whose evidence of actual possession is not reliable, the Magistrate may declare the true owner's possession, however slight his evidence of actual possession may have been. It is not open to the Magistrate in such a proceeding to *determine* questions of title as between the contending parties; but, where there has been a determination of that question by a Court of competent jurisdiction he may respect that determination in valuing the evidence of actual possession led on either side.

A Magistrate deciding a dispute about unworked minerals under S. 145, Cr. P. Code, is not totally precluded from considering the evidence of title in its bearing on the question of actual possession. Moreover, without calling in aid the doctrine of "possession follows title," the nature of proof necessary to show actual possession of underground minerals on behalf of a true owner may be different from that on behalf of a trespasser, because the two may not stand on the same footing as regards the two constituent elements of possession—animus and corpus. Even as an inference of fact the inference which is made from certain acts by the true owner need not be the same as made from similar acts by the trespasser; this will depend on the circumstances of the case with reference to the subjective and objective elements of possession. Therefore, a Magistrate does not commit any error if in considering the evidence of actual possession and drawing inferences therefrom, he makes a distinction between the true owner and a trespasser, provided he always keeps in mind that he has to decide the question of actual possession (even that of a trespasser) and proof of title is not necessarily proof of possession. 18 Pat. 215, cons.

Per *Meredith, J., contra*—In a proceeding under S. 145, Cr. P. Code, the Magistrate has to see that the statements of claim filed by the parties are confined to questions of possession. He must strictly follow the wording of the section and make his decision without any reference to the merits of the respective claims to title. He is to decide only the question of actual possession upon the evidence as to actual possession; and in considering that evidence he must not let himself be biassed one way or the other by his opinion on the question of title. In suitable cases, as an inference of fact, the Magistrate may find actual possession where it cannot be said that there is complete physical possession, all the time, of the whole but any inferences he draws must be inferences from physical facts and physical acts, and not from questions of title. It is one thing to infer possession from certain acts at intervals, or over the whole from the part, and quite a different thing to infer it from the title. The first is permissible to the Magistrate and consistent with the wording of S. 145, Cr. P. Code. The second is debarred. The one has its basis in physical possession, the other has no connection with that and is quite consistent with a complete absence of any physical connection with the property. Moreover, the criteria which a Magistrate uses in judging the evidence of both parties must be the same, and must not be influenced in favour of one party by his opinion of the title.

The above observations have no reference to cases where the title is not in dispute. Where there are no rival claims to a right to possess the subject-matter of dispute, S. 145 contains nothing debarring the Magistrate from referring to the title, should that serve any useful purpose. Further, the Magistrate is not debarred from referring to a delivery of possession and coming to a decision as to whether it was effective or not. Delivery of possession is a matter entirely distinct from title, though it may follow a decree for title. It is a relevant fact in deciding the question of possession that at some previous time one party had obtained delivery of possession and that fact will cast some onus upon the opposite party to show that the possession brought about by the delivery did not continue. This is in no way inconsistent with the view that the Magistrate must not refer to the merits of rival claims to title or use any opinion he may have formed upon that matter to reinforce the evidence of one party or the other.

In a case where the minerals have been found to be unworked and consequently, not in the actual possession of anyone, it is not open to the Magistrate to find possession for the purpose of an order under S. 145 by applying the principle of constructive possession, namely, that possession follows title. Actual possession of minerals in the ground must always be more or less notional, but it has nevertheless nothing to do with any inference from title. The inference must be from acts in regard to the property. No distinction can be made between the possession of a trespasser and a true owner in proceedings under S. 145, Cr. P. Code. 18 P. 215, Diss. from. 27 Pat. 1027=50 Cr. L. J. 299=A.I.R. 1949 Pat. 146=30 P.L.T. 41 (S.B.).

——S. 145—Possession—Actual possession—Question of right to possession or rightful possession—If arises—Order on written statements only—Propriety.

S.145, Cr. P. Code, is concerned solely with actual possession; the question as to how the party came into possession does not arise for consideration; nor is the Magistrate concerned with rightful possession or competent to deal with the right to possession. The question of actual possession cannot of course be decided by the Magistrate on no evidence at all or merely on the written statements of the parties. 3 A.I. Cr. D. 296=A.I.R. 1949 E.P. 231=50 Cr. L. J. 573.

——S. 145—Possession—Disputes as to right to—Contending parties not in actual possession—Proceeding, if can be taken.

The word "dispute" in S. 145 (1), Criminal P. C., means a dispute without reference to the claims of the contending parties as to their actual possession. The section can, therefore, be invoked in cases where the contending parties are not in actual possession at the time of the prliminary order but have *bona fide* rights to succeed to the property and there is a serious danger of a breach of the peace if action under the section is not taken. Pak. L.R. (1949) Lah. 466=A.I.R. 1949 Lah. 273=51 Cr. L. J. 55.

——Ss. 145 (4) and 146—Possession—Nature of possession contemplated under S. 145 (4)—Scramble for possession and scrappy work done here and there to support plea of possession—Proper order to pass in such a case.

Where there has been a scramble for possession between the two parties and in that scramble some kind of work here and some kind of work there has been done by one side or the other to lend support to their pleas of possession, such possession of a fugitive, scrappy or recent character is not the possession that is contemplated under sub-Cl. (4) of S. 145 of the Cr. P. Code, as the possession which should be maintained by the Magistrate subject to the result of the decision of a Civil Court. In such a case neither has effective possession and under such circumstances, the proper order to make is one under S. 146, namely, that the property be attached until a competent Court determines the rights of the parties or determines who is the person entitled to possession. 1947 M.W.N. 522=60 L.W. 576=49 Cr. L. J. 65 (1) =A.I.R. 1948 Mad. 118 (1)=(1947) 2 M.L.J. 276.

——S. 145—Possession—Lessee ousted by lessor under order of magistrate procured on wrong information—If amounts to "forcible" eviction—Right to restoration of possession—Dropping of proceedings under S. 145 (5)—When permissible—Absence of further violence—If ground for drop-

ping proceedings—Continuance of breach of peace —If necessary for making final order.

Where it is found that the petitioner, a lessee, was in possession and had been evicted by the lessor only by notice obtained on incorrect representation to the Magistrate and it was only by the issue of a notice on such incorrect recitals that the petitioner's servants were made to vacate the building, it must be considered that there was a forcible eviction of the petitioner, and an order should be made declaring that the lessee is entitled to be in possession, that he was in possession, that he was forcibly ousted and is entitled to have his possession restored. It is only if there has been a subsequent settlement or if the petitioner agreed to give up his lease and not to claim back possession of the property that action can be taken under S. 145 (5) Cr. P. Code, and proceedings dropped. Merely because there has been no further violence, it could not be said that there cannot be a breach of the peace and that proceedings should be dropped. A continuance of the breach of the peace is not necessary before a final order could be passed. 59 L.W. 645=1946 M.W.N. 692=229 Ind. Cas. 530=48 Cr. L.J. 435=A.I.R. 1947 Mad. 133=(1946) 2 M.L.J. 349.

——S. 145—Possession—Order declaring possession in favour of parties disclaiming interest—Evidence supporting possession of person disclaiming same—Finding on—Sustainability.

Where certain parties to proceedings under S. 145, Cr. P. Code, disclaim any interest in disputed properties, but the Magistrate declares possession in their favour also, that vitiates the order passed by him. Where the Magistrate relies on evidence which proves possession in favour of persons who themselves do not claim to be in possession of the property, such evidence, and the finding based upon it, can hardly be said to be inspiring or worthy of credence. (1946) P.W.N. 278=13 B.R. 539=231 Ind. Cas. 90=48 Cr. L. J. 683=A.I.R. 1947 Pat. 175.

——S. 145—Possession—"Actual possession" has no reference to any right to possess.

What the Magistrate is concerned within proceedings relating to disputes as to immovable property under Chap. XII, Criminal P. C., is not the right to possess the subject matter of dispute but the actual possession thereof at the date of the order under Cl. (1). S. 145. The expression 'actual possession' is plain and unambiguous and has no reference to any right to possess. A.I.R. 1940 Sind 61=41 Cr. L. J. 493=I.L.R. (1940) Kar. 421=187 Ind. Cas. 627.

——S. 145—Possession.

Possession of document is not enough. Actual possession is the only deciding factor. 1935 M.W.N. 1064.

——S. 145—'Possession' contemplated is actual and exclusive possession and not joint or constructive possession. A.I.R. 1941 Oudh 515=1941 O.W.N. (C.C.) 848 (2) =42 Cr. L. J. 710=1941 A.W.R. (C.C.) 247=195 Ind. Cas. 236.

——S. 145—Possession—Squatter, rights of.

Even a squatter is entitled to the benefit of S. 145 unless his' possession began within two months of the filing of the petition. 1937 M.W.N. 732.

——S. 145—Possession—"Actual possession" means actual physical possession though wrongful—"Dispute" means actual disagreement at the time though the question is previously decided by Civil Court (Mukherji, J. differing).

Per *Full Bench.*—The words "actual possession" in sub-S. (1), S. 145, mean actual physical possession even though wrongful, *e.g.*, that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145, and the word "dispute" in the same sub-section means actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to the right to possession has already been decided by a Civil Court.

Per *Mukherji, J.*—The word "dispute" in sub-S. (1) S. 145, means actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to right to possession has already been decided by a Civil Court if the decision of the Civil Court amounts only to a determination of the right to possession, except in cases where such right and a consequent claim to possession have been negatived by a decree which is either *inter partes* or may be treated as such, as also in cases in which *khas* or actual possession has been delivered by the Civil Court either *inter partes* or between parties who may, in effect, be regarded as parties to the proceedings. The words "actual possession" in sub-S. (1). S. 145, mean actual physical possession even though wrongful, *i.e.*, that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145, provided the dispute as to possession has not been determined by a Civil Court as explained above. 113 Ind. Cas. 181=48 C.L.J. 193=32 C.W.N. 1173=56 Cal. 290 =11 A.I. Cr. R. 433=30 Cr. L. J. 69=A.I.R. 1928 Cal. 610 (F.B.).

——S. 145—Possession—Actual possession.

The word "actual" in S. 145 used in relation to possession, must be interpreted in the sense of only such actual possession as the nature of the property is susceptible of. 84 Ind. Cas. 942=11 O.L.J. 743=26 Cr. L.J. 398=A.I.R. 1925 Oudh 251.

——S. 145—Possession—Evidence—Value of police report—If admissible in evidence.

The police report and the evidence contained therein is inadmissible in evidence about the factum of possession in a proceeding under S. 145, Cr. P. Code. It is useful simply for initiating the proceeding. 1 P.L.T. 501= 21 Cr. L. J. 735=58 Ind. Cas. 159.

——S. 145—"Possession"—Meaning—Notional possession—Sufficiency — Continuous possession — What is—Tenant attorning to third party—If dispossession of landlord.

Possession within the meaning of S. 145 of the Cr. P. Code, is actual possession and not notional possession (*e.g.*, by attornment). Continuous possession for purposes of S. 145, Cr. P. Code, means such possession which is party in possession may have occasion to exercise and has exercised and exercises whenever and wherever he or she likes. In the case of tenanted lands, it has to be by receiving the share of the produce. The tenants of a party in possession cannot by merely attorning to another deprive their landlord of the latter's possession, and the landlord cannot be said to be dispossessed unless there has been delivery or payment of the produce by the attorning tenants to that another. 15 Cal. 527, Foll. I.L.R. (1949) Cut. 635=A.I.R. 1950 Orissa 59=51 Cr. L. J. 674.

——S. 145—Possession—Rule, "possession of tenant is possession of landlord"—Applicability.

The rule that the possession of the tenant is the possession of the landlord does not apply as between landlord and tenant. But as between rival landlords or between a landlord and the tenant of another landlord, the rule will apply.

[Whether tenants can be made parties discussed.] A.I.R. 1945 Mad. 255=1945 M.W.N. 104=(1945) 1 M.L.J. 303=58 M.L.W. 272=46 Cr. L. J. 730= 220 Ind. Cas. 309.

——S. 145—Possession through tenant, whether such possession.

The words "actual possession" found in S. 145, Criminal P. C., mean actual physical possession, even though wrongful. The words are sufficiently clear and they can only mean possession in fact as distinguished from possession implied by law, or constructive possession. A party cannot be said to be in possession of land within the meaning of S. 145 when it is the possession claimed through the tenant, *i.e.*, constructive possession. A.I.R. 1938 Mad. 654=1938 M.W.N. 252=47 M.L.W. 340 =(1938) 1 M.L.J. 453=39 Cr. L. J. 922=177 Ind. Cas. 584.

——S. 145—Possession—Partition between A and B after harvest—A willingly accepting partition and saying that B's share was to be his—Amounts to giving over possession to B—B's repairing bunds and cultivating seed-bed, is sufficient to constitute possession. A.I.R. 1942 Mad. 249=(1941) 2 M.L.J. 1047=1942 M.W.N. 38=43 Cr. L. J. 487=199 Ind. Cas. 320.

——S. 145—Possession—Land cultivated by heirs of Zamindar on his behalf—Person squatting on such land —Heirs declaring to be heirs of such person in respect of some land—Does not amount to forcible ousting of Zamindar. A.I.R. 1940 Sind 33=41 Cr. L. J. 486= I.L.R. (1940) Kar. 162=187 Ind. Cas. 636.

——S. 145—Possession—Held on facts that person was in possession of minerals at places being worked by him —Operation carried on by person, held did not constitute ouster of proprietor's possession over unworked minerals. A.I.R. 1939 Pat. 209=20 P.L.T. 105=5 B.R. 711=18 Pat. 215=40 Cr. L. J. 631=182 Ind. Cas. 89.

——S. 145—Possession—Mere delivery certificate not possession.

An auction-purchaser in court sale to whom delivery of certificates has been granted but who has not been placed either actually or symbolically in possession, cannot be declared to be in possession under S. 145, Cr. P. C. 31 M. 416=4 M.L.T. 189.

——S. 145—Possession—Successful party's possession, if can be guaranteed.

The Magistrate cannot guarantee keeping the successful party in peaceful possession, even as against the other party or parties to the proceeding, nor can he prevent that party from parting with the land and afterwards changing his mind. A.I.R. 1938 Pat. 1=18 P.L.T. 886=4 B.R. 211=39 Cr. L. J. 268=173 Ind. Cas. 107.

——S. 145—Possession—Trespasser obtaining possession and sowing crops—Title, if established.

Possession is not lost because trespassers go without license and plough the land.

If trespassers obtain possession for a sufficient length of time to sow crops themselves, they cannot be said to have established a title to remain in possession and are not amenable to the sanctions of the criminal law. A.I.R. 1936 Nag. 192=I.L.R. (1936) Nag. 205=38 Cr. L. J. 307=166 Ind. Cas. 709.

——S. 145—Possession—Delivery of possession in execution of warrant—Possession is at an end.

When a person knows that possession had been delivered in execution of a warrant obtained against him, his possession is at an end. A.I.R. 1936 Nag. 192=I.L.R. (1936) Nag. 205=38 Cr. L. J. 307=166 Ind. Cas. 709.

——S. 145—Possession—Decree holder's possession lawful against one but unlawful against another —Possession, whether can be maintained under S. 145.

For the purposes of S. 145, Criminal P. C., a decree-holder has no advantage over anyone else except that he can date his possession from the date when the Court delivered possession to him, but he must maintain that possession as any other person would have to maintain it. His possession might be lawful as against one person and unlawful as against another but the possession is his. Such possession can be maintained under S. 145. A.I.R. 1934 Nag. 217=36 Cr. L. J. 52=17 N.L.J. 261= 31 N.L.R. 97=152 Ind. Cas. 28.

——S. 145—Possession—No overt act beyond taking possession under orders of Court—Continued possession of another party, if broken.

Possession given by the Court, even though there be no overt act beyond the actual taking of possession under the orders of the Court, breaks a previous continued possession of another party. A.I.R. 1934 Nag. 217 =36 Cr. L. J. 52=17 N.L.J. 261=31 N.L.R. 97=152 Ind. Cas. 28.

——S. 145—Possession—Isolated act of trespass, does not amount to possession as against rightful owner in possession. A.I.R. 1934 Pat. 565=36 Cr. L. J. 146= 1 B.R. 65=15 P.L.T. 819=152 Ind. Cas. 591.

——S. 145—Possession—Delivery of possession made by Civil Court.

Once it is established that possession was delivered, that fact proves the possession of the party taking delivery on the date when it was delivered and raises a strong presumption in favour of the continuance of that possession unless the other side can show that subsequently they have succeeded effectively in displacing the holder of it and restoring their own possession. On the other hand, there is no rule of law that a Magistrate is bound to accept the evidence that the Civil Court peon went to the village and actually performed the acts which are required to constitute a delivery of possession. A.I.R. 1933 Pat. 586=35 Cr. L. J. 154=146 Ind. Cas. 631.

——S. 145—Possession—Continuous possession does not mean possession exercised every day of the year.

The possession claimed by persons other than the landlords having been disbelieved, possession is presumed to be with parties who have title to the land. This possession may not be actual possession. Possession under S. 145 must be absolute and continuous and not occasional. But it is not intended that possession must be such as should be exercised continuously or every day of the year. "By continuous possession" is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. Continuity of possession should be understood with reference to the object over which it is exercised.

Where the land not capable of yielding much profit on the bank of a river and used to get covered with water at certain seasons of the year and it was found that sometimes bricks were stacked on it, sometimes people were allowed to dry jute on the land, and bastu puja was held on it.

Held, it cannot be said that the landlords were not in actual possession. 100 Ind. Cas. 823=31 C.W.N. 334=28 Cr. L. J. 343=7 A.I.Cr. R. 556=A.I.R. 1927 Cal. 313.

——Ss. 145, 147—Possession—Servant, whether can set up possession against master.

When there is a dispute as to the possession of a temple and the right to perform *puja* therein, the Magistrate can deal with the claim as to the right to perform *puja* as

part of the larger relief that is prayed for. If, however, it is not so included in the major relief, it is doubtful whether an application under S. 147, Criminal P. C., can lie merely as to the right to perform *puja* in a certain temple.

In a proceeding under S. 145, Criminal P. C., the servant cannot set up that possession by him for his master or superior is his own possession.

A trustee has authority over an *archaka* or *pujari*, even if his post is hereditary. A.I.R. 1933 Mad. 245 =(1932) M.W.N. 1079=37 M.L.W. 143=34 Cr. L. J. 88=140 Ind. Cas. 900.

——S. 145—Possession.

The possession of an agent or a servant which is permissive cannot give him a *locus standi* as against his principal or master. The possession that can be pleaded in a proceeding under S. 145 must be possession based on a claim of right to possession. 10 C.W.N. 1088, Foll. 92 Ind. Cas. 164=27 Cr. L. J. 212=A.I.R. 1926 Nag. 286.

——S. 145—Possession.

S. 145 is not meant to be used to protect the possession of a servant against the master. 71 Ind. Cas. 228= 1922 M.W.N. 629=16 M.L.W. 497=31 M.L.T. 202= 24 Cr. L. J. 100=A.I.R. 1923 Mad. 60=43 M.L.J. 624.

——S. 145—Possession.

Dispossession should be wrongful as well as forcible. 84 Ind. Cas. 332=3 Pat. 809=26 Cr. L. J. 268= A.I.R. 1925 Pat. 33.

——S. 145—Possession.

A person in formal possession of a property in execution of a decree shall be deemed to be in possession of the property. 81 Ind. Cas. 533=25 Cr. L. J. 917=A.I.R. 1925 Oudh 183.

——S. 145—Possession means effective possession.

During the absence of the opposite party, a stealthy act of possession in the most haphazard manner cannot be regarded to be an act of possession. *De facto* possession means effective occupation or control. The word "accused" in S. 360 does include persons against whom an order under S. 145 (1) has been drawn up and in the case of proceedings under Chapter XII the evidence must be read over to the witnesses. But the omission to do so cannot make the Magistrate's order based thereon *ultra vires*, though it may exempt the witnesses from prosecution for perjury. 65 Ind. Cas. 557=3 Pat. L. T. 291=23 Cr. L. J. 125=A.I.R. 1922 Pat. 371.

——S. 145—Possession—Symbolical possession.

Where symbolical possession of the holding was given to a party some 15 months before the date of proceedings under S. 145, *held*, it was incumbent on the Magistrate to go into the question of actual possession between the two dates and he should not discard evidence of actual possession on the date on which the proceedings were instituted. 18 Cr. L. J. 718=22 C.W.N. 479=40 Ind. Cas. 718.

——S. 145—Possession—Relevancy of symbolical possession—How determined.

It is the actual possession of the subject of dispute that must be enquired into in proceeding under S. 145, regardless of the delivery of symbolical possession under O. 21, R. 96, C. P. C. 16 Cr. L. J. 736=31 Ind. Cas. 176.

——S. 145—Possession—Order of possession on documentary evidence alone, without examining witnesses, how far proper.

Where in a proceeding under S. 145, Cr. P. C., the Magistrate considered that a decree of the year 1881 in favour of one of the parties was conclusive on the question of possession and therefore refused to receive oral evidence from the other party. *Held*. that the Magistrate ought to have taken evidence and the order was bad. 8 C.W.N. 719.

——Ss. 145, 437—Possession—Dispute as to—Magistrate declining to proceed on a Police report—Jurisdiction of District Magistrate to take proceedings on the same Police report.

A District Magistrate has no jurisdiction to revise the order of a Subordinate Magistrate striking off a case under S. 145, Cr. P. C. But where such Magistrate declined to take proceedings and the District Magistrate acting on the same Police report instituted proceedings under S. 145. *Held*, that the order of the District Magistrate was within jurisdiction. 6 C.W.N. 209=29 Cal. 154=4 Bom. L. R. 238=12 M.L.J. 73=29 I.A. 9 (P.C.).

58. Powers of Magistrate.

——S. 145—Powers of Magistrate—Petition by person of respectability—Allegation of likelihood of breach of peace—Duty of Magistrate.

When a petition is filed before a Magistrate by a person, who *prima facie* is a person of respectability and position, making allegation that there is a likelihood of a breach of the peace, the Magistrate has to make an enquiry and he should satisfy himself on this question before deciding whether to proceed in accordance with the provisions of S. 145, Cr. P. Code, or not. I.L.R. (1948) 2 Cal. 73.

——S. 145—Power of Magistrate—Absence of evidence.

A Magistrate has no jurisdiction to make an order under this section without any evidence being adduced before him. 73 Ind. Cas. 814=24 Cr. L. J. 702=A.I.R. 1924 Cal. 544.

——S. 145—Power of Magistrate—Admission of evidence.

In proceedings under S. 145 it is in the discretion of the Magistrate to refuse to examine all the witnesses produced by any party, but the discretion is one which must be exercised with due care and caution and with careful regard to the circumstances of each particular case. The admission of a document without its being duly proved but without any objection may be an illegality but it does not affect the jurisdiction of the Magistrate to pass the final order in the case. 75 Ind. Cas. 538=24 Cr. L. J. 954=A.I.R. 1924 Pat. 534.

——S. 145—Power of Magistrate—Consolidation.

Single proceeding under S. 145 is not without jurisdiction because some of the parties are concerned only with possession of a portion of land in dispute. 30 C. 155; 6 C.W.N. 737 (F.B.), Foll. 71 Ind. Cas. 699=24 Cr. L. J. 235=A.I.R. 1924 Cal. 539.

——S. 145—Powers of Magistrate—Lumping together different items of property is not illegal.

A decision under S. 145 should not be arbitrary but should be arrived at after giving each of the disputants an opportunity of being heard. A decision arrived at in the absence of parties or either of them is illegal. Where a dispute embraces several items of property, they may be lumped together in a single enquiry provided the disputants are the same for each item. In other cases the Magistrate would have no jurisdiction to decide the question of possession of a number of items after only hearing the parties claiming possession of one or two of them. The Magistrate's failure to record his reasons for thinking that there is a danger of the breach of the peace though a serious irregularity does not affect his

jurisdiction. 12 M.L.W. 315=59 Ind. Cas. 378=22 Cr. L. J. 90.

——S. 145—Power of Magistrate—Conversion of proceedings.

Where proceedings are instituted under S. 145 on the basis of a polic report which states that there is an imminent risk of a breach of the peace, but the magistrate afterwards discovers that the question at issue is not one of possession under S. 145, but is one as to rights falling under S. 147, he can convert the proceedings into proceedings under S. 147. 85 Ind. Cas. 654=26 Cr. L. J. 558=A.I.R. 1925 Cal. 1022.

——S. 145—Power of Magistrate— Co-owners.

Merely because the parties are brothers and presumably members of a joint Hindu family the Court is not precluded from giving possession to one as against the other. If the Court finds from the evidence that one brother is already in possession and that if no order is passed continuing him in possession there is likely to be a breach of the peace, the Court is perfectly right in passing an order under S. 145 without any regard to the merits of the other brother's claim to have a share in the land. 1 L.C. 201=9 A.I.Cr. R. 43=28 Cr. L. J. 877=104 Ind. Cas. 717=A.I.R. 1927 Oudh 316.

——S. 145—Powers of Magistrate.

Where according to the settlement papers, the land in dispute is a joint property in which the petitioners were co-sharers ; but the Magistrate finds that one co-sharer was in sole possession of this land, *held*, the Court had jurisdiction to make an order under S. 145. 72 Ind. Cas. 32=24 Cr. L. J. 304=A.I.R. 1924 Cal. 444.

——S. 145—Power of Magistrate—Excess area.

A Magistrate has no jurisdiction to pass order in respect of land which was not referred to in the initiatory proceeding. 92 Ind. Cas. 172=3 Pat. 288=7 P.L.T. 283=27 Cr. L. J. 220=A.I.R. 1924 Pat. 589.

——S. 145—Power of Magistrate—Excess land.

A Magistrate has no jurisdiction to pass an order in respect of a larger area of land than was included in the proceedings, A.I.R. 1924 Pat. 589, Foll. 28 Cr. L. J. 929=105 Ind. Cas. 449=9 A.I.Cr.R. 374=A.I.R. 1928 Nag. 81.

——S. 145—Powers of Magistrate.

If, in a proceeding under S. 145, the Magistrate deals in his order with more land than that included in the proceedings, his order is bad and must be set aside. 7 C.W.N. 558, Foll. 72 Ind. Cas. 69=4 P.L.T. 372=1 Pat. L. R. Cr. 255=24 Cr. L. J. 309=A.I.R. 1923 Pat. 528.

——S. 145—Power of Magistrate— Functus officio.

The order passed under S. 145 is a final order and it is not open either to the Magistrate who passed it or to his successor to review it, or to set it aside in any way. If a Court does so act, its action is without jurisdiction. 48 All. 258=24 A.L.J. 227=7 L.R.A.Cr. 29=27 Cr. L. J. 466=93 Ind. Cas. 690=A.I.R. 1926 All. 242.

——S. 145—Powers of Magistrate.

Where proceedings instituted under S. 145 are dropped with the consent of both parties on the ground that there is no likelihood of breach of the peace, and the Magistrate has no jurisdiction to decide as to the title to the sale proceeds of the crop attached during the pendency of the proceedings. 85 Ind. Cas. 256=26 Cr. L. J. 512=20 M.L.W. 924=A.I.R. 1925 Mad. 327.

——S. 145—Power of Magistrate—Future possession.

S. 145 relates simply to the fact of actual possession at the date of the preliminary order. No question of title can be taken into consideration, nor can any order be passed as regards future possession with reference to the actual possession at the date of the preliminary order. Where a Magistrate, in proceedings under S. 145 passed an order according to an agreement between the parties, for future possession.

Held, that the order regarding future possession on the strength of the agreement was wrong. 121 Ind. Cas. 47=1929 Cr. C. 459=31 Cr. L. J. 191=A.I.R. 1929 Nag. 285.

——S. 145—Power of Magistrate—Initiation of proceedings.

The District Magistrate has no authority in law to direct a subordinate to institute proceedings under S. 145. Whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion. Where the terms in which the District Magistrate's order is expressed, clearly indicate that the order was intended to leave the Magistrate free to exercise his own discretion in the matter, and he had ample materials before him on which S. 145 proceedings in respect of the whole land in question might be properly based, it cannot be said that the Magistrate failed to exercise his discretion vested in him by law, when he passed an order requiring certain additional land to be included in the proceedings. 125 Ind. Cas. 750=31 Cr. L. J. 923=1929 Cr. C. 574=50 C.L.J. 287=34 C.W.N. 82=A.I.R. 1929 Cal. 805.

——S. 145—Powers of Magistrate.

Where a District Magistrate setting aside the proceedings of a Sub-divisional Magistrate under S. 144 (4), directed him to draw up proceedings under S. 145 and he so drew them up.

Held, that he was not acting without jurisdiction where he had sufficient material whereon to base his order under S. 145. 33 C.W.N. 723=1929 Cr. C. 335=123 Ind. Cas. 647=31 Cr. L. J. 544=A.I.R. 1929 Cal. 751.

——S. 145—Powers of Magistrate.

Although the Sub-divisional Magistrate has refused to take action under S. 145, District Magistrate can take proceedings under that section on the same materials even though no application is made to him for taking such proceedings. 29 Cal. 242, Rel. on. 43 C.L.J. 586=27 Cr. L. J. 1083=97 Ind. Cas. 59=A.I.R. 1926 Cal. 1049.

——S. 145—Power of Magistrate—Mortgagee in possession.

In a proceeding under S. 145 of the Criminal P. C., a Magistrate has no power to disturb the possession of an usufructuary mortgagee at the instance of a depositor of the mortgage money under S. 83 of the T. P. Act. The deposit does not *ipso facto* transfer the possession of the property, nor cause cessation of that possession, and as that possession can only be disturbed by a Civil Court. 62 Ind. Cas. 577=22 Cr. L. J. 561 (Pat.).

——S. 145—Power of Magistrate—Question of jurisdiction.

A Magistrate has power to decide whether he has jurisdiction over the land in dispute and where he decides he has no jurisdiction it is not failure to exercise his jurisdiction so as to enable the High Court to interfere in revision. 61 Ind. Cas. 520=22 Cr. L. J. 392 (Cal.).

——S. 145—Power of Magistrate—Recording opinion.

Where as the result of his enquiry the Magistrate comes to the conclusion that there was no danger of a breach of the peace, his proper course then is to cancel

his order under S. 145 (5) and he cannot pass an order under Cl. (6). There is nothing in the Code to prevent the Magistrate from recording the results of his inquiry and the opinions at which he has arrived as to possession. 89 Ind. Cas. 710=26 Cr. L. J. 1398=A.I.R. 1926 Oudh 182.

——S. 145—Power of Magistrate—Restoration of possession.

In proceedings under S. 145, a Magistrate has no jurisdiction to order restoration of possession.

All that the Magistrate is empowered to do is to declare that a particular party is entitled to possession. At the same time if a party is declared to be entitled to possession and the world at large is forbidden to disturb his possession he would be entitled to take possession and no one would have any right to interfere with his doing so. 76 Ind. Cas. 621=24 Cr. L. J. 461=A.I.R. 1924 Lah. 411.

——S. 145—Power of Magistrate—Sale proceeds.

The sale proceeds of crops standing on the lands when the lands were attached in proceedings may be ordered to be kept in deposit in the Court until one party or the other obtained an order in his favour. 81 Ind. Cas. 626=20 M.L.W. 58=35 M.L.T. 68=34 M.L.T. 248 =47 Mad. 713=25 Cr. L. J. 978=A.I.R. 1924 Mad. 795=46 M.L.J. 565.

——S. 145—Power of Magistrate—Stay of proceedings.

When the Magistrate is able to act upon the police report or other information in starting proceeding under S. 145, he is competent to stay further proceedings on similar information regarding absence of likelihood of breach of peace without being obliged to record such evidence as the parties may adduce. A.I.R. 1924 Mad. 795, Rel. on. 33 C.W.N. 399=A.I.R. 1929 Cal. 328.

——S. 145—Powers of Magistrate.

Where a District Magistrate cancelled his predecessor's order under S. 145 (1) and stayed the proceedings:

Held, that he had jurisdiction to cancel the order and to stay proceedings if he became satisfied, whatever the source of information may be, that the state of things did not exist, which alone would give jurisdiction to proceed with the enquiry, and the High Court could not interfere in such case as the District Magistrate had not acted without jurisdiction. 30 Cal. 112, Rel. on. 66 Ind. Cas. 516=105 P.L.R. 1921=2 Lah. 364=A.I.R. 1921 Lah. 92=23 Cr. L. J. 292.

——S. 145—Power of Magistrate—Striking off proceedings.

A Magistrate shall cancel the order initiating the proceeding under S. 145, if he is satisfied at any stage of the case that no dispute likely to cause a breach of the peace exists, though these words are not expressly used in the section. But the sense is conveyed by the use of the word "exist" in it. 30 Cal. 112; A.I.R. 1925 Mad. 1252; A.I.R. 1924 Mad. 795, Rel. on. 33 C.W.N. 399=A.I.R. 1929 Cal. 328.

——S. 145—Powers of Magistrate—Magistrate can drop proceedings once started if he finds no likelihood of breach of peace.

Proceedings under S. 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under S. 145 and withdraw from interfering with the rights of parties in the property. 30 Cal. 112, Rel. on; 20 M.L.W. 58, Foll.

Cl. (5) of S. 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of the breach of the peace. But after he drops the proceedings under S. 145 he is *functus officio* and has no jurisdiction to pass any further orders in the case, *e.g.*, with regard to the delivery of the possession of the attached property to either party. He must leave the parties to settle their rights in the manner they think best to do, in the meanwhile holding his hands. 1 M.L.W. 1032 and 1925 Mad. 327, Foll.; A.I.R. 1923 Mad. 472, Not foll. 91 Ind. Cas. 399=27 Cr. L. J. 95=49 Mad. 232=22 M.L.W. 524=1925 M.W.N. 792=A.I.R. 1925 Mad. 1252=49 M.L.J. 784.

——S. 145—Powers of Magistrate.

Dropping proceedings after passing the preliminary order is not illegal if the Magistrate is satisfied that no dispute likely to cause a breach of the peace existed although in coming to the conclusion he acted on the petition of a third party to the proceedings; and the Magistrate is not bound under such circumstances to record the evidence of the witnesses of the petitioner who might have shown by their evidence that a dispute still existed. 81 Ind. Cas. 626=20 M.L.W. 58=35 M.L.T. 68=34 M.L.T. 248=47 Mad. 713=25 Cr. L. J. 978=A.I.R. 1924 Mad. 795=46 M.L.J. 565.

——S. 145—Power of Magistrate—Sufficiency of evidence.

The Magistrate may take further evidence if he thinks it necessary to do so. But if on the evidence produced he is satisfied as to who is the party in actual possession he need not take further evidence. 75 Ind. Cas. 535=5 P.L.T. 69=2 Pat. L. R. Cr. 104=A.I.R. 1924 Pat. 509=24 Cr. L. J. 951.

——S. 145—Power of Magistrate—Temporary order.

A Magistrate has no power to pass a temporary order pending his decision of the question of possession under S. 145. 59 Ind. Cas. 160=14 P.L.R. 1921=22 Cr. L. J. 48=A.I.R. 1921 Lah. 205.

——S. 145 (5)—Power of Magistrate.

A Magistrate after drawing up proceedings under S. 145 and as a case of urgency, had the land attached and the crops gathered by the Supt. of Police. Subsequently the Magistrate found on the evidence that one of the parties was entitled to possession. He also found that there was then no dispute likely to cause a breach of peace. He stayed proceedings under S. 145 and ordered the crops to be delivered to the party who in his opinion had grown the crops. *Held*, that the order was proper and that he had jurisdiction to pass it. 8 Cr. L. R. 320.

——S. 145—Power of Magistrate—Initiation of proceedings—Dropping of.

Where proceedings under S. 145, have once been started, the Magistrate has no jurisdiction to strike them off. He must pass an order either under S. 145 or under S. 146. 20 Cr. L. J. 464=51 Ind. Cas. 352.

——S. 145—Power of Magistrate—Order under Chap. XII—Revision.

An order is not one under Chap. XII of the Code, merely because it is mentioned to be made under S. 145, but the orderly and decent nature of a Court's work is presumed, and a Magistrate with jurisdiction can enter the ring fence of Chap. XII, and he cannot be followed nor can his procedure be examined. The Magistrate's

satisfaction about the existence of a dispute likely to cause breach of peace in relation to land or water, etc., within his jurisdiction is the chief requisite for the exercise of his jurisdiction under S. 145. 3 O.L.J. 546=19 O.C. 136=18 Cr. L. J. 100=37 Ind. Cas. 308.

——S. 145 (6)—Powers of Magistrate—Order as to possession.

An order as to possession subject to reservations is not forbidden by Cl. (6) of S. 145, *e.g.*, upholding one party's possession of a temple and directing that he should allow the other party to enter it and perform *puja* there. If a dispute is in fact for possession of a temple and the right to perform *puja* therein is only a portion of the larger relief claimed ; a Magistrate can deal with that portion only. 17 Cr. L. J. 235=34 Ind. Cas. 651.

——S. 145—Powers of Magistrate—Disputes as to portion.

S. 145 is merely intended to prevent a breach of the peace and if the Magistrate thinks it sufficient to include a portion of the land which is the subject of the Police report he can do so. The rule that if a suit is brought only in respect of a portion of the land claimed, a subsequent suit for the remainder is barred is not applicable to proceedings under this section. 18 Cr. L. J. 692=40 Ind. Cas. 692.

——S. 145—Powers of Magistrate—Magistrate, if may take proceedings by way of execution of the final orders in a proceeding under S. 145.

After passing final order declaring a party to a proceeding under S. 145, Cr. P. C., to be in possession, the Magistrate has no jurisdiction to take any proceedings in the nature of execution of the order. Where, after the Magistrate, in a proceeding under S. 145, Cr. P. C., had declared the first and third parties to be in possession of the property in dispute, the Police gave formal possession to those parties by planting bamboos, but disputes still not ceasing, the Magistrate held a local enquiry and again declared the possession of the first and third parties and a further enquiry was held to determine whether the property of which possession had been declared was identical with the subject of the proceeding under S. 145, Cr. P. C. *Held*, that all the proceedings after the final order passed by the Magistrate in the proceeding under S. 145, Cr. P. C., were *ultra vires*. There is no specific provision in the code authorising a Magistrate to take proceedings in the nature of execution after passing orders under S. 145. 14 C.W.N. 78=5 Ind. Cas. 40 (1) =11 Cr. L. J. 26. *See*, however, 12 C.W.N. 701=5 C.L.J. 547.

——Ss. 145 and 350—Powers of Magistrate—Transfer of Magistrate—Successor can continue proceedings.

Where a Magistrate enquiring into a case under S. 145 is succeeded by another, the latter is the successor of the former and can deal with the proceedings under S. 350 of the Code. 13 C.W.N. 420=9 Cr. L. J. 278=1 Ind. Cas. 336.

——S. 145—Powers of Magistrate—Possession to land, identity of—Failure to determine—Jurisdiction.

Although in a proceeding under S. 145, Cr. P. C., the disputed land should be thoroughly ascertained by both parties, yet where the parties were not at issue upon the question as to what the disputed lands were, and neither the Court nor any body concerned in the dispute was under any misapprehension as to that point, there is no ground for holding that the Magistrate, who tried the case had no jurisdiction to make an order under the section for want of proper specification of the lands in dispute. 5 C.W.N. 563.

59. Preliminary Order.

——S. 145—Preliminary order.

(a) Contents.

(b) Delay in passing.

(c) Necessity.

(d) Service and publication.

(e) Use of Police report and other information.

(f) When can be passed.

See also, CRIMINAL P. C., S. 145—OBJECT AND SCOPE.

(a) Contents.

——S. 145 (1)—Preliminary order—Contents—Grounds for satisfaction not mentioned in the order—Proceedings, if vitiated.

The omission from the order of any mention of the grounds for his satisfaction by the Magistrate is merely an irregularity and it cannot be said that the proceedings are vitiated by that irregularity when the applicant has not been prejudiced in any manner. 1950 A.L.J. 209=A.I.R. 1950 A. 274=51 Cr. L. J. 769=1950 A.W.R. 388.

——S. 145—Preliminary order—Contents—Failure to state in order that Magistrate was satisfied of existence of *bona fide* dispute and that there was likelihood of breach of peace—If renders proceedings illegal or without jurisdiction.

The mere failure on the part of a Magistrate initiating proceedings under S. 145, Cr. P. Code, to state in his order that he was satisfied that there was an apprehension of a breach of the peace or that there was a *bona fide* dispute, etc., is nothing more than an irregularity and does not render the proceedings illegal or without jurisdiction, when it is clear that on the materials before him he was satisfied that there was an immediate apprehension of a breach of the peace and that the dispute giving rise to the apprehension was one which could be more satisfactorily dealt with under S. 145. 4 A.I. Cr. D. 282=A.I.R. 1950 Pat. 372=51 Cr. L. J. 1365.

——S. 145—Preliminary order—Contents—Magistrate not stating grounds for apprehending breach of peace—Interference in revision.

Per *Meredith*, *J.*—When the Magistrate who is responsible for the maintenance of the peace within his jurisdiction has expressly stated that a danger of a breach of the peace necessitating action under S. 145, Cr. P. Code, exists, the High Court would be taking an unjustifiable risk and responsibility in interfering with his order merely on the ground that he has not stated the grounds of his being so satisfied. The failure to state the grounds does not touch the question of jurisdiction. 32 C. 771, Diss. from. 27 Pat. 1027=50 Cr. L. J. 299=A.I.R. 1949 Pat. 146=30 P. L.T. 41 (S.B.).

——S. 145 (1)—Preliminary order—Contents.

Where there is a preliminary order under S. 145 (1), Cr. P. Code, the fact that it is not complete in some respects is not sufficient to vitiate the proceedings. 51 P.L.R. 301=A.I.R. 1949 E.P. 398=3 A.I.Cr. D. 617=51 Cr. L. J. 3.

——S. 145 (1)—Preliminary order—Contents—Grounds of belief—Validity of an order without, such grounds.

It is clear from S. 145 (1), Cr. P. Code, that recording the grounds of his being satisfied as to the existence of a likelihood of a breach of the peace is mandatory upon the Magistrate making the order. An order without such statement is without justification and would vitiate the further proceedings under the section. 230 Ind. Cas. 229=1947 A.W.R. (C.C.)40=1947 O.A. (C.C.) 40=1947 O.W.N. 139=1947 A. Cr. C. 61=A.I.R. 1947 Oudh 159.

——S. 145—Preliminary order—Contents—Order under S. 145 (1)—No grounds stated of being satisfied as to breach of peace—Order, if valid.

An order under S. 145 (1), Criminal P. C., in which the Magistrate does not state the grounds for his being satisfied that a dispute likely to cause the breach of the peace existed, cannot be said to comply with the provisions of S. 145 (1). A.I.R. 1942 Sind 117=43 Cr. L. J. 876=I.L.R. (1942) Kar. 120=202 Ind. Cas. 617.

——S. 145—Preliminary order—Contents—No ground of Magistrate being satisfied—Also non-compliance with S. 145 (1)—Proceeding, if vitiated.

When making an order on an application under S. 145, Criminal P. C., the Magistrate ought to comply with the provisions of S. 145 (1) and he ought to make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed. This failure, together with the fact that the Magistrate actually has no grounds whatsoever for being so satisfied, vitiates his whole proceeding and makes them illegal as being taken without jurisdiction. A.I.R. 1938 Rang. 229=39 Cr. L. J. 708=176 Ind. Cas. 266.

——S. 145—Preliminary order—Contents—Duty of Magistrate to record reasons how he was satisfied as to likelihood of breach of peace—Omission to do so—Irregularity, if cured.

In proceedings under S. 145, Criminal P. C., though it is desirable for a Magistrate to record in his preliminary order, at any rate briefly, reasons why he is satisfied that a dispute likely to cause a breach of peace exists concerning any land within the local limits of his jurisdiction, the omission to do so would not divest him of jurisdiction, and that at most it would be an irregularity curable by S. 537, Criminal P. C. A.I.R. 1934 Nag. 112=35 Cr. L. J. 1381=30 N.L.R. 311=151 Ind. Cas. 348.

——S. 145—Preliminary order—Contents—Omission to comply with S. 145 (1)—If cured by S. 537.

The omission on the part of the Magistrate to record the fact that he was satisfied that a dispute likely to cause a breach of the peace existed and further to record the grounds on which he was so satisfied, does not deprive a Magistrate of his jurisdiction to proceed with the case. Nor is it an illegality which cannot be cured by S. 537, Criminal P. C. A.I.R. 1933 All. 264=(1933) A.L.J. 188=34 Cr. L. J. 414=55 All. 301=142 Ind. Cas. 537 (F.B.).

——S. 145 (1)—Preliminary order—Contents—Failure of Magistrate to state in order of notice that there is danger of breach of peace—Proceedings will be vitiated. A.I.R. 1933 All. 96=(1932) A.L.J. 1087=34 Cr. L. J. 449=142 Ind. Cas. 775.

——Ss. 145 (1), 537—Preliminary order—Contents—Omission to record order in strict accordance with s. 145 (1)—Effect.

The Magistrate's omission to record in his order under S. 145 (1), Criminal P. C., the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists concerning some immovable property will not vitiate the subsequent proceedings unless such omission has caused a failure of justice.

A Court of Revision is absolutely prohibited from setting aside an order under S. 145, Criminal P. C., on account of any omission or irregularity in the proceedings unless such omission or irregularity has occasioned a failure of justice. A.I.R. 1932 All. 681=54 All. 1002=34 Cr. L. J. 425=(1932) A.L.J. 865=142 Ind. Cas. 532.

——S. 145—Preliminary order—Contents—Failure to state grounds of satisfaction—Trial, if vitiated.

The failure of the Magistrate to set forth explicitly the grounds of his being satisfied will not vitiate the proceedings if there was otherwise a substantial compliance with the requirements of S. 145.

In proceedings under S. 145, Courts have no concern with title. Possession is the only matter which the Magistrate should concern himself with. Where there has been no dispossession, the case is not covered by S. 145 (4) and the question of dispossession does not arise.

Where a Magistrate refused to grant an adjournment for enabling a party to file a sale-deed in a proceeding under S. 145 in which the dispute had reached a stage so critical that a breach of the peace was immediately to be apprehended, and the case did not admit of procrastination :

Held, that the action of the Magistrate did not amount to an irregularity which would render his order liable to be set aside. A.I.R. 1932 Sind 145=26 S.L.R. 353=34 Cr. L. J. 216=141 Ind. Cas. 628.

——S. 145—Preliminary order—Contents.

Order under S. 145 (1) must state the matters which that sub-section requires to be stated. 1931 M.W.N. 1317.

——S. 145—Preliminary order—Contents—Omission to state grounds of.

Omission to state the grounds on which a Magistrate is satisfied of the existence of a likelihood of a breach of the peace is, at the most, an irregularity ; and in the absence of proof that a party was prejudiced thereby, the order of the Magistrate will not be set aside on that ground. Where two parties were interested in the subject-matter and only one was served with notice, it is not open to him to contend that the order is bad on the ground that the other person was not made a party especially when that other party had not chosen to appear and question the order. 30 M. 548=3 M.L.T. 18.

——S. 145—Preliminary order—Contents—Grounds not stated expressly—Reference to petition containing grounds—Substantial compliance.

Where the initial order made under S. 145, Cl. (1) Cr. P. C., does not state in express terms the grounds upon which the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists, but such grounds appear in the petition on which the order is founded and to which it makes reference, and there is no denial of such grounds on the other side, there is a substantial compliance with the provisions of S. 145, Cl. (1). Cr. P. C. 16 M.L.J. 148=3 Cr. L. J. 487.

——S. 145—Preliminary order—Contents of.

The recording of a proper order under S. 145 (1) Cr.P. C., is necessary to give a Magistrate jurisdiction to take proceedings under that section. Such order should state the information upon which the Magistrate has reason to suppose that a breach of the peace is probable or imminent. 20 C. 867, Foll. 6 C.W.N. 923=But *see also*—27 C. 981.

——S. 145, Cl. (1)—Preliminary order—Contents—Necessity to set out ground for believing that there would be a breach of the peace—Opportunity to parties to produce evidence.

A Magistrate's order under S. 145 should set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists. Parties should be given reasonable opportunities to adduce evidence. 28 C. 416.

(b) Delay in passing.

——S. 145—Preliminary order—Delay in passing.

S. 145 (1) does not contemplate any sustained inquiry before the making of the preliminary order. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged

inquiry extending over several hearings. A.I.R. 1940 Sind 33=41 Cr. L. J. 486=I.L.R. (1940) Kar. 162=187 Ind. Cas. 636.

(c) Necessity.

——Ss. 145 and 537—Preliminary order—Necessity—Curability.

Where a party is not in any way prejudiced by the omission on the part of a Magistrate to record a preliminary order under S. 145 (1), Cr. P. Code, the irregularity would be cured by S. 537, Cr. P. Code. 1933 A.L.J. 188, (F.B.), Foll. 1950 A.W.R. 640=A.I.R. 1950 All. 734 =1950 A.L.J. 692.

——S. 145—Preliminary order —Necessity.

The absence of a preliminary order under S. 145 (1), Cr. P. Code, does not vitiate the entire proceedings. The failure to draw up a preliminary order is nothing more than a mere irregularity, when there is no question of prejudice. 4 A.I.Cr. D. 282=A.I.R. 1950 Pat. 372 51 Cr. L. J. 1365.

——S. 145 (1)—Preliminary order—Necessity—Omission to draw formal order.

The omission by the Magistrate to draw a formal order in terms of sub-S. (1) of S. 145, Cr. P. Code, does not invalidate his order, if it has been substantially complied with and a perusal of the order shows that the parties have not been prejudiced thereby. 1933 A.L.J. 188, (F.B.), Foll. A.I.R. 1949 All. 230=50 Cr. L. J. 345.

——Ss. 145 (1) and 537—Preliminary order—Necessity.

The mere omission to record a preliminary order as required by S. 145 (1), Cr. P. Code, however objectionable, is not sufficient to discharge the final order. The irregularity is cured by the provisions of S. 537 Cr. P. Code, if it does not in fact occasion a failure of justice. 228 Ind. Cas. 130=48 Cr. L. J. 159=A.I.R. 1947 Pesh. 8.

——Ss. 145, 537—Preliminary order—Necessity.

Omission by Magistrate to make initial order as required by sub-S. (1) of S. 145, Criminal P. C., failure to serve notice on the opposite party according to law, or failure to affix a copy of the order made by the Magistrate to some conspicuous place at or near the subject of dispute, and failure of the Magistrate to record a finding even in the final order that there was a danger of a breach of the peace about the land in dispute, are all defects which S. 537, Criminal P. C. can cure and are not, therefore, sufficient to vitiate proceedings under S. 145 when the parties are not in any manner prejudiced. A.I.R. 1939 Lah. 233=41 P.L.R. 188=40 Cr. L. J. 784=183 Ind. Cas. 351.

——S. 145—Preliminary order—Necessity.

Proceedings are not bad for want of preliminary order under S. 145 (1), Criminal P. C., where, in fact, there is an order though it is not complete. 39 P.L.R. 503.

——S. 145 (1)—Preliminary order—Necessity of—Want of objection by parties, effect of.

Unless there is a preliminary order under S. 145 (1), Criminal P. C., the Magistrate has no jurisdiction to pass any order under S. 145 (6) and the conduct of the parties in allowing the Magistrate to go on without objection, though reprehensible, cannot validate an order under S. 145 (6) which is without jurisdiction.

"Cause of action" is a very unsuitable expression in connection with proceedings under S. 145, Criminal P. C. A.I.R. 1936 Mad. 824=(1936) M.W.N. 647=44 M.L.W. 305=71 M. L.J. 305=37 Cr. L. J. 953=164 Ind. Cas. 689 (2).

——Ss. 145 (1), 537—Preliminary order—Necessity—Omission, if cured by S. 537.

Where a Magistrate, in proceedings under S. 145, Criminal P. C., omitted to make a preliminary order under S. 145 (1), but in final order he definitely stated that there was an apprehension of the breach of the peace:

Held, that the omission to record a preliminary order under S. 145 (1), however objectionable, was not sufficient to discharge the final order and that the omission was cured by S. 537, Criminal P. C. A.I.R. 1933 Pesh. 88 =34 Cr. L. J. 1138=145 Ind. Cas. 868.

——S. 145—Preliminary order—Necessity—Omission to draw up order under S. 145 (1)—Effect of.

S. 145 (1), Criminal P.C., is not mandatory at all, except in the sense that the Court will set aside an order passed under the latter clauses of S. 145 if there is any reason to believe that the omission of an order or the passing of an order not strictly in the terms of S. 145 (1) led to some prejudice to one or other of the parties.

It would be quite unjustifiable and unreasonable to set aside lengthy proceedings under S. 145 when the facts indicate that the parties could not conceivably have been prejudiced by the absence of a formal order, where it is manifest that they knew well all facts and contested the matter with the advantage of the knowledge of the whole of the facts.

The omission to draw up an order under S. 145 (1) has nothing to do with the question of jurisdiction at all. A.I.R. 1932 All. 446=(1932) A.L.J. 503=34 Cr. L. J. 156=141 Ind. Cas. 831.

——S. 145—Preliminary order must be passed under S. 145 and the Magistrate cannot restrict the number of witnesses for examination. 1932 M.W.N. 320.

——S. 145—Preliminary order—Necessity.

Where the Magistrate did not make an order in writing as required by S. 145 (1). S. 537 is sufficient to cure this defect. 84 Ind. Cas. 548=3 Bur. L. J. 256=26 Cr. L. J. 324=A.I.R. 1925 Rang. 111.

——S. 145 (1)—Preliminary order—Necessity.

Where proceedings under S. 145 are irregular and the Magistrate acts without jurisdiction the Chief Court can interfere in revision and an omission to serve or record the order under S. 145, Cl. (4) is an irregularity which will render proceedings liable to be set aside ; a Magistrate, in case of forcible possession, must find the date of dispossession for every item of property. 18 Cr. L. J. 660=28 P.W.R.Cr. 1917=40 P.R.Cr. 1917=40 Ind. Cas. 308.

——S. 145 (1) and (3)—Preliminary order—Necessity.

It is not always that an omission to frame an order in writing as required by S. 145 (1) or to serve a copy of the order on parties as required by S. 145 (3) invalidates the proceedings under S. 145. Where the parties appeared before a Magistrate who explained matters to them fully and they evidently understood everything that was requisite, *Held*, that there was no sufficient cause for interference. 26 P.W.R. Cr. 1917=18 Cr. L. J. 633=39 Ind. Cas. 1001.

——S. 145—Preliminary order—Necessity.

An omission to record a preliminary order or to affix a copy of it is not fatal to the jurisdiction of the court to proceed with the case under S. 145, where an order directing the filing of written statements has been recorded in the presence of parties and the parties have understood the nature of the proceedings. 15 P.W.R. Cr. 1914=68 P.L.R. 1914=15 Cr. L. J. 279=23 Ind. Cas. 487.

——S. 145—Preliminary order—Necessity of.

The making of a formal order under sub-section (1) of S. 145, Cr. P.C., is necessary to give the Magistrate jurisdiction to initiate proceedings under that section.

Where a notice was issued on the parties under S. 107 of the Code to show cause why they should not execute a bond to keep the peace, and the Magistrate at the hearing recorded an order wherein he stated that it was a case for the application of S. 145, and he proceeded 'to bind down' the first party under sub-section (6) of S. 145. *Held* that the expression 'bind down' was incorrect and that the order was wrong. 30 C. 443=7 C.W.N. 174.

——S. 145—Preliminary order—Necessity.

The making of a formal order under sub-S. (1) of S. 145, Code of Criminal Procedure, is absolutely necessary to the initation of proceedings under the section, and an omission to make such an order and to draw up a proceeding under the sub-section is a question of jurisdiction which renders all the proceedings invalid. 1 C.L.J. 432=32 C. 552. *See also* 7 C.W.N. 461.

——S. 145—Preliminary order—Necessity.

Where a Magistrate has recorded no order in writing under S. 145, Cr. P. C., stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists or not such as are justified by Ch. XII of the Code, it may be set aside in revision as entirely without jurisdiction. 2 A.L.J. 272.

(d) Service and publication.

——S. 145—Preliminary order—Service and publication.

In a case under S. 145, Criminal P. C., service of notice on the spot under the second part of S. 145 (3) does not dispense with ordinary service upon the respondent as required by the first part of that sub-section.

Where no summons is served personally on the respondent or on an adult member of his family or affixed to his house, this in itself is sufficient to vitiate all subsequent proceedings.

No action under S. 145, Criminal P. C., can be taken where the claim is only to the right to use land either as a public road or as a pathway.

Where a Magistrate issues a notice under S. 145, he cannot proceed under S. 147. A.I.R. 1933 Lah. 145 =34 Cr. L. J. 616=143 Ind. Cas. 477.

——S. 145—Preliminary order—Service and publication.

Where the Magistrate failed to serve a copy of the preliminary order under S. 145 (1) and to post the order on the land.

Held, that these were irregularities curable by S. 537. 94 Ind. Cas. 703=27 Cr. L.J. 660=3 Rang. 169=A.I.R. 1925 Rang. 270.

——S. 145, Cl. (3)—Preliminary order—Service of—Non-service of copy of order under clause (3)—Want of jurisdiction—Revision.

When a copy of an order as contemplated by S. 145, Clause (3), Cr. P. C., was not published in some conspicuous place at or near the subject of dispute. *Held*, that the order passed should be set aside in as much as the the provisions in Clause (3) of S. 145, Cr. P. C., are of a mandatory character, and the failure to publish a copy of the order in accordance with the provisions of the latter part of Clause (3) affects the jurisdiction of the court. 8 C.W.N. 590.

(e) Use of Police report and other information.

——S. 145—Preliminary order—Use of Police report and other information.

Ordinarily, a Police report is accepted in cases under S. 145, Criminal P. C., unless there is any reason to the contrary. If the Magistrate has any reason for preferring the statement of the complainant to the opinion of the Police after inquiry, it is incumbent on him to give reasons in his subsequent order for not accepting the opinion of the Police. When the Magistrate does not apply his mind to this question and does not even state in his preliminary order that he is satisfied that there is apprehension of a breach of the peace, an order under S. 145 cannot stand. A.I.R. 1945 Oudh 62=1944 O.W.N. (C.C.) 479 =1944 A.W.R. (C.C.) 295.

——S. 145—Preliminary order—Use of police report.

The constable at first reported an apprehension of a breach of the peace. The Assistant Sub-Inspector then held an inquiry and before him, both parties claimed to be in possession of the land. In his report he asked for action under S. 144, Criminal P.C., against the first party. The first party then filed a petition of protest in which it was asserted that they were in possession. The Sub-Divisional Magistrate, by his order prohibited both the parties from going upon the land. Then the Deputy Magistrate, in his report, recommended proceeding under S. 145, Criminal P. C. He said, "At present there is absolutely no apprehension of a breach of the peace." Proceedings were drawn up under S. 145, on the recommendation of the Deputy Magistrate :

Held, that reading the report of the Deputy Magistrate along with that of the Assistant Sub-Inspector, it was apparent that what the Deputy Magistrate actually meant was that there was no immediate apprehension of breach of the peace such as would justify a proceeding under S. 144, Criminal P. C. He, however, recommended a proceeding under S. 145, Criminal P. C. Though the crop was not fit for cutting at the time, both the parties were claiming the right to cut it and a clash was likely to take place between them at the time of cutting or even before, if any party wanted to cut it before it was completely ripe. A dispute undoubtedly existed at the time, and it was of such a character that it was likely to cause a breach of the peace unless proceedings were taken under S. 145, Criminal P.C. Thus it could not be doubted that there was "a present fear" that the dispute that existed was likely to cause a breach of the peace unless proceedings were taken under S. 145, Criminal P. C. A.I.R. 1943 Pat. 44=44 Cr. L.J. 25=9 B.R. 73=203 Ind. Cas. 275.

——S. 145—Preliminary order—Use of Police report.

Where an order under S. 145, Criminal P. C., is, to a large extent, based on statements alleged to have been made by the petitioners to the Sub-Inspector of Police which are not on record not were the petitioners questioned about these statements, the order must be set aside. A.I.R. 1941 Mad. 751 (1)=1941 M.W.N. 678=54 M.L. W. 392 (1) =43 Cr. L. J. 344=198 Ind. Cas. 16 (1).

——S. 145—Preliminary order—Use of Police report.

Where, while passing a preliminary order under S. 145, Criminal P. C., the Magistrate has relied on the Police report which is on the record, his reference to that constitutes sufficient ground for the order. Even if the source of information is not recorded, that would be an irregularity curable by S. 537, Criminal P. C. A.I.R. 1940 Nag. 265=1940 N.L.J. 375=41 Cr. L. J. 799=189 Ind. Cas. 774.

——S. 145—Preliminary order—Use of Police report.

The question whether a Magistrate has jurisdiction to take action under S. 145, Criminal P. C., on a Police report depends upon what that Police report contains, and when a Police report sets out the subject-matter of dispute, the cause of dispute, its nature, the apprehension that unless action is taken the breach of the peace will ensue then the report contains sufficient material for the Magistrate to act upon. A.I.R. 1936 Sind 143=37 Cr. L. J. 1030 =164 Ind. Cas. 969.

——S. 145—Preliminary order—Use of Police report.

The Police report to a Magistrate suggesting initiation of proceedings under S. 145 is not and should not be confined to written reports which they themselves may have received. The Police themselves must inquire whether a breach of the peace is likely and state their grounds for their reason to do so and it is the result of their enquiry and not merely a copy of reports which they may have received that is to be communicated to the Magistrate. In such a case, however, it is not sufficient to refer to a Police report as giving information that a dispute likely to cause a breach of the peace exists, without stating the Magistrate's satisfaction that the report is correct. The provisions of sub-S. (1) of S. 145 must be observed and the making of a preliminary order should not be allowed to lapse into mere routine as if it were the filling up of a printed form. A.I.R. 1935 Nag. 78=17 N.L.J. 231.

——S. 145—Preliminary order—Use of Police report.

The report of the Police is not binding on the Magistrate, who may, if he thinks proper, ignore it altogether. 1934 M.W.N. 1285.

——Ss. 145, 147—Preliminary order—Use of Police report without examining officer, legality of.

Where the only use which a Magistrate makes of Police report is that contemplated by S. 147 (1), Criminal P.C., it is not necessary for him to call on the Police officer to give evidence as to the correctness of the report.

The fact that breach of the peace is not imminent and there is sufficient time to go to the Civil Court is no bar to the initiation of proceedings under Chap. XII, Criminal P.C. on the other hand, the provisions of Chap. XII are intended to provide a speedy remedy in cases of disputes with which that Chapter deals in order that the matter may be settled temporarily while more lengthy civil proceedings take place. A.I.R. 1931 All. 14=(1930) A.L.J. 1437=32 Cr. L. J. 309=53 All. 215=129 Ind. Cas. 441.

——S. 145—Preliminary order—Use of Police report.

Though it is the imminence of a breach of the peace as disclosed in the police report which creates jurisdiction under S. 145, it cannot be held that the Magistrate is confined within the four corners of the report. It is his duty from all the material before him to decide whether proceedings under S. 145 are necessary or not. And even if the Magistrate relies on the police report for starting proceedings under S. 145, he need not rely on the whole of it. The Magistrate is not bound to accept the version given by the police beyond what he requires for the support of his order under S. 145. 49 C.L.J. 428=33 C.W.N. 858=30 Cr. L.J. 1027=119 Ind. Cas. 372=1929 Cr. C. 95=A.I.R. 1929 Cal. 468.

——S. 145—Preliminary order—Use of Police reports.

Where the Magistrate based his conclusions about possession on the police report and a sketch submitted with it showing the lands in possession of different parties.

Held, that the use made of these documents was not a proper one. The only legitimate use to which the sketch and the report could be put was to treat them as the basis of the proceedings and as affording materials for determining the question of likelihood of a breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. 45 C.L.J. 537=31 C.W.N. 310=28 Cr. L. J. 329=100 Ind. Cas. 713=A.I.R. 1927 Cal. 327.

——S. 145—Preliminary order—Use of Police report.

A Magistrate as a general rule may refuse to take action at all under S. 145 except when a report from the police is sent to him on the matter. Even when such report is sent to the Magistrate it should not be a mere forwarding of a report made to the police by one of the parties even though accompanied by a record of the inquiry made by a police officer in the same matter. But it must be a definite statement of opinion by a responsible police officer to the effect that he apprehends that there will be a disturbance of the peace which is beyond his powers to prevent and that he therefore desires the exercise of the higher powers of the Magistrate to prevent it. When such report is not sent to the Magistrate the fact will almost be conclusive as an indication of the absence of any likelihood of the breach of the peace. 81 Ind. Cas. 933=25 Cr. L.J. 1109=A.I.R. 1925 Nag. 142.

——S. 145—Preliminary order—Use of Police report.

Where there is no police report, the statements of interested parties ought to be received with great caution but if the Magistrate has reason to believe such statements, he does not act without jurisdiction in taking proceedings under this section. 72 Ind. Cas. 32=24 Cr. L. J. 304=A.I.R. 1924 Cal. 441.

——S. 145—Preliminary order—Use of Police report.

The Magistrate, in order to assume jurisdiction under S. 145 has to satisfy himself about the likelihood of a breach of the peace. He is to exercise his own judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon the materials placed before him, there is a likelihood of a breach of the peace. He would not be justified in acting merely upon the expression of an opinion by the police. If in the proceeding so drawn up in the office a reference is made to the police report and to the petition of the second party, dated the 27th March, 1923, which documents stated that there was no likelihood of a breach of the peace that will not by itself take away the jurisdiction of the Magistrate to initiate proceedings under S. 145, if he was satisfied that there was a likelihood of a breach of the peace. Although the police might have reported that in their opinion there was no likelihood of a breach of the peace the Magistrate on considering the report is entitled to come to a different conclusion of his own to initiate proceedings if he thought it necessary to do so. 33 Cal. 33, Appr. 83 Ind. Cas 693=5 P.L.T. 252=1924 P.H.C.C. 83=26 Cr. L. J. 133=A.I.R. 1924 Pat. 787.

——S. 145—Preliminary order—Use of Police report.

Where the Magistrate initiates proceedings under S. 145 upon a police report that there is a dispute likely to cause breach of peace, he cannot be said to act without jurisdiction. 60 Ind. Cas. 61=1 Pat. L.T. 738=22 Cr. L. J. 205.

——S. 145—Preliminary order—Use of Police report.

A Police report upon which the Magistrate founds his initial order under S. 145, Cr. P. C., should contain a statement of the facts from which the Magistrate may be satisfied of the existence of likelihood of a breach of the peace. But there is no inflexible rule that the Police report must show that the disputing parties are actually assembling men or doing other specific overt acts. No rule can be laid down so much as to specify the sufficiency of the materials upon which he takes action, but he must form his own judgment and not proceed upon a mere expression of opinion by the Police. A Magistrate is entitled to take proceedings under S. 145, Cr. P. Code, when a breach of the peace is likely; it is not necessary

that it should be imminent. If the Police report is defective, it is not obligatory upon the High Court to interfere, when it is proved at the trial that a breach of the peace was likely at the date of the initial order. The question of possession in a proceeding under S. 145, Cr. P. C., has to be determined with reference to a specified point of time; upon this question every previous decree of a civil court or order of a criminal court is not necessarily conclusive : the evidentiary value to be attached to such document must depend upon the circumstances of each particular case. 2 C.L.J. 271=33 C. 33=10 C.W.N. 257.

(f) When can be passed.

——S. 145—Preliminary order—When can be passed.

An order under S. 145 (1), Criminal P.C. can be made only by a Magistrate having local jurisdiction over the land in dispute. A.I.R. 1945 Nag. 56=1944 N.L.J. 538=I.L.R. (1944) Nag. 836=46 Cr. L.J. 654=220 Ind. Cas. 77.

——S. 145—Preliminary order--When can be passed.

S. 145 and certain other sections of a like nature have been incorporated in the Criminal P. C. with the object of enabling the Criminal Courts to take suitable action in disputes relating to property to prevent breaches of the peace. But the jurisdiction thus conferred is a very limited one and is carefully restricted to a prevention of the apprehended breach of the peace. The Legislature has laid it down in clear words that whenever a matter of this nature is brought to the Court of a Magistrate, it is the Magistrate's duty not only to be satisfied that there is a dispute which is likely to cause a breach of the peace, but also to make an order in writing stating the grounds of his being so satisfied before he can require the parties to appear before him. If he is not satisfied that a dispute likely to cause a breach of the peace exists, he has no jurisdiction under the section. A.I.R. 1945 All. 60=1944 O.W.N. (H.C.) 230=I.L.R. (1944) All 727=46 Cr. L. J. 504=1945 A.W.R. (H.C.) 294=218 Ind. Cas. 397.

——S. 145—Preliminary order—When can be passed.

When a person comes forward and complains about being forcibly ousted from possession by the other side and asks for attachment of the property and for the appointment of a Receiver and asks for action to be taken under S. 145, Criminal P. C., (which relates to land alone) there can be no reasonable doubt that he is setting forth all the necessary facts to invest the Court with jurisdiction to proceed under S. 145. A.I.R. 1941 Nag. 171=1941 N.L.J. 110=42 Cr. L. J. 675=195 Ind. Cas. 122.

——S. 145—Preliminary order—When can be passed.

It is necessary that the Magistrate should be satisfied at the time of drawing up proceedings under S. 145, Criminal P. C., that there was then existing a likelihood of the breach of the peace arising from disputes between parties as to possession of the land in question. A.I.R. 1943 Cal. 559=45 Cr. L. J. 107=209 Ind. Cas. 215.

——S. 145—Preliminary order—When can be passed.

On an application alleging that there was a dispute likely to lead to a breach of the peace about the possession of a certain plot of land, proceedings under S. 145, Criminal P. C., should be instituted. An *ex parte* order under S. 144, Criminal P. C., is ill-advised. A.I.R. 1942 Cal. 66 (1)=15 C.W.N. 1090=43 Cr. L. J. 396=198 Ind. Cas. 559.

——S. 145—Preliminary order—When can be passed.

Proceedings under S. 145 cannot be validly initiated or continued without an apprehension of a breach of the peace. A.I.R. 1942 Pat. 489=9 B.R. 91=44 Cr. L. J. 95=203 Ind. Cas. 521.

——S. 145—Preliminary order—When can be passed.

Preventive action under Part IV of Criminal P. C. can be taken under various sections each with its own scope and conditions of applicability. A dispute likely to cause a breach of the peace concerning land can be dealt with under S. 144 which applies to disputes which are not *bona fide*. A.I.R. 1942 Pat 331=23 P.L.T. 243=8 B.R. 670=43 Cr. L. J. 637=200 Ind. Cas. 316.

——S. 145—Preliminary order—When can be passed.

There may be occasions where an order is first appropriately passed under S. 144 and the proceedings afterwards converted into one under S. 145 in order to pass an even more appropriate and permanent order. A.I.R. 1940 Pat. 492=6 B.R. 428=41 Cr. L. J. 417=187 Ind. Cas. 139.

——Ss. 145, 144—Preliminary order—When can be passed.

In the case of *bona fide* disputes with regard to possession of land, the proper method of dealing with the dispute is by a proceeding under S. 145, Criminal P. C., and not by a proceeding under S. 144. A.I.R. 1940 Pat. 471=21 P.L.T. 326=6 B.R. 464=41 Cr. L. J. 451=187 Ind. Cas. 349.

——S. 145—Preliminary order—When can be passed.

Proceeding under S. 145, Criminal P. C., can be started in a case in which one party claims exclusive possession while another party claims to be in joint possession along with them as the question in such case is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. A.I.R. 1940 Pat. 135=6 B.R. 155=41 Cr. L. J. 171=185 Ind. Cas. 346.

——S. 145—Preliminary order—When can be passed.

When, in the course of a proceeding under S. 144, Criminal P. C., the Magistrate finds that there is a *bona fide* dispute as to possession of land likely to cause a breach of the peace, he is bound immediately to take action under S. 145. A.I.R. 1940 Sind 158=41 Cr. L. J. 952=I.L.R. (1940) Kar. 508=190 Ind. Cas. 618.

——S. 145—Preliminary order—When can be passed.

It is not open to a Magistrate by passing repeated orders under S. 144, Criminal P. C., to avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107, Criminal P. C. A.I.R. 1939 Pat. 512=20 P.L.T. 374=40 Cr. L. J. 895=6 B.R. 30=184 Ind. Cas. 240.

——S. 145—Preliminary order—When can be passed.

For the foundation of jurisdiction of the Magistrate under S. 145, Criminal P. C., two essential conditions are that there should be a dispute likely to cause a breach of the peace and that the dispute should concern land. A.I.R. 1938 Pat. 1=18 P.L.T. 886=4 B.R. 211=39 Cr. L. J. 268=173 Ind. Cas. 107. *See also* A.I.R. 1943 Pat. 44=44 Cr. L. J. 25=9 B.R. 73=203. Ind. Cas. 275.

——S. 145—Preliminary order—When can be passed.

Where the petition under S. 145 (1), Criminal P. C., contains no information that a dispute likely to cause a breach of the peace existed, the Magistrate is not justi-

fied in taking action under S. 145. A.I.R. 1938 Rang. 229=39 Cr. L. J. 708=176 Ind. Cas. 266.

——S. 145—Preliminary order—When can be passed.

Where the land is *gora deh*, no one has a right to take exclusive possession to the detriment of the other persons who were entitled to and apparently were in the habit of using the land and the mere fact that the land is *shamilat* does not preclude the Court from making enquiry and taking proceedings under S. 145, Criminal P. C. A.I.R. 1936 Lah. 1015=38 P.L.R. 332=38 Cr. L. J. 123=166 Ind. Cas. 71.

——S. 145—Preliminary order—When can be passed.

Jurisdiction to enquire into possession is founded on the existence of a probability of breach of peace—One party eliminating—Probability no longer existing—No jurisdiction in Magistrate to conduct enquiry. 1936 M.W.N. 209.

——S. 145—Preliminary order—When can be passed.

Where S. 107 or S. 145, Criminal P. C., will meet the requirements of a case, S. 144, Criminal P. C., is not an appropriate remedy. 159 Ind. Cas. 455=37 Cr. L.J. 95=2 B.R. 83.

——Ss. 145, 537—Preliminary order—When can be passed—Magistrate, if can take action merely on sworn testimony of complainant—Omission to record grounds for being satisfied of likelihood of breach of peace—Whether cured by S. 537.

Per *King, C.J. and Srivastava, J.*—There is nothing in the language of S. 145, Criminal P. C., to suggest that the Magistrate cannot take action merely on the sworn testimony of the complainant himself, if the Magistrate believes it to be true. If a Magistrate believes the statement of one witness to be true, he is at perfect liberty to act upon it for the purpose of passing an order under S. 145 (1). It is no incumbent upon him to hold a preliminary inquiry himself by examining further witnesses, nor is it necessary for him to call for a report from the Police. If the Magistrate is satisfied on the strength of the testimony of one witness, then he can pass an order under S. 145 (1).

When the Magistrate is so satisfied regarding the likelihood of breach of the peace, his omission to say so in his order is a mere omission to frame his order in accordance with law and as long as no failure of justice or prejudice to the accused has been occasioned, the omission is covered by S. 537, Criminal P. C., and cannot furnish a reason for setting aside the Magistrate's final order.

Per *King, C.J.*—Magistrates are not to understand that defects in procedure are of no importance. Slipshod procedure is to be condemned even though it does not necessarily result in vitiating the whole proceeding.

Per *Nanavutty. J.*—Before passing an order under S.145 (1) the Magistrate should call upon the complainant to produce evidence on his behalf to prove that there really was dispute between him and the opposite parties concerning the plots he mentioned in his complaint, and that that dispute was of such a nature as was likely to cause a breach of the peace. And this preliminary inquiry is necessary to enable the Magistrate to satisfy himself that such a dispute did exist and that it was, in all probability, likely to cause a breach of the peace.

The omission of the Magistrate to satisfy himself of the existence of a dispute concerning land which, in his opinion, was likely to cause a breach of the peace is an omission which goes to the root of the matter as there is an intital want of jurisdiction on the part of the Magistrate to initiate proceedings under S. 145 of the Code, and such an infringement of the Code does not come within the purview of S. 537, for it vitiates at the very outset, the entire proceedings of the Magistrate. A.I.R. 1935 Oudh 316=1935 O.W.N. (C.C.) 454=36 Cr. L.J. 656=11 Luck. 157=155 Ind. Cas. 169.

——S. 145—Preliminary order—When can be passed.

Where the dispute is with regard to possession of immovable property, a proceeding under S. 144, Criminal P. C., is a poor substitute for a proceeding under S. 145, which settles once for all so far as the Criminal Courts are concerned the question of possession with regard to a particular piece of immovable property. Such cases should be decided under S. 145, Criminal P. C. A.I.R. 1935 Pat. 224=36 Cr. L. J. 655=1 B.R. 387=155 Ind. Cas. 88.

——S. 145—Preliminary order—When can be passed.

Proceedings under S. 145, Criminal P. C., are *quasi* executive. The intention of the Legislature in not amending the term "other information" when it recently amended S. 145, seems to leave the term elastic and give the Magistrates, widest possible latitude in such cases. There is no particular way of receiving information. A general information or an application by a party is enough.

Where, therefore, a long and detailed application which was signed by Pleaders and the applicant set out the history of the dispute and property, the subject-matter of the dispute, and gave particulars about the incidents which were likely to lead to a breach of the peace and the Magistrate passed a preliminary order believing the information:

Held, that the Magistrate acted not without jurisdiction. A.I.R. 1934 Nag. 194=35 Cr. L.J. 1460=151 Ind. Cas. 853.

—— S. 145—Preliminary order—When can be passed.

The jurisdiction of a Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate does not depend on how he proceeds. A.I.R. 1933 All. 264=(1933) A.L.J. 188=34 Cr. L. J. 414=55 All. 301=142 Ind. Cas. 537 (F.B.).

——S. 145—Preliminary order—When can be granted.

No proceedings under S. 145, Criminal P. C., can be started unless the Magistrate is satisfied that there is fear of a breach of the peace between the parties. Hence where a Magistrate dismisses a complaint under S. 145 upon a perusal of the report made by the station officer of the Police that no likelihood of breach of the peace exists, his order cannot be set aside in revision. A.I.R. 1933 Oudh 253=10 O.W.N. (C.C.) 310=34 Cr. L. J. 934 (1)=145 Ind. Cas. 299 (2).

——S. 145—Preliminary order—When can be passed.

S. 145, Criminal P. C., requires that there must be a present dispute, and that there must be a likelihood of the breach of the peace. Under the section, there must be a present fear that it is probable that there will be a breach of the peace owing to the dispute, unless proceedings are taken under the section. But it does not require that there should be a fear of an 'imminent' or 'immediate' breach of the peace. A.I.R. 1932 Cal. 60=35 C.W.N. 1003=33 Cr. L.J. 305 (2)=136 Ind. Cas. 475.

——S. 145—Preliminary order—When can be passed.

There must be a present danger of a breach of the peace before an order under S. 145, Criminal P. C., is passed but there need not be a danger of an immediate or immi-

nent breach of the peace. It is not material whether there is or is not sufficient time for persons interested to resort to civil remedy, inasmuch as if neither party intends to resort to civil remedy, the fact that there is time to do so does not affect the likelihood of a breach of the peace. A preliminary order under S. 145, is entirely suitable if a dispute likely to cause a breach of the peace exists and the acutal breach is likely to occur some time later. A.I.R. 1932 Nag. 134=28 N.L.R. 154=33 Cr. L. J. 937=140 Ind. Cas. 231.

——S. 145—Preliminary order—When can be made—Applicant's statement on oath, whether sufficient to make preliminary order.

The statement of the applicant on oath is sufficient to justify a Magistrate in making a preliminary order under S. 145 (1), Criminal P. C., and the High Court will not quash an order in revision before the inquiry under S.145 has been held on the mere ground that it was based on the applicant's statement alone without any other materials. But if the Magistrate, in the course of the order, directs that both the parties be restrained from entering the property and its compound until further orders the order is *ultra vires*. A.I.R. 1931 Rang. 51 (2)=32 Cr. L.J. 637 (1)=131 Ind. Cas. 63.

60. Procedure.

——S. 145—Procedure—Remand—Direction to come to finding on evidence already on record or on further evidence adduced by parties—Finding without consideration of evidence taken before remand—Sustainability.

It is a very serious error on the part of a Magistrate dealing with a case on remand not to take into consideration and to ignore the evidence of witnesses who had been examined before the order of remand. When the order of remand has not directed him to reject the evidence already on record, but on the contrary directed him to come to a finding either on reference to the evidence already on record or on such evidence as the parties might adduce after being given an opportunity to do so, a finding arrived at without taking into consideration the evidence already on record before remand is unsustainable and cannot be accepted as correct. (1946) P.W.N. 278 =13 B.R. 539=231 Ind. Cas. 90=48 Cr. L.J. 683= A.I.R. 1947 Pat. 175.

——S. 145—Procedure—Dispute between tenants of one zemindar and tenants of another—Each tenant claiming a separate plot—One order concerning the whole—Legality of.

Although it may be desirable in proceedings under S. 145, Cr. P. C., to deal with each separate dispute separately, it is impossible to apply to such proceedings the strict rule of procedure which has to be observed in civil actions. 6 C.W.N. 206.

——S. 145—Procedure—Disputes relating to several plots of land—One proceeding as to all—Legality of.

When there are independent disputes relative to distinct parcels of land they ought to be dealt with in separate proceedings, but when the dispute is one, the fact that it embraces several parcels of land is not sufficient to necessitate an independent proceeding in respect of each and the matter is not one which affects the jurisdiction of the Magistrate. 30 Cal. 155=6 C.W.N. 737 (F.B.). *See* also 5 C.W.N. 710.

——Ss. 145, 537—Procedure—Several lands—Separate proceeding—Irregularity—Prejudice.

Where a Magistrate drew up one proceeding in respect of several plots of lands claimed to be in the possession of different persons and the parties were not prejudiced by the Magistrate not taking separate proceedings, but dealing with the matter in one and the same proceeding, and where the course taken by the Magistrate did not preclude any of the parties from adducing evidence in the case concerning the different plots of land; *Held* that the procedure taken by the Magistrate did not vitiate the inquiry and the order made therein. 5 C.W.N. 544.

61. Proceedings under.

——S. 145—Proceeding under S. 145 or S. 144.

See CRIMINAL P. C., S. 145—

(1) NATURE OF PROCEEDINGS.
(2) OBJECT AND SCOPE.
(3) PRELIMINARY ORDER—WHEN CAN BE PASSED.

——S. 145—Proceedings under—Award of compensation—Legality.

No compensation is awardable in proceedings under S. 145, Cr. P. Code. The Court can allow only costs. An award for compensation on account of loss suffered due to the inability of the opposite party to harvest the crop by reason of proceedings under S. 145, cannot be treated as order for costs. A.I.R. 1949 Assam 48=50 Cr. L.J. 1002.

——S. 145—Proceeding under—Conversion into one under S. 107—Legality.

Where on an application filed under S. 145, Cr. P. Code, in respect of a dispute relating to immovable property, the Court sent the papers to the Police for enquiry and report and the police put up a challan under S. 107, Cr. P. Code against the opposite party who was bound over by the Court.

Held, that the proceedings under S. 107, Cr. P. Code were not without jurisdiction. 39 C. 150 and 1942 Pat. 331, followed. I.L.R. (1947) Nag. 706=A.I.R. 1948 Nag. 76=48 Cr. L. J. 61=1947 N.L.J. 360.

——S. 145—Proceedings after order.

A Magistrate cannot take proceedings in the nature of execution, after passing orders under S. 145. All such proceedings are *ultra vires*. 11 Cr. L. J. 26=14 C.W.N. 78=5 Ind. Cas. 40.

——S. 145, Ch. XII—Proceedings under—Punishment for perjury—Obiter.

A person who deposes falsely in proceedings under Ch. XII, Cr. P. C., is liable to be punished for perjury, not being an accused person. 9 C.W.N. 983=2 C.L.J. 149.

62. Question of title.

——S. 145 (4)—Question of title—Power of Magistrate to look into.

A Magistrate in proceedings under S. 145, Cr. P. Code, is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. If the question of possession could be effectively decided without a decision on the question of title, he would not be entitled to go into the title of the parties. 1 P.L.T. 387, foll. I.L.R. (1951) Nag. 21=1950 N.L.J. 498.

——S. 145—Question of title—Duty of Magistrates—Evidence as to title, when relevant.

The duty of a Magistrate in proceedings under S. 145, Cr. P. Code, is to ascertain which party was in possession on the relevant date. He is not to decide any question of title at all. Evidence as to title can be considered only in two instances, namely, (1) in which the property in dispute admits of no actual possession, and (2) in which the evidence as to possession is equally balanced. 1948 A.W.R. (H.C.) 180=A.I.R. 1949 All. 144=50 Cr. L. J. 209.

——S. 145—Question of title—Evidence as to possession not satisfactory on either side—Evidence

of title, if can be considered for determining the question of possession.

Where in proceedings under S. 145, Criminal P. C., the evidence of possession is not quite satisfactory on either side, a Magistrate can consider evidence of title to supplement the evidence of possession. A.I.R. 1937 Oudh 510 =1937 O.W.N. (C.C.) 1016=38 Cr. L. J. 1107=171 Ind. Cas. 181.

——**S. 145**—Questions of title are irrelevant under the section. A.I.R. 1936 Nag. 271=38 Cr. L. J. 375=I.L.R. (1937) Nag. 174=167 Ind. Cas. 359.

——**S. 145 (4)—Question of title—Only point for determination is which party was in actual possession at time of preliminary order.**

The only point for determination in proceedings under S. 145 is which party was in possession at the time of the preliminary order. It does not matter whether such possession was wrongful or not. Actual possession is all that matters, subject, of course, to Proviso 1, sub-S. (4), S.145.

The Magistrate should not base his order on the respective merits of the claims of the parties to title and thus arrogate to himself the functions of the Civil Court. A.I.R. 1936 Nag. 3=18 N.L.J. 100.

——**S. 145—Question of title.**

The propriety of the order whereby a Magistrate assumes the function of the Civil Court and makes an order which practically amounts to an order of ejectment on grounds of title may certainly be questioned, though he may be technically justified by the fact that he records his apprehension of a breach of the peace. But where the effect of the order has expired and the matter is before the Civil Courts, the application for revision of the order will be dismissed. A.I.R. 1938 Pat. 145=1 B.R. 286 (1)=36 Cr. L. J. 474=154 Ind. Cas. 184.

——**S. 145—Question of title—Inquiry—Whether should be confined to question of possession.**

An inquiry under S. 145, Criminal P. C., should, as far as possible, be confined to the question of possession only. A.I.R. 1935 Pat. 88=16 P.L.T. 19=1 B.R. 312= 36 Cr. L. J. 513=154 Ind. Cas. 426 (2).

——**S. 145—Question of title.**

Questions of title are of little importance under S. 145, Criminal P. C., except in so far as they may be available to show who was in actual physical possession of the land at the time when proceedings were taken. A.I.R. 1934 Cal. 95=37 C.W.N. 849=35 Cr. L. J. 489=147 Ind. Cas. 817.

——**S. 145—Question of title.**

An enquiry under S. 145 (4) should relate to the question of actual possession and not to the question of right to possession. A.I.R. 1932 Mad. 368=35 M.L.W. 390= (1932) M.W.N. 425=33 Cr. L. J. 536=138 Ind. Cas. 68.

——**S. 145—Question of title—Finding on, when to be given.**

The proper place of a finding on matters of title is in a regularly constituted litigation between the parties claiming title and though cases may arise in Criminal Courts where, without deciding a question of title, the matters directly under trial cannot be properly disposed of, it is desirable to limit one's finding as to title in the criminal proceedings to those cases in which a finding is necessary and to those points only which the Court is compelled to determine. A.I.R. 1932 Pat. 189=13 P.L.T. 193= 33 Cr. L. J. 509=137 Ind. Cas. 693.

——**S. 145—Question of title.**

Neither proof of title nor an adjudication on the question of title constitutes proof of actual possession. Even a trespasser is entitled to have his possession maintained if it is peaceful. 111 Ind. Cas. 662=24 N.L.R. 148=29 Cr. L. J. 902=11 A.I. Cr. R. 166=A.I.R. 1928 Nag. 284.

——**S. 145—Question of title.**

The question of title has been expressly excluded from Magistrate's consideration under S. 145. 110 Ind. Cas. 228=29 Cr. L. J. 676=10 A.I. Cr. R. 411.

——**S. 145—Question of title—Enquiry must be limited to actual possession—Rights of parties to possession are immaterial.**

Where the tenants instead of paying rent to the rightful person having right to collect, pay it willingly to another, the former cannot be said to be "forcibly" dispossessed by the latter. A.I.R. 1925 Pat. 33, Rel. on ; 1890 A.W.N. 178, Diss. from. 101 Ind. Cas. 469=8 L.R.A. Cr. 64= 28 Cr. L. J. 437=7 A.I. Cr. R. 433=A.I.R. 1927 All. 476.

——**S. 145—Question of title.**

In a proceeding under S. 145, the main point to be considered is the fact of actual possession and not the right of a party to possess the subject-matter of dispute. 91 Ind. Cas. 76=27 Cr. L. J. 44 (Oudh).

——**S. 145—Question of title.**

It is not the duty of the Court in proceedings under S. 145 to declare who is entitled to possession. The declaration must be as to who is actually in possession and entitled to remain in possession till a decision is given by a competent Court. 95 Ind. Cas. 320=1926 P.H.C.C. 160=7 P.L.T. 873=27 Cr. L. J. 784.

——**S. 145—Question of title.**

Elaborate enquiries into questions of title need not be made as the proceedings are intended to be summary. 81 Ind. Cas. 905=25 Cr. L. J. 1081=A.I.R. 1925 Oudh 149.

——**S. 145—Question of title.**

Questions of title, fraud, etc., cannot be tried in proceedings under S. 145 or S. 144. 84 Ind. Cas. 332=3 Pat. 809=26 Cr. L. J. 268=A.I.R. 1925 Pat. 33.

——**S. 145—Question of title.**

A right to possess is quite different from actual physical possession, and questions as the rights of parties cannot legitimately be the subject of inquiry in proceedings under S. 145, which is concerned solely with the fact of actual physical possession, whether lawful or unlawful. 75 Ind. Cas. 990=25 Cr. L. J. 78=A.I.R. 1924 Lah. 678.

——**S. 145—Question of title—When evidence as to possession equally balanced—Magistrate can rely on presumption arising on title.**

Where a Judge finds on each side evidence which in itself is reliable and he finds that the evidence on either side is equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he has found to be in that side. However, the principle does not apply to a case where the Court has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. 71 Ind. Cas. 365=26 C.W.N. 1000=24 Cr. L. J. 141= A.I.R. 1923 Cal. 303.

——**S. 145—Question of title.**

The Magistrate cannot, in a proceeding under S. 145, rely simply on the question of title but he can use the evidence of title to supplement the evidence of possession. 61 Ind. Cas. 174=22 Cr. L. J. 350 (Cal).

——**S. 145—Question of title.**

The actual factum of possession is a vital question for determination under S. 145. 4 Pat. L.W. 120=19 Cr. L. J. 789=46 Ind. Cas. 709.

——S. 145—Question of title—Actual possession—Nature of possession, irrelevant.

S. 145 is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether enjoyed in his own right or on behalf of others. Therefore in proceedings under this section, any question as to whether possession is on behalf of others or one's own right is irrelevant. Questions as to the rights of parties raised by their written statements under S. 145 are quite irrelevant, as such proceedings are initiated by the Magistrate in the interests of public order and tranquillity and it is his preliminary order that settles the actual issue between the parties and founds his jurisdiction. 3 L.W. 164=16 Cr. L. J. 525=29 Ind. Cas. 541.

——S. 145—Question of title.

In proceedings under S. 145, the question of title does not arise. 1 O.L.J. 242=15 Cr. L. J. 470=24 Ind. Cas. 350.

——S. 145—Question of title—Possession—Handing over properties to party.

In a case, under S. 145, the Magistrate has no jurisdiction to enquire into the rights of parties; what he has got to look to is the fact of possession only. A Magistrate in a case under S. 145 passed the following order: "I further order that if any fruit has been gathered on any of the said land attached by order of this Court, the proceeds of such fruit, minus expenses, shall be handed over to *A*." *Held*—There is no authority in S. 145 or any other section to justify such an order. 7 C.L.J. 369.

——S. 145, Cl. (4)—Question of title—How far should be gone into—Removal of a bund—Award of damages—Magistrate's jurisdiction to pass orders.

In a case under S. 145, Cr. P. C., the Magistrate dealt with the matter as if he had to try a question solely of title and not one of possession. Further he directed by his order that a bund which was in dispute should be removed and that one of the parties should pay to the other party compensation for damages done to crops, as well as costs in the case. *Held* that the entire order must be set aside, including the order as to costs in the case. Under S. 148 the Magistrate could not make an order as to costs other than those incurred for witnesses or pleader's fees or both. 9 C.W.N. 862=32 C. 602.

63. Receiver.

——Ss. 145 and 146—Receiver—Disputed properties in possession of—Civil suit by one of the parties—Dismissal for default—Effect—Other side, if automatically entitled to possession.

Proceedings commenced under S. 145 of the Cr. P. Code, ended in the Magistrate passing an order that the properties in dispute should be in the possession of a receiver as he was unable to decide who was then in possession. One of the parties, then filed a suit in the Civil Court for a declaration of title and possession, which was dismissed for default and such dismissal was confirmed by the appellate Court, with the result that, that party became precluded and debarred from bringing a fresh suit on the same cause of action for the same relief. On an application to the Magistrate by the defendant in that suit that he may be put in possession of the properties on the ground that on the dismissal of the declaratory suit as between the parties the title had been determined by the principle of *res judicata*.

Held, though the dismissal of the suit may prevent the plaintiff from bringing a suit on the same cause of action, his rights to the properties, if any, had not been extinguished under S. 28 of the Limitation Act, and it is not as if the parties have no further remedy, resulting in the property remaining in *custodia legis* for all time. Either of the parties is at liberty to bring a suit for the recovery of the profits received by the receiver within the period of limitation and the Civil Court will then adjudicate as to who is entitled to the profits. In such a suit, the question of title to the property will have to be decided and finally adjudicated. It is only such a finding in the judgment on the issue of title that will have the force of *res judicata* for the purpose of S. 146 of the Code and will operate as a determination of the right of the successful plaintiff to the land and profits. 61 L.W. 365=49 Cr. L. J. 603=1948 M.W.N. 415=A.I.R. 1949 Mad. 71=(1948) 1 M.L.J. 383.

——S. 145—Receiver.

S. 146 (2) cannot be so read as to make its provisions apply to attachment under S. 145, (4) and the appointment of receiver under S. 145 (4) is illegal. (1910) M.W.N. 821 and 3 P.L.J. 147, Foll.; 91 P. R. 1912, Not foll. 115 Ind. Cas. 29=10 Lah. 800=30 P.L.R. 23=30 Cr. L. J. 411=A.I.R. 1929 Lah. 223.

——S. 145—Receiver.

Where a Magistrate finds that there is no likelihood of a breach of peace, he has no jurisdiction to pass an order that the lands under dispute should continue in the custody and management of the receiver. The proceedings under S. 145 having been dropped the Magistrate should direct the receiver appointed by him to hand over the property to the person from whom possession was taken. 108 Ind. Cas. 904=29 Cr. L. J. 456=10 A.I.Cr.R. 51=1 M.Cr.C. 230=A.I.R. 1928 Mad. 859.

——S. 145—Receiver.

The High Court has no power to appoint a receiver pending disposal of a petition to revise an order passed under S. 145. 91 Ind. Cas. 702=22 M.L.W. 723=1925 M.W.N. 772=27 Cr. L. J. 126=A.I.R. 1926 Mad. 139=49 M.L.J. 593.

——S. 145—Receiver—Person appointed by Magistrate to take charge of property, has no powers of a Receiver.

Although under S. 145 a Magistrate has in cases of emergency the power to attach the subject in dispute, he has no power at the stage to appoint a Receiver. (8 M.L.T. 314 and 3 P.L.J. 147, Foll.) If in order to prevent a breach of the peace it is necessary for the Magistrate to take possession of the attached property and manage it during the pendency of the proceedings, it is quite competent to him in his administrative capacity or in exercise of his inherent jurisdiction to appoint some person to manage the property on his behalf and subject to his control and supervision, but the person so appointed is in no sense a receiver but merely a servant of the Magistrate, *e.g.*, he has no powers which a receiver appointed under S. 145 (2) can exercise. 89 Ind. Cas. 514=8 N.L.J. 69=26 Cr. L. J. 1378=21 N.L.R. 191=A.I.R. 1925 Nag. 297.

——Ss. 145 (4) and 146—Receiver.

The Magistrate has power to appoint a receiver to remain in custody of property attached under S. 145, though the powers of such a receiver may not be the same as that of one appointed under S. 146. S. 145 of the Cr. P. Code does not authorize a Magistrate to attach movable properties. *Burn, J.*—The mere fact that both parties claim joint possession will not take away the jurisdiction of a Magistrate to pass final orders under S. 146 where only one party is in actual physical exclusive possession. An attachment of property by a Magistrate under S. 145 or 146, C. P. Code, is not the same as an attachment by a Civil Court, but places the property in the possession of the Magistrate who can ordinarily act only through some agent appointed by him. 11 L.W. 459=21 M.L.T. 234=21 Cr. L. J. 473=54 Ind. Cas. 473.

——Ss. 145 and 146—Receiver, appointment of.

When a Magistrate takes proceedings under S. 145 of the Cr. P. Code the object of the law is that he shall confirm the party in actual possession. He is certainly not competent to dispossess such a party by appointing a receiver. (1917) P.H.C.C. 363=3 Pat. L. J. 147=19 Cr. L. J. 249=4 Pat. L. W. 359=44 Ind. Cas. 41.

——Ss. 145 and 146—Receiver.

Before the termination of the proceedings under S. 145, if a Magistrate were to appoint a Receiver under S. 146 (2) his order was *ultra vires* and without jurisdiction. 13 Cr. L. J. 536=15 Ind. Cas. 808.

——Ss. 145 (4) and 146—Receiver—Power of.

A Magistrate can attach not only the land in dispute but also the " crops harvested and rents received since disturbance". An appointment of a Receiver under S. 145 is not prohibited but he cannot exercise all the functions that a Receiver appointed under S. 146 can exercise. A Receiver appointed under the former section must be treated as an agent or servant of the Magistrate whose order is only an administrative order passed for the management of the property. 13 Cr. L. J. 295=14 Ind. Cas. 759.

——Ss. 145 and 146—Receiver—Possession of—Nature of.

The possession of a Receiver appointed in a proceeding under S. 145 is the possession of the party who will ultimately be found to have been in possession prior to the appointment of the Receiver. 10 M.L.T. 573=22 M.L.J. 154=13 Cr. L. J. 23=13 Ind. Cas. 215.

——Ss. 145 (4) and 146—Receiver.

The appointment of a Receiver under S. 145 (4) is not authorised by law and is *ultra vires* and illegal. 8 M.L.T. 314=(1910) M.W.N. 821=11 Cr. L. J. 536=7 Ind. Cas. 895.

64. Reference.

——Ss. 145, 435, 438—Reference—Jurisdiction of District Magistrate with regard to order passed under S. 145 by Magistrate subordinate to him—Nature of—Procedure, where he thinks interference necessary.

The jurisdiction of the District Magistrate with regard to orders passed by Magistrate subordinate to him under S. 145, Criminal P.C., is not appellate jurisdiction. He has not even power to revise the order himself. All he can do is to call for the record of the case under S. 435 and, if he considers that the order should be interfered with, his duty is to refer it to the High Court under S. 438. A.I.R. 1941 Pat. 105=7 B.R. 492=42 Cr. L. J. 340=192 Ind. Cas. 784.

——Ss. 145, 438—Reference—Mere error of law, whether ground for reference.

The practice as regards reference in a case under S. 145, Criminal P. C., is exactly the same as the practice in any ordinary case, and there ought to be no reference merely upon difference of opinion as to the value of evidence. Even if there should appear error of law, reference should not be made unless it appears that the error of law is of such a character as to call for interference by higher authority.

In making a reference under S. 438, referring Courts must always bear in mind the limits which the High Court has in practice put upon its own discretion, and they should not make a reference where the only objection is to the findings of the Court below upon the merits.

It is not the rule of the Court to interfere with decision on facts upon evidence except for special reasons and moreover, the referring Courts should make their references in the form prescribed ; they should state in what particular portion of the order the Court making the reference consider an error on a point of law to exist. A.I.R. 1931 Cal. 619=58 Cal. 1081=35 C.W.N. 374=32 Cr. L. J. 1237=134 Ind. Cas. 915.

——S. 145—Reference.

A reference asking to confirm a part of the order under S. 145 and quash the rest is not in proper form. 99 Ind. Cas. 1010=44 C.L.j. 593=28 Cr. L. J. 210=7 A.I.Cr.R. 383=A.I.R. 1927 Cal. 261.

——Ss. 145, 438—Reference—Illegal order—Sessions Judge, duty of, to refer to High Court.

On application to the Sessions Judge for redress against illegality, he would report the matter under S. 438 of the code for orders of the High Court, if he is of opinion that the order is illegal and without jurisdiction. 5 C.W.N. 71.

65. Remedy of aggrieved party.

——S. 145—Remedy of aggrieved party—Limitation.

Where in proceedings under S. 145, Criminal P. C. between the plaintiff and the defendant, the Magistrate declares the defendant to be in possession of the property in dispute, a suit by the plaintiff for possession of his share of the property falls under Art. 47, Lim. Act. A.I.R. 1941 Pesh. 65=42 Cr. L. J. 872=196 Ind. Cas. 144.

——S. 145—Remedy of aggrieved party—Limitation.

Order under S. 145—Failure to bring suit within time prescribed under Art. 47 by person against whom order is passed :

Held, that his right to property is extinguished. A.I.R. 1937 All. 300=(1937) A.L.J. 225=1937 A.W.R. (H.C.) 235=169 Ind. Cas. 125.

——S. 145—Remedy of aggrieved party—Limitation.

Exclusive possession for 12 years by one of claimant co-sharers from the order under S. 145 in his favour, amounts to adverse possession. A.I.R. 1937 All. 300=(1937) A.L.J. 225=1937 A.W.R. (H.C.) 235=169 Ind. Cas. 125.

——S. 145—Remedy of aggrieved person—Limitation.

Final order under S. 145 in respect of the whole of property—Suit for possession of an undivided share of the property :

Held, that Art. 47 was applicable and a joint possession could not be given. But as the title was not extinguished, plaintiff could sue for the partition of joint property. 163 Ind. Cas. 370=39 C.W.N. 853.

——S. 145—Remedy of aggrieved party—Limitation.

The words " claiming under such person " mentioned in Art. 47 refer to those persons who claim from the person bound by the order under a title created subsequent to the order.

Where the title was created prior to order under S. 145:
Held, that Art. 47, Lim. Act, was not applicable. A.I.R. 1936 Pat. 629=15 Pat. 481=17 P.L.T. 726=3 B.R. 148=166 Ind. Cas. 29.

——S. 145—Remedy of aggrieved party—Limitation.

Proceedings under S. 145 decided in favour of defendant No. 2—Defendant No 1 bringing suit for possession 3 years after—Decree—Plaintiff resisting possession—Resistance ineffectual—Suit by plaintiff for declaration of title and recovery of possession :

Held, that whatever title (if any) the plaintiff had to the property, was completely extinguished. A.I.R. 1935 Pat. 164=1 B.R. 550=16 P.L.T. 183=14 Pat. 424=155 Ind. Cas. 1094.

66. Review.

——S. 145—Review.

A Criminal Court has no right or authority to review a final order passed by it under S. 145, Criminal P. C., and the fact that the Magistrate who disposed of the previous proceeding was a different officer from the Magistrate who passed the order in the later case makes not the slightest difference. A.I.R. 1935 Rang. 447=13 Rang. 302=37 Cr. L. J. 92=159 Ind. Cas. 308. (1).

——S. 145—Review—Review by Deputy Commissioner *ex parte*, is illegal.

A complaint was lodged as to the possession of certain property and the Sub-Divisional Magistrate made an enquiry, heard evidence and made an order purporting to be under S. 145. He found that the proceedings under S. 145 were no longer necessary as there had been no breach of the peace during four months previous to the proceedings. He found actual possession in favour of the first party and ordered the crops to be delivered to them. On second party applying for review to District Magistrate, he set aside the order of the Sub-Divisional Magistrate and ordered the crops to be delivered to second party.

Held, although the procedure followed by the Sub-Divisional Magistrate was irregular and was not according to the procedure as laid down by S. 145, he must be considered to have contemplated the proceedings to be under S. 145. Under the circumstances, it was not open to the Deputy Commissioner to review the Sub-Divisional Magistrate's decision and in any case to do so *ex parte*, and the order of the Deputy Commissioner should be set aside.

Further, *Held*, that the order of Sub-Divisional Magistrate was not passed on proper procedure and must be set aside. A.I.R. 1922 Pat. 449.

——S. 145—Review.

A Criminal Court has no right or authority to review final orders passed by it under S. 145 Cr. P. C. 12 C.W.N. 605=35 C. 350.

67. Revision.

——Ss. 145 and 439—Revision—Order under S. 145—Revision—Interference.

Interference in revision with orders passed under S. 145, Cr. P. Code, is rare. The reasons for this are that the object of the section is to inhibit blemishes of the peace and that the order itself is in no way final. Where however neither of the lower Courts appeared to be fully aware of the significance of the provisions of S. 145 (4), Cr. P. Code, and the order is marred by peri-phrastic reference to matters which are largely irrelevant to the task of deciding the question of possession on the relevant date, it is liable to be set aside in revision. I.L.R. (1951) Nag. 21=1950 N.L.J. 498.

——Ss. 145 and 439—Revision—Interference by High Court with findings of fact in proceedings under S. 145, Cr. P. Code.

Ordinarily findings of fact of Magistrates in proceedings under S. 145, Cr. P. Code, are not to be disturbed. But where he has been influenced more by considerations of title to the property than actual possession over the same, the findings are liable to be interfered with in revision by the High Court. 1948 A.W.R. (H.C.) 180=A.I.R. 1949 All. 144=50 Cr. L. J. 209.

——Ss. 145, 435 and 439—Revision—Application for stay of delivery of possession to the respondents and for continuance of lands in possession of Receiver pending disposal of the revision petition—Maintainability.

During the course of an enquiry in proceedings under S. 145, Cr. P. Code, the lands in dispute were put in the possession of the Village Munsiff. In a criminal revision petition against the final order in such proceedings a petition was filed for the issue of an order directing the stay of delivery of possession of the lands to the respondents by the Village Munsiff pending the disposal of the Criminal Revision Petition by the High Court. On an objection as to the maintainability of such an application,

Held, that the application for stay of delivery of possession pending disposal of the criminal revision petition which virtually means the appointment of the Village Munsiff as a Receiver after the termination of the proceedings under S. 145, Cr. P. Code, could not be maintained. The High Court cannot continue such a Receiver or appoint a new Receiver unless it is satisfied afresh that a dispute likely to cause a breach of the peace exists. 60 L.W. 171=1947 M.W.N. 159=49 Cr. L. J. 113=A.I.R. 1948 Mad. 133=(1947) 1 M.L.J. 171.

——S. 145—Revision—Finding as to possession—Revision—High Court, when may interfere.

Under S. 145, Cr. P. Code, it is for the Magistrate to decide which party was in possession at the date of the initial order, and if the finding of the Magistrate as to possession is based on evidence and there was material before him on which he could come to such a finding, he is the only Judge as to whether the material was sufficient or not, and if, upon the material placed before him, he is satisfied that one of the parties is in possession, his order cannot be deemed to be without jurisdiction and cannot be interfered with by the High Court in revision. It is only if the finding of the Magistrate as to possession is based on no material at all that the High Court can interfere with his order on revision. 48 P.L.R. 499=A.I.R. 1947 Lah. 227=48 Cr. L. J. 844.

——S. 145—Revision—Findings as to likelihood of breach of peace—Interference.

There is ample authority for the view that it is the Magistrate alone who is to be satisfied as to there being or not being likelihood of a breach of the peace and if he is satisfied one way or the other, the High Court on revision cannot interfere with his decision. 48 P.L.R. 499=A.I.R. 1947 Lah. 227=48 Cr. L. J. 844.

——S. 145—Revision—Finding of possession—Misreading of document and referring to irrelevant evidence and Finding vitiated by mistake of record—High Court will set aside. (1946) P.W.N. 278=13 B.R. 539=231 Ind. Cas. 90=48 Cr. L. J. 683=A.I.R. 1947 Pat. 175.

——S. 145—Revision—Order rescinding preliminary order under S. 144—Proceedings on same day under S. 145and delivery of possession to party found to have been in possession—Order not stating specifically that there was a likelihood of breach of peace—Irregularity—Not fatal warranting interference in revision. 1946 M.W.N. 733=231 Ind. Cas. 263=A.I.R. 1947 Mad. 161=48 Cr. L. J. 730=(1946) 2 M.L.J. 433.

——S. 145—Revision—Possession—Finding of trial Court, finality of.

The duty of weighing evidence regarding possession in proceeding under S. 145, Criminal P. C., is reserved purely for the trial Court and the finding of the trial Court is not open to interference in revision unless it is

vitiated by error of law. A.I.R. 1945 Oudh 12=1944 O.W.N. (C.C.) 287=1944 A.W.R. (C.C.) 196=46 Cr. L. J. 680=220 Ind. Cas. 418.

——S. 145—Revision.

The Magistrate being responsible for peace and order, his decision to institute a proceeding under S. 145, should be unfettered, provided he has before him material, however slight, for his being satisfied as to the existence of a dispute likely to cause a breach of the peace. A.I.R. 1943 Pat. 44=44 Cr. L. J. 25=9 B.R. 73=203 Ind. Cas. 275.

——S. 145—Revision—Evidence cannot be gone into.

As a rule of practice, the High Court will not go into the evidence in revision in matters under S. 145, unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. A.I.R. 1942 Pat. 489=9 B.R. 91=44 Cr. L. J. 95=203 Ind. Cas. 521.

——Ss. 145, 147, 435—Revision.

With the deletion in 1923 of sub-section (3) of S. 435, Criminal P. C., the High Court has full revisional power over proceedings under Ss. 145 and 147 and though even now the High Court will be slow to interfere with a real exercise of discretion by the lower Courts, there can be no hesitation in interfering in revision when no discretion has been exercised at all, or when, what discretion has been exercised, has been exercised on wrong principles altogether. A.I.R. 1939 Pat. 206=5 B.R. 539=20 P.L.T. 164=40 Cr. L. J. 538=181 Ind. Cas. 176.

——Ss. 145, 439—Revision—Finding on point of possession contrary to prior Civil Court adjudication.

Finding of a Magistrate on the point of possession is a finding of fact with which the High Court ordinarily refuses to interfere; but where there are certain circumstances which completely vitiate the findings of the Magistrate in that he does not keep in view that it is the bounden duty of a Criminal Court to obey the orders of the Civil Court and to respect the *dakhaldehani* given by the Civil Courts, the High Court will interfere even though the Magistrate does not commit any error of jurisdiction. A.I.R. 1938 Pat. 105=4 B.R. 335=39 Cr. L. J. 379=173 Ind. Cas. 756.

——S. 145—Revision.

It is the practice of the Sind Judicial Commissioner's Court that it will not interfere with proceedings of Magistrates under Chap. XII, Criminal P. C., in which S. 145 comes merely because the Judges would have exercised their discretion differently upon the facts, because proceedings under this Chapter are proceedings only of a *quasi*-judicial nature. They are temporary and emergent in their nature, and Magistrates on the spot are in a better position to judge of the true state of affairs than Judges in Courts many miles away. But where it is shown that there is not upon the record material on which the Magistrate could properly have exercised jurisdiction, then the Judicial Commissioner's Court will interfere. A.I.R. 1936 Sind 143=37 Cr. L. J. 1030=164 Ind. Cas. 969.

——Ss. 145, 439—Revision—Magistrate arriving at conclusion after due inquiry—Findings of fact, cannot be impugned in revision. A.I.R. 1934 Oudh 158 (1)=11 O.W.N. (C.C.) 375=35 Cr. L. J. 1056 (1)=150 Ind. Cas. 143.

——Ss. 145, 146—Revision—No question of law involved in case—Reasons of Magistrate on facts not unsound or untenable—High Court will not interfere. A.I.R. 1934 Pat. 33=35 Cr. L. J. 611=148 Ind. Cas. 198.

——S. 145—Revision.

Interference in revision is a matter which will be undertaken or left open upon a consideration of the character of the case as a whole and in detail and even though High Court has very wide revisional powers, not being confined to matters of law alone, it will not go into evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. There must appear, on the face of the judgment or of the order complained of or of the record, some ground—which need not always be a ground of law—to induce the High Court to think that the evidence ought to be examined in order to see whether there has been a miscarriage of justice. A.I.R. 1931 Cal. 619=58 Cal. 1081=35 C.W.N. 374=32 Cr. L. J. 1237=134 Ind. Cas. 915.

——S. 145—Revision—Absence of finding.

Where there was evidence that both parties were attempting to cultivate the land, the sowings of one party having been ploughed up by the other,

Held, that this was likely to cause a breach of peace, and the mere fact that the Magistrate had not made this clear in his order did not justify the High Court in interfering in revision. 87 Ind. Cas. 923=26 Cr. L. J. 1035=A.I.R. 1925 Nag. 448.

——S. 145—Revision.

Where the Magistrate failed to decide as to which party was in possession on the date of the preliminary order the High Court can in such circumstances interfere on the ground that the Magistrate has acted without jurisdiction. 16 Cr. L. J. 239 ; 7 Cr. L. R. 450, and 18 Mad. 41, Foll. 69 Ind. Cas. 158 =16 M.L.W. 701=31 M.L.T. 382=23 Cr. L. J. 670=A.I.R. 1923 Mad. 142=45 M.L.J. 56.

——S. 145—Revision.

Proceedings under S. 145 were instituted but there was no finding that there was any likelihood of a breach of the peace. However the notice showed that the Magistrate was satisfied that there was a serious dispute between the parties and from the judgment it appeared that there was a quarrel between the parties with reference to the possession of several plots of land.

Held, it was a proceeding under S. 145 and therefore the High Court could not interfere in revision. 66 Ind. Cas. 527=23 Cr. L. J. 303=A.I.R. 1922 All. 31.

——S. 145—Revision.

Where the Magistrate dismissed an application without finding as to who was in possession, his order is revisable. 66 Ind. Cas. 65=23 Cr. L. J. 225=2 Lah. 372=A.I.R. 1922 Lah. 348.

——S. 145—Revision.

Where proceedings are in intention, in form and in fact, proceedings under Chap. 12 by a Magistrate duly empowered to act under that chapter, the High Court has no power to send for those proceedings or to revise them. The mere omission by a Magistrate to state that he was satisfied from the police report there was a likelihood of a breach of the peace is not a fatal defect. 18 A.L.J. 1140=22 Cr. L. J. 97=2 U.P.L.R. (A.) 428=59 Ind. Cas. 401=L.R. 2 All. 22 (Cr.).

——Ss. 145 and 439—Revision.

The High Court has no power to send for proceeding when these proceedings are in intention, in form and in fact proceedings under Chap. XII by a Magistrate duly empowered to act under the Chapter, either under S. 435, Cr. P. C. or S. 107 of the Govt. of India Act or under S. 15 of the High Courts Act. 31 A. 50 ; 26 A. 144 ; 36 A. 233 ; 4 A.L.J. 91, Foll.; 35 I. C. 801, Diss. ; 21 A. 315. Exp. 39 All. 612=15 A.L.J. 576=18 Cr. L. J. 828=41 Ind. Cas. 652.

——S. 145—Revision—Absence of jurisdiction.

Where the order is *ultra vires* and without jurisdiction, for example, where the action taken professedly under

Chap. 12 really does not fall within the jurisdiction granted thereunder a revision will lie, but not otherwise. 11 O.L.J. 59=25 Cr. L. J. 440=77 Ind. Cas. 728=A.I.R. 1924 Oudh 331.

——S. 145—Revision.

When there is initial want of jurisdiction it is clear that the proceedings though they may purport to be under S. 145 are not really proceedings under it and the High Court can interfere under S. 439, but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Charter Act. 31 Mad. 318, Foll.; 71 Ind. Cas. 228=1929 M.W.N. 629=16 M.L.W. 497=31 M.L.T. 202=24 Cr. L. J. 100=A.I.R. 1923 Mad. 60=43 M.L.J. 624.

——S. 145—Revision—Action within jurisdiction.

Where a District Magistrate cancelled his predecessor's order under S. 145 (1) and stayed the proceedings:

Held, that he had jurisdiction to cancel the order and to stay proceedings if he became satisfied, whatever the source of information may be, that the state of things did not exist, which alone would give jurisdiction to proceed with the enquiry, and the High Court could not interfere in such cases as the District Magistrate had not acted without jurisdiction. 30 Cal. 112. Rel. on. 66 Ind. Cas. 516=2 Lah. 364=105 P.L.R. 1921=A.I.R. 1921 Lah. 92.

——S. 145—Revision—Finding of possession.

The High Court as a Court of revision cannot interfere with the decision of the trial Court on the factum of possession as long as there is evidence in support of that finding. 93 Ind. Cas. 695=8 L.L.J. 47=27 P.L.R. 102=27 Cr. L. J. 471.

——S. 145—Revision—Finding, based on evidence in mutation proceedings, is bad.

While an appeal was pending from an order refusing to set aside an auction-sale the auction purchaser applied for mutation which proceeding was also stayed. In S. 145 proceedings the Magistrate relying on the evidence in the mutation proceedings came to the conclusion that the possession of the auction-purchaser had been satisfactorily established and that the existence of the conflicting claims rendered a breach of the peace at any time probable. *Held* : the Magistrate was not justified in importing his knowledge of the evidence recorded in the mutation proceeding still undecided, into this case and assuming that a breach of the peace was likely, the finding is thus virtually a finding based on no legal evidence and is open to revision. 69 Ind. Cas. 268=25 O.C. 148=10 O.L.J. 157=23 Cr. L. J. 684=A.I.R. 1922 Oudh 256.

——S. 145—Revision—Findings of fact.

It is not the duty of the High Court in a reference made by the Sessions Judge against an order of the Sub-Divisional Officer under S. 145, to examine the evidence to consider whether it might have come to a different finding. 105 Ind. Cas. 229=9 P.L.T. 18=28 Cr. L. J. 901=A.I.R. 1928 Pat. 88.

——S. 145—Revision—Forum.

Where an application has been filed against an order of a Magistrate declaring certain persons to be in possession of certain property under S. 145 :

Held : that the High Court should not entertain the application, as the Sessions Judge has, under Ss. 435 to 438, concurrent jurisdiction in the matter. The application should first be made in the Court of the Sessions Judge : 36 Cal. 643 ; 48 Cal. 534 and 3 Pat. L. J. 302, Rel. on. 91 Ind. Cas 247=27 Cr. L. J. 71=A.I.R. 1926 Nag. 285.

——S. 145—Revision—Grounds for.

In order to interfere with the order under S. 145 putting one party in possession of certain property, the Magistrate must have acted illegally or in an irregular manner. 114 Ind. Cas. 810=6 O.W.N. 17=30 Cr. L. J. 381=A.I.R. 1929 Oudh 82.

——S. 145—Revision.

The undefined character of the area of the land in question and the consequent difficulty experienced in settling the exact location thereof had presented an insuperable obstacle in the way of the Magistrate's arriving at a definite conclusion in regard to possession.

Held : that there is no good ground for interfering with the order of the Magistrate. 111 Ind. Cas. 445=29 Cr. L. J. 861=11 A.I.Cr. R. 194=A.I.R. 1928 Nag. 325.

——S. 145—Revision.

Where the Magistrate had gone at length into the question of ownership and his order was further unsatisfactory, in that it did not explain how a breach of the peace was to be apprehended between the parties. *Held*, That the order should be set aside. 100 Ind. Cas. 712=28 P.L.R. 107=7 A.I.Cr. R. 269=28 Cr. L. J. 328=A.I.R. 1927 Lah. 822.

——S. 145—Revision.

S. 145 requires that a Magistrate, before passing an order, should be satisfied that a dispute likely to cause a breach of the peace exists. The section does not require a Magistrate to record evidence on that question sufficient to satisfy a superior Court. Where such an order is not plainly and palpably wrong, the mere absence of any evidence as to the breach of the peace, on the record is not a sufficient reason for interfering in revision. 104 Ind. Cas. 463=4 O.W.N. 834=28 Cr. L. J. 847=A.I.R. 1927 Oudh 359.

——S. 145—Revision.

Where an enquiry proves that there is a dispute which may lead to bloodshed, and where a Magistrate has taken effective steps under S. 145 to abate temporarily the cause of dispute, his order should not be set aside, thereby reviving the conditions he is specifically ordered to remedy, merely because he omitted to put in writing the grounds which had caused him so to act : A.I.R. 1927 P.C. 44, Foll. 102 Ind. Cas. 911=5 Rang. 129=28 Cr. L. J. 623=8 A.I.Cr. R. 241=A.I.R. 1927 Rang. 177.

——S. 145—Revision.

The High Court can interfere in revision if there has been not a proceeding either in fact or in law as contemplated by S. 145. Where the lower Court has exceeded its jurisdiction in making the order, it is null and void and the High Court will interfere. 59 Ind. Cas. 401=L.R. 2 A. (Cr.) 22=18 A.L.J. 1140=2 U.P.L.R. (A.) 428=22 Cr. L. J. 97.

——S. 145—Revision—Absence of reasons for decision vitiates the order.

Where the order of the Magistrate did not show how he approached the question or how he had considered the evidence in coming to his conclusion, the High Court ordered that the case be reopened from the point reached on the date of the order and that after hearing the parties afresh and recording statement of reasons for the decision the Magistrate should dispose of the matter. 81 Ind. Cas. 939=25 Cr. L. J. 1115=39 C.L.J. 366=A.I.R. 1924 Cal. 848.

——S. 145—Revision.

Complainant appeared before the Magistrate with a petition to the effect that the respondent had in violation of the *razinama* previously filed taken possession of a *kotha* leasing it out and threatened to use violence. The Magistrate summoned the respondent who appeared

and put in a written statement to the effect that the *kotha* was already in his possession and that there was no apprehension of breach of the peace. The Magistrate then ordered that " till the decision of the Civil case the respondent shall not keep his possession over the property in dispute". *Held*, that the proceedings after the date of the *razinama* were in continuation of the order made on that day, and that the second complaint was not treated by the Magistrate as a fresh complaint under S. 145. That being so, there was no grave irregualrity in the proceedings or final order of the Magistrate. 69 Ind. Cas. 452=23 Cr. L. J. 724=A.I.R. 1923 Lah. 46.

——S. 145—Revision.

An arbitrary refusal to examine more than a certain number of witnesses in a proceeding under S. 145 affects the exercise of jurisdiction bringing the case within the revisional powers of the High Court. 61 Ind. Cas. 718=2 P.L.T. 660=22 Cr. L. J. 430=A.I.R. 1921 Pat. 308.

——S. 145—Revision—Procedure of High Court.

On a difference of opinion in matters under S. 145, the Senior Judge's opinion prevails as the jurisdiction exercised by the High Court is under S. 107 of the Govt. of India Act and not under Ss. 435 and 439, Cr. P. Code. 59 Ind. Cas. 403=32 C.L.J. 54=22 Cr. L. J. 99.

——Ss. 145 and 439—Revision by High Court.

In a proper case the High Court can call for the records of the proceedings of Magistrates under S. 145, Cr. P. C., and interfere in revision with the order. 42 All. 214=18 A.L.J. 171=21 Cr. L. J. 242=55 Ind. Cas. 194.

——Ss. 145 (1) and 439—Revision—Preliminary order—Interference.

The High Court will not ordinarily interfere with a preliminary order under S. 145, Cr. P. Code, except where such order is manifestly illegal. 27 M.L.T. 234=11 L.W. 459=21 Cr. L. J. 73=54 Ind. Cas. 473.

——Ss. 145 (7) and 439—Revision—Death of applicant—Abatement.

An application under S. 435, Cr. P. C., for revision of an order under S. 145 abates upon the death of the applicant. The right to carry on the proceedings conferred by S. 145 (7) is confined to proceedings before a Magistrate. 23 P.R. (Cr.) 1919=20 Cr. L. J. 720=52 Ind. Cas. 800.

——Ss. 145 and 439—Revision.

The High Court will not set aside an order under S. 145 except on the ground of want of jurisdiction or departure from procedure sufficiently grave so as to prejudice the parties. 20 Cr. L. J. 176=49 Ind. Cas. 496.

——Ss. 145 (4) and 439—Revision.

It depends upon the circumstances in each case whether the rejection of the evidence is tantamount to a refusal to exercise proper jurisdiction. If the evidence rejected is a material document affecting possession of a party, its rejection might furnish a good ground of grievance to that party. 20 Cr. L. J. 234=49 Ind. Cas. 358.

——Ss. 145 (1) and 439—Revision.

All proceedings purporting to be taken under Chap. XII without first making a formal order under S. 145 (1) are without jurisdiction and are therefore open to revision under S. 439 of the Code. 20 Cr. L. J. 124=49 Ind. Cas. 108.

——S. 145 (4) and 439—Revision—Rejection of material evidence.

The rejection of evidence by a Court is not a good ground for revision. But the rejection of material evidence offered by a party would amount to a refusal to exercise jurisdiction and is a proper ground for revision. 19 Cr. L. J. 529=45 Ind. Cas. 337.

——Ss. 145, 435 (3) and 503—Revision.

An order passed under S. 145 and proceedings under Chap. XII of the Cr. P. Code are not subject to revision. S. 436 (3), Cr. P. C., does not deprive the High Court of its jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Chap. XII of the Code. 19 Cr. L. J. 389=3 U.B.R. (1917) 33=44 Ind. Cas. 741.

——Ss. 145 and 435 (3)—Revision—Limits of.

Orders passed under Chap. XII of the Cr. P. Code are not subject to revision, being expressly excluded from the operation of S. 435 of the Code by Cl. (3) of that section. But in order to make S. 435, Cl. (3) applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Chap. XII of that Code in fact and not only in name. 19 Cr. L. J. 381=3 U.B.R. (1917) 35=44 Ind. Cas. 685.

——Ss. 145 and 439—Revision.

Where, in a proceeding under S. 145 of the Cr. P. Code, a Magistrate merely expresses his opinion of the documents produced and their legal effect without passing final orders under sub-s. (6) the High Court cannot interfere in revision. (1918) M.W.N. 37=19 Cr. L. J. 63=43 Ind. Cas. 95.

——Ss. 145 and 439—Revision—Declaring possession of lands not claimed—Interference.

Making order declaring possession of property not claimed is not a defect of jurisdiction. The case was sent back to the Magistrate to see whether in fact any error had been committed and that if so committed, it was for him to correct it. 18 Cr. L. J. 995=42 Ind. Cas. 723.

——S. 145—Revision.

Mistake of law is no ground for interference under S. 145, *e.g.*, failure to add a party. But where the Magistrate awards to a party more than what he claimed he acts beyond his jurisdiction and the High Court will interfere. 18 Cr. L. J. 692=40 Ind. Cas. 692.

——Ss. 145 and 435—Revision.

The High Court cannot revise an order passed by a Magistrate under S. 145, Cr. P. Code under S. 435, Cr. P. Code, or under S. 15 of the High Court's Act of 1861. 26 A. 144, Ref. 18 Cr. L. J. 418=38 Ind. Cas. 978.

——Ss. 145 and 435—Revision.

Proceedings under Chap. XII of the Code are not open to revision by a non-chartered High Court, but if and where the fact of such proceedings being initiated by the Lower Court without jurisdiction can be ascertained by such High Court without sending for the Lower Court's records it can exercise revisional power. 56 C. 1, Dist. 3 O.L.J. 546=19 O.C. 136=18 Cr. L. J. 100=37 Ind. Cas. 308.

——Ss. 145 and 435—Revision.

The High Court cannot in revision deal with Magistrate's order under S. 145, *suo motu* when he has complied with all the formalities. 17 Cr. L. J. 389=4 L.W. 440=35 Ind. Cas. 821.

——Ss. 145 and 439—Revision.

If a Magistrate refuses to examine except on the ground of delay or vexation the witnesses tendered in proceedings under S. 145 or fails to record a finding as to which party was in possession at the date of the preliminary order, he fails to exercise a jurisdiction vested in him by law and the High Court will interfere in revision. 17 Cr. L. J. 217=34 Ind. Cas. 329.

——Ss. 145 and 439—Revision.

An order under S. 145 is made for the purpose of keeping the peace pending the party's appeal to the civil tribunal and should not be lightly disturbed. 17 Cr. L. J. 143=33 Ind. Cas. 319.

——Ss. 145 and 439—Revision.

Proceedings under Chap. XII are of a special nature giving Magistrates greater liberty than in trying ordinary crimes and such proceedings should not be interfered with in revision under S. 439, Cr. P. Code, or under S. 15 of Charter Act, unless they are without jurisdiction or are obviously unreasonable or unjust. 36 M. 275, Foll. 16 Cr. L. J. 767=31 Ind. Cas. 367.

——Ss. 145 (1) and 439—Revision.

Before passing an order under S. 145, Cr. P. C., the Magistrate failed to issue the preliminary order in writing and to serve a copy of the order on the parties. *Held*, that the final order under S. 145 was *ultra vires*. 169 P.L.R. 1915=32 Cr. P. W. R. 1915=16 Cr. L. J. 628 =30 Ind. Cas. 452.

——Ss. 145 and 439—Revision.

The Judicial Commissioner's Court has no authority to revise proceedings of a Magistrate under S. 145, Cr. P. C. 16 Cr. L. J. 541=18 O.C. 69=29 Ind. Cas. 669.

——Ss. 145 (4) and 439—Revision.

The omission of the Magistrate in making an order under S. 145, Cr. P. C., to give effect to the presumption arising from the entries in a recently published record-of-rights is not a question of jurisdiction, and the High Court cannot interfere on that ground in revision. 19 C.W.N. 123=16 Cr. L. J. 315=28 Ind. Cas. 651.

——Ss. 145 and 439—Revision.

Where proceedings are taken under Chap. XII of the Cr. P. C. by a Magistrate duly empowered the High Court has no power to interfere in revision even though the Magistrate's order is erroneous in law. 8 S.L.R. 207=16 Cr. L. J. 235=27 Ind. Cas. 907.

——Ss. 145, 439—Revision.

A non-compliance by a Magistrate in proceeding under S. 145, with the provisions mentioned therein, and his failure to find that the dispute is likely to occasion a breach of the peace will vitiate his order and it can be set aside in revision. 9 P.W.R. Cr. 1915=16 Cr. L. J. 206=92 P.L.R. 1915=27 Ind. Cas. 766.

——Ss. 145 and 439—Revision.

If the Magistrate has on a perusal of the written statements decided that the possession of the first party is that of an agent and that the second party the principal is entitled to possession : *Held*, the decision was on the merits and the High Court will not interfere in revision. 1 L.W. 939=15 Cr. L. J. 708=26 Ind. Cas. 156.

——S. 145—Revision.

A decision based on the merits of a case cannot be interfered with in revision. (1914) M.W.N. 795=15 Cr. L. J. 669=25 Ind. Cas. 997.

——Ss. 145 and 439—Revision.

A Magistrate's order under S. 145 is not revisable by the High Court. 36 All. 233=12 A.L.J. 344=15 Cr. L. J. 572=25 Ind. Cas. 324.

——Ss. 145, 435 and 439—Revision.

The High Court has no jurisdiction to interfere under Ss. 435, 439 of the Code, with orders under S. 145 of the Code. 26 M.L.J. 208=(1914) M.W.N. 352=15 Cr. L. J. 509=24 Ind. Cas. 597.

——S. 145—Revision when allowed.

A revision lies to the High Court, where a Magistrate closes a proceeding under the section without complying with all the provisions of the section and to the prejudice of the parties. 14 Cr. L. J. 277=11 A.L.J. 586= 19 Ind. Cas. 709.

——Ss. 145, 439—Revision.

All that a Magistrate can do under S. 145 is to maintain possession after due enquiry in strict compliance with its provisions. He cannot remove any superstructure on the disputed land and is not concerned with the question of title. An order under S. 145 without any enquiry and when there is no evidence showing a likelihood of a breach of a peace, cannot be sustained. 6 P.L.R. 1913= 2 P.W.R. (Cr.) 1913=14 Cr. L. J. 138=18 Ind. Cas. 890.

——Ss. 145 and 439—Revision.

A Magistrate acting under S. 145 must hear the evidence before he passes orders and cannot go on the report of a subordinate officer to whom he has referred for enquiry. 13 Cr. L. J. 777=10 A.L.J. 465=17 Ind. Cas. 409.

——Ss. 145, 439 and 537—Revision.

Once a Magistrate is satisfied from information of some sort that a dispute exists which is likely to cause a breach of the peace concerning land or water within his jurisdiction, his jurisdiction is complete under S. 145, Cr. P. C., and his subsequent action must be considered in relation to procedure not jurisdiction. A petition does not lie under S. 439 Cr. P. C. to revise proceedings under S. 145 Cr. P. C. The words 'The record of which has been called for by itself' in S. 439, Cr. P.C., is limited to cases where the High Court acts *suo motu*. The words 'otherwise comes to its knowledge' have no reference to any power outside the Cr. P. C. (10 C. 268 F.) The failure by a Magistrate to record a preliminary order under S. 145 (1) Cr. P. C. does not destroy his jurisdiction to take action under the Code but is an irregularity only, cured by S. 537, Cr. P. C. (6 M.I.A. 134 ; Expl., 25 M. 61 ; 33 C. 352 ; 4 M.L.T. 213 ; 16 M.L.T. 146 ; 30 M. 548 Ref.) 36 Mad. 275=12 M.L.T. 439= 23 M.L.J. 499=(1912) M.W.N. 1154=13 Cr. L. J. 753 =17 Ind. Cas. 65.

——Ss. 145 and 439—Revision.

In cases under S. 145, the High Court may revise the lower court's order if it is entirely opposed to law and justice and if the opposite party's conduct be lawless and high-handed. Except in such special cases the High Court will not interfere. 33 P.W.R. Cr. 1912=193 P.L.R. 1912=13 Cr. L. J. 719=16 Ind. Cas. 527.

——Ss. 145 and 439—Revision.

An order purporting to be one under S. 145, Cr. P. C., passed without following the procedure laid down therein and combined with an order of dismissal of complaint under S. 297 I.P.C. is illegal and without jurisdiction and should be set aside in revision. 24 P.W.R. Cr. 1910= 11 Cr. L. J. 422=6 Ind. Cas. 955.

——Ss. 145 and 439—Revision.

Order of a Magistrate not following the procedure in Chap. XII and simply disposing of an application of complaint under S. 145 on the Patwar's examination, is without jurisdiction. 11 Cr. L. J. 47=5 Ind. Cas. 128.

——Ss. 145 and 439—Revision.

Where the procedure laid down in S. 145 of Cr. P. Code has not been complied with, the order passed thereunder is *ultra vires* and bad in law and is liable to be set aside on revision under S. 439 of the said Code. 11 P.W.Cr. 1909=105 P.L.R. 1909=11 Cr. L. J. 61=12 P.R.Cr. 1909=4 Ind. Cas. 860.

——Ss. 145, Cl. (1), 439—Revision—Written order defective—Apprehension of breach of the peace—Jurisdiction—Revision.

Where the initial order in writing made by a Magistrate under S. 145 (1), Code of Criminal Procedure, is defective, but both sides are fully cognisant of the matter in dispute and there is a danger of the breach of the peace, the High Court will not interfere in revision with the final order passed by the Magistrate. 5 Ind. Cas. 471=11 Cr. L. J. 141=7 A.L.J. 53=32 A. 132.

——Ss. 145 and 435—Revision.

A High Court has no power of revision under the Cr. P. Code or under S. 15 of the High Courts Act over the proceedings held by a duly qualified Magistrate which are in fact, intention, and form proceedings under Chap. XII of the Code. 31 All. 150=6 A.L.J. 113=9 Cr. L. J. 382=1 Ind. Cas. 762.

——Ss. 145 (1), 439 (3)—Revision—Jurisdiction to interfere with an order purporting to be passed under S. 145.

Where an order purporting to be passed under S. 145, Cr. P. C., after evidence recorded which satisfied the Magistrate that there existed a dispute likely to occasion a breach of the peace in respect of certain immovable property was found to be insufficient or defective in the sense that it gave no information as to the subject of the dispute and left the persons to whom it was issued quite in the dark as to the property in regard to which they had to set forth their respective claims : *Held*, that the inadequacy of such order gave the High Court jurisdiction to interfere under Cl. (3) of S. 439 of the Code. 27 C. 681 and 30 C. 443, Foll. (1904) A.W.N. 234=27 A. 296. *See* 5 C.W.N. 653.

——S. 145, Cl. (4)—Revision—Inquiry—Witnesses—Refusal to examine—Revision—Jurisdiction.

A Magistrate's refusal to examine witnesses on behalf of a party when those were present in court is in direct contravention of the law as contained in Cl. (4), S. 145 Cr. P. C., and the High Court is competent to interfere in such a case. 30 C. 578 not Foll. 31 C. 685.

——S. 145, Cl. (4)—Revision—Inquiry—Order without evidence, jurisdiction—Time for filing written statement, application for—Adjournment—Discretion—Revision.

An order passed under S. 145, Cr. P. C., without any evidence, though *ex parte*, is one passed without jurisdiction, and the High Court can interfere with such order in revision. A Magistrate has discretion to refuse an application for time to file a written statement in a proceeding under S. 145, Cr. P. C. 8 C.W.N. 642.

——S. 145—Revision—Proceedings under S. 439—Charter Act, S. 15—High Court, powers of, to direct Magistrate to continue proceedings stayed by him.

The High Court cannot direct the institution of proceedings under S. 145 or the revival of proceedings under S. 145 stayed by the Magistrate. 25 C. 559, 5 C.W.N. 71, and 22 C. 297 dist. 6 C.W.N. 417=30 Cal. 112.

——S. 145—Revision.

The High Court has no power to interfere with orders under Ch. XII of the Criminal P. C., except under the powers of superintendence conferred by S. 15 of 24 and 25 *Bic.*, C. 104. A Sessions Judge has no power to make any reference in a case under Ch. XII that the power of superintendence may be exercised. 28 C. 416. *See* also (1903) A.W.N. 212=26 A. 144.

——Ss. 145, 435—Revision.

In the course of proceedings commenced under S. 107 Criminal P. C. it was found by the Magistrate that there was a dispute relating to land and likely to cause a breach of the peace between the two parties before him. After giving both an opportunity of being heard, the Magistrate passed an order under S. 145 of the Code maintaining one party in possession. *Held*, that notwithstanding that the procedure of the Magistrate was in some respects defective, there was no cause for the exercise of the revisional jurisdiction of the High Court, inasmuch as the parties had been given an opportunity of representing their respective cases, and there was nothing to show that the irregularities in procedure which had occurred had caused any prejudice to either. 27 A. 296 ref. to. (1907) A.W.N. 265=4 A.L.J. 705=30 A. 41.

——S. 145—Revision—Magistrate acting without jurisdiction—Power of High Court to revise order.

Where the court exceeded its jurisdiction, or where without complying with the procedure prescribed in S. 145 the court passed an order under S. 146, the High Court is competent to interfere in revision. 26 C. 118 ; 24 B. 527 ; 18 M. 41 ref. to. (1903) A.W.N. 102=25 A. 537.

——Ss. 145, 526—Revision—Magistrate's duty under S. 145—Question for consideration before transfer.

The provisions of S. 526, Cr. P. C., confer no power to direct the transfer of any proceedings initiated under S. 145, Cr. P. C. Parties cannot be called on in the proceeding under S. 145 to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon any conclusion at which he may arrive, as to the respective titles of the parties. There can be no revision of orders under Ch. XII except on the ground of want of jurisdiction. 25 B. 179=2 Bom. L. R. 755.

——S. 145—Revision.

Where proceedings under S. 145, Cr. P. C., have been once started, such proceedings should be brought to a termination in one or other of the ways contemplated by law. It is improper for a Magistrate after starting proceedings under S. 145, Cr. P. C., to record an order : "Parties absent, case filed". 6 C.W.N. 923.

——Ss. 145, 435—Revision—Non-joinder of parties on ground that Magistrate had no power to join—Revision.

Per *Banerjee, J.*—Where a Magistrate declines to add a party to the proceedings under S. 145 on the ground that he has no power to join him, he declines jurisdiction and his final order can be set aside as without jurisdiction under S. 435, Cr. P. C., and S. 15 of the Charter Act. 6 C.W.N. 737 =30 Cal. 155 (F.B.).

——S. 145—Revision.

An order under S. 145 made in favour of four persons, two of whom claim no interest in the property in dispute, is not warranted by law and is bad for want of jurisdiction. 6 C.W.N. 104.

——S. 145—Revision.

A Magistrate is not justified in disregarding the decree of a civil court. It is his duty to uphold and carry out that decree so far as lies in him to do so. 26 C. 625 Ref. to. A civil Court decreed redemption of certain shares in a zemindari. The mortgagee claimed to remain in cultivatory possession of certain plots of land, contending that the decree of the civil court did not affect his rights as a tenant. Upon a dispute for possession arising between the tenant and the mortgagor's representatives : *Held*, that the Magistrate had jurisdiction to pass an order under S. 145 and that, therefore, the High Court could not revise his order. 2 A.L.J. 274. But *see* 7 C.W.N. 461.

——S. 145, Ch. XII—Revision.

High Court cannot exercise revisional power in respect of proceedings under Chapter XII, Criminal P. C., unless in a case where the Magistrate has acted without jurisdiction. 26 C. 625, Foll. (1902) A.W.N. 74=24 A. 315.

——S. 145—Revision.

Where a Magistrate, after entertaining proceedings under S. 145, Cr. P. C., had declined to make any order declaring one or other of the contending parties in possession, the High Court would not interfere in revision at the instance of a person who, though apparently the next reversioner to the estate, could for the time being have no possible right on his own behalf to prevent possession. I.L.R. 27 C. 892 ; 28 C. 446 distinguished. 1902 A.W.N. 111=24 A. 443.

——S. 145—Revision.

The High Court may interfere in a proceeding instituted by a Magistrate under S. 145, Cr. P. C., when the Police Report on which the proceeding is based states in the vaguest terms that each of the parties claims a certain right and that inasmuch as both the parties are men of substance there might be a breach of the peace. Before a proceeding is drawn up under S. 145, Cr. P. C., the subject-matter of the dispute must be clearly determined. 11 C.W.N. 198.

68. Security for keeping peace.

——S. 145—Security for keeping peace.

The Magistrate under S. 145 is to decide the question of possession and not that of title which is to be decided by a Civil Court, and if it is probable that the parties to a land dispute will break the King's peace before the decision of the Civil Court can be given, that danger can be guarded against by an order under S. 107 in an appropriate case. 95 Ind. Cas. 62=28 Bom. L. R. 488=27 Cr. L. J. 734=A.I.R. 1926 Bom. 313.

——S. 145—Security for keeping the peace.

While it is discretionary with the Magistrate to draw up proceedings under S. 107, the proper course when there is a *bona fide* dispute as to lands is to proceed under S. 145. Otherwise, the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession. A.I.R. 1922 Pat. 435 (F.B.). Ref. and Foll. 32 Cal. 966 and 7 C.W.N. 746, Dist. 90 Ind. Cas. 442=6 P.L.T. 766=26 Cr. L. J. 1562=1925 P.H.C.C. 263=A.I.R. 1925 Pat. 610.

——S. 145—Security for keeping the peace.

It may sometimes be necessary to bind parties under S. 107 in order to prevent a breach of the peace even though proceedings under S. 145 have been taken. 61 Ind. Cas. 240=24 O.C. 21=22 Cr. L. J. 381=A.I.R. 1921 Oudh 119.

——S. 145—Security for keeping the peace.

S. 145 does not apply where one party is clearly in possession and the other party wants to take forcible possession of it, as there is no dispute as to possession of the property within S. 145. The proper remedy is to take proceedings under S. 107 of the Code. 1 Pat. L.T. 681=59 Ind. Cas. 374=22 Cr. L. J. 86.

——Ss. 145 and 107—Security for keeping peace.

Where the property was recorded in the Collector's register in the name of the widow after the death of her husband in the absence of an objection by the agnates under Bengal Land Registration Act, and where there was a dispute as to the possession of the property, proceedings under S. 107 against the agnates who claimed the properties on the ground of survivorship were proper especially where there was overwhelming evidence of the widow's possession. An order under S. 107 can be passed only when the wrongful acts can be proved by overt actions against each of the several individuals sought to be bound down. Where, however, the wrongful acts are committed or threatened to be committed jointly by a number of individuals and not only by some of them, the act is the act of all and therefore all of them are liable under S. 107. 22 Cr. L. J. 86=1 Pat. L. T. 681=59 Ind. Cas. 374.

——Ss. 145 and 439—Security for keeping peace.

By an order of a Magistrate, proceedings under S. 145, Cr. P. Code, were dropped because proceedings under S. 107 would meet the case and because the latter were pending. *Held*, that the High Court would not interfere in revision with the order. 21 Cr. L. J. 134=54 Ind.Cas. 614 (Cal.).

——S. 145—Security for keeping the peace.

A case under S. 107, Criminal P. C., can be proceeded under S. 145 if facts disclose likewise. 1935 M.W.N. 813.

——Ss. 145 and 107—Security for keeping the peace—Jurisdiction to drop proceedings under S. 107 and to start under S. 145—Termination of proceedings under S. 145.

A Magistrate taking cognisance of a case under S. 107 can drop the proceedings under that section, and proceed under S. 145. Where there is a clear dispute as to possession the proper section to proceed under is S. 145, which is more effective and less prejudicial to the contending parties. A proceeding under S. 145 can only be terminated by decision upon the evidence under S. 145 (5), Cl. 4. Proceedings can be dropped under S. 145 (5) on the only ground mentioned therein. 19 Cr. L. J. 712=46 Ind. Cas. 296.

——Ss. 145 and 107—Security for keeping peace—Initiation of proceedings under S. 107—Conversion into one under S. 145.

Where a proceeding is started under S. 107 of the Cr. P. Code and evidence is taken but the Magistrate subsequently converted the proceedings into one under S. 145, he must call for written statement of the parties and record evidence under the latter section. Failure to do so vitiates an order under S. 145. 4 Pat. L.W. 195=19 Cr. L. J. 320=44 Ind. Cas. 336.

——Ss. 145 and 107—Security for keeping peace—Simultaneous proceedings—Legality.

There can be no two simultaneous proceedings on the same materials one under S. 145 the other under S. 107. If there are, then the proceedings under S. 107 should be set aside. 1 Pat. L.W. 546=(1917) Pat. H.C.C. 216=18 Cr. L. J. 628=39 Ind. Cas. 996.

——Ss. 145 and 107—Security for keeping peace—Proceedings under S. 145—Whether order under S. 107 can be made.

An order under S. 107 cannot be made on the termination of proceedings under S. 145. 14 A.L.J. 794=17 Cr. L. J. 527=36 Ind. Cas. 495.

69. Sine die postponement.

——S. 145—Sine die postponement.

Under S. 145 a Magistrate can postpone a proceeding '*sine die*' when he expects that settlement proceedings in respect of the land in question were soon to commence. 13 C.W.N. 601=11 Cr. L. J. 7=4 Ind. Cas. 537.

——S. 145—Sine die postponement.

The proceedings under S. 145, Cr. P. Code, should not be postponed *sine die* pending settlement of the property under Regulation VII of 1822 and at the same time retaining the property under attachment. 13 C.W.N. 104=9 Cr. L. J. 35=8 C.L.J. 564=4 Ind. Cas. 328.

70. Subject-matter of dispute.

——S. 145—Subject-matter of dispute—Dispute as to right to receive offerings at shrine depending upon right to sit in particular spot—Order can be made either under S. 145 or S. 147.

Where a dispute regarding the right to receive the offerings at a shrine centres round and depends upon the right to sit in a particular spot, the dispute relates either to the possession of the land or to its use. Therefore, an order either under S. 145 or under S. 147, Criminal P. C., can be made. A.I.R. 1941 Nag. 171=1941 N.L.J. 110=42 Cr. L. J. 675=195 Ind. Cas. 122.

——S. 145—Subject matter of dispute—Order under S. 145 in respect of stock of medicines, if can be passed.

The definition of land in Cl. (2) of S. 145, Criminal P. C., cannot include the movable property, such as a stock of medicines in a shop. Consequently, no order under the section can be passed in respect of the stock of medicines. A.I.R. 1941 Oudh 515=1941 O.W.N. (C.C.) 848 (2)=42 Cr. L. J. 710=1941 A.W.R. (C.C.) 247=195 Ind. Cas. 236.

——S. 145—Subject matter of dispute—Dispute as to possession of minerals—Proceedings under S. 145, if can be started.

Proceedings under S. 145, Criminal P. C., can be appropriately instituted in cases of disputes as to the possession of minerals. A.I.R. 1939 Pat. 209=20 P.L.T. 105=5 B.R. 711=40 Cr. L. J. 631=18 Pat. 215=182 Ind. Cas. 89.

——S. 145—Subject matter of dispute—Fees khutagarai, arhat and keali, whether come within expression "land and water" in S. 145 (1).

Certain fees called *khutagarai*, *arhat* and *keali*, levied in respect of boats moored in a shallow channel and dissociated from the ownership of the site are not included within the expression "land or water" as used in Sub-S. (1) of S. 145, Criminal P. C., and as explained in Sub-S.(2) of that section. A.I.R. 1939 Pat. 206=20 P.L.T. 164=5 B.R. 539=40 Cr. L. J. 538=181 Ind. Cas. 176.

——S. 145—Subject matter of dispute—Share in annual produce of mango grove is not specific tangible property susceptible of exclusive possession.

Property which comes into existence anew each season and the extent of which may grow or shrink in comparison with the crop of the previous season, cannot be held to be specific tangible property capable of such demarcation as would render it susceptible of exclusive possession. A share in the annual produce of such property (a share in annaul produce of mango-grove) cannot, therefore, be held to be a specified or demarcated portion of it. A.I.R. 1935 Nag. 44=17 N.L.J. 216.

——S. 145—Subject matter of dispute—Dispute as to lease of lac produce whether dispute with regard to land.

It is ture that lac itself would not be immovable property, but it can only be propagated on trees and is so connected with the trees that any dispute with regard to it must also involve a dispute with regard to land or right to enter upon that land for the purpose of taking the lac. A.I.R. 1934 Nag. 112=35 Cr. L. J. 1381=30 N.L.R. 311=151 Ind. Cas. 348.

——Ss. 145, 147—Subject matter of dispute—Right to catch fish in waters upon the land of another.

The subject-matter of a proceeding under S. 147, Criminal P. C., may be fisheries to which one of the parties may have a right apart from any right to the land upon which the fishery stands. The subject-matter of the proceeding under S. 145, if it relates to fisheries, must relate to the particular local area where the fishery extends. The difference is that in the one case, that is, in the case of S. 147, the right may be a prescriptive right or right of easement to use water or land not belonging to the parties but belonging to somebody else which has to be considered.

Where the right claimed by one party is the right to catch fish in waters upon the land of the other party, it is in the nature of an easement or profits *a prendre* and hence a proceeding in respect of the right comes within ambit of S. 147, Criminal P. C.

In a proceeding under S. 147, the action of the Magistrate in admitting documents after the close of the case without notice to the opposite party and without giving them an opportunity to adduce rebutting evidence is illegal. A.I.R. 1934 Pat. 86=35 Cr. L. J. 481=15 P.L.T. 147=13 Pat. 153=147 Ind. Cas. 774.

——Ss. 145, 146—Subject matter of dispute—Attachment as to some plots and confirmation of one party's possession as to rest—Validity of order.

Where in proceedings instituted under S. 145, Cr. P.C., as to possession of several plots, the court, if it finds some plots to be in possession of one party and is unable to find possession as to the rest, may confirm the party's possession as to those in his possession and attach the other plots. There is no rule that he should attach all plots or none. Where several plots are in dispute, each may be considered to be independently the subject-matter of the proceeding. Per *Taylor J.*—A case under S. 145 as to several plots may be viewed as several proceedings tried together, the joint trial being only an immaterial irregularity. 5 C.W.N. 710.

——S. 145, Cl. (1)—Subject-matter of dispute—Partly within and partly without the local limits of a Magistrate's jurisdiction.

S. 145 of the Code of Criminal Procedure gives power to a Magistrate to institute proceedings under the section in regard to any land or water or the boundaries thereof, within the local limits of his jurisdiction. When therefore, a *jalkar*, the subject of a proceeding under S. 145, Criminal P. Code, is situate partly within and partly without the local limits of a Magistrate's jurisdiction, the order of the Magistrate with regard to that portion of it which lies outside it is *ultra vires*. Proceedings having been taken with regard to the *jalkar* as a whole, the entire order should be set aside. 1 C.L.J. 329.

71. Transfer of case.

——Ss. 145 and 528—Transfer of case—District Magistrate transferring application to file of a First Class Magistrate—Preliminary order by the First Class Magistrate who is subsequently found to have no territorial jurisdiction over some of the properties—Jurisdiction of District Magistrate to withdraw case to his own file.

No doubt the general proposition is that proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted and a superior Court, cannot transfer them to a Court having jurisdiction and thereby cure a defect. But that does not mean that a power of transfer once exercised cannot be further invoked for the purpose of correcting an inadvertent and unthought of mistake.

Where a District Magistrate transferred an application under S. 145, Cr. P. Code, to a First Class Magistrate who passed the preliminary order and it was subsequently found that he had no jurisdiction over some of the properties, the District Magistrate has jurisdiction to withdraw the case and take it on his own file. 1949 M.W.N. 184=61 L.W. 848=A.I.R. 1949 Mad. 563=50 Cr. L. J. 866=(1949) 1 M. L. J. 646.

——S. 145—Transfer of case.

Where a District Magistrate transferred a case under S. 145, Criminal P. C., to another Magistrate in another Sub-Division and the Magistrate to whom it was transferred included in the proceedings before him certain land outside his Sub-Division :

Held, that he had jurisdiction to do so. A.I.R. 1935 Pat. 436=16 P.L.T. 576=2 B.R. 61=37 Cr. L. J. 55=159 Ind. Cas. 12.

——Ss. 145 and 526—Transfer of case.

Although a "case" in Cl. (8), S. 526, includes a proceeding under S. 145, a party in a proceeding under S. 145 cannot apply for adjournment under Cl. (8) S. 526. 106 Ind. Cas. 219=6 Pat. 553=8 P.L.T. 716=28 Cr. L. J. 1035=A.I.R. 1927 Pat. 351.

——Ss. 145 and 526—Transfer of case.

S. 526 does not empower a High Court to transfer proceedings under S. 145 of the Code as such proceedings cannot be described as a criminal case in which a person is accused of an offence. 25 Cr. L. J. 276=76 Ind. Cas. 868=A.I.R. 1925 Lah. 48.

——Ss. 145 and 526—Transfer of case.

The fact that the trying Magistrate is believed to have made up his mind that there is no likelihood of a breach of peace is not a sufficient ground for transfer. If he forms any opinion on the question of possession which might hamper him in dealing with the evidence on that point, it might no doubt be proper ground for transferring the case. 76 Ind. Cas. 562=25 Cr. L. J. 194=A.I.R. 1923 Oudh 161.

——Ss. 145 and 526—Transfer.

A proceeding under S. 145 of the Cr. P. Code is not a "Criminal Case" within S. 526 of the Cr. P. Code and an application for transfer of such a proceeding is therefore incompetent. 8 S.L.R. 215=16 Cr. L. J. 249=28 Ind. Cas. 105.

——Ss. 145 and 529—Transfer of case.

If a Magistrate transfers cases under S. 145 not being empowered so to do under 192 (2), the defect can be cured by S. 529. 36 Cal. 370=13 C.W.N. 530=9 Cr. L. J. 399=1 Ind. Cas. 817.

——S. 145, Sub-S. (5)—Transfer of a proceeding under S. 145—Power of Magistrate to quash proceeding upon transfer.

Where a proceeding under S. 145, Cr. P. C., drawn up by a Deputy Magistrate was transferred by the District Magistrate to his own file and then summarily quashed :

Held—That the District Magistrate could only quash the proceeding in accordance with the provisions of Sub-S.(5) of S. 145, Cr. P. C., on facts being brought to his notice which were sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. That his order quashing the proceeding on the sole ground that he thought that the letter addressed to him by one of the parties contained an admission that the other party was in actual possession of the land in dispute was without jurisdiction and should be set aside. *Semble*:—If the District Magistrate, after transferring to his own file a proceeding under S. 145, Cr. P. C., drawn up by a Subordina e Magistrate, quashed the proceeding on a full consideration of all the facts and after hearing the objections, if any, of the parties, the High Court would not interfere with the order quashing the proceeding. (1908) 13 C.W.N. 125=4 Ind. Cas. 354=10 Cr. L. J. 560.

——Ss. 145, 192—Transfer of case.

Where a District Magistrate transferred a case under S. 145, Cr. P. C., to a senior Deputy Magistrate to be disposed of by him or any other Magistrate whom he may direct to dispose of it, and subsequently the Deputy Magistrate transferred the case to another Magistrate who disposed of the case finally : *Held*, that if the transfer was under S. 192 and irregular, not being to a specified Magistrate, the irregularity did not vitiate the proceedings by reason of S. 529 (*f*) of the code. 5 C.W.N. 686.

——S. 145—Transfer of case.

The jurisdiction to make a final order under S. 145, Cr. P. C., is not personal to the Magistrate who initiates the proceeding, and a District Magistrate may of his motion, transfer a case under Chap. XII of the Code to a Magistrate of the first class subordinate to him. A Magistrate of the first class holding the court of the headquarters has local jurisdiction throughout the district. Where the Magistrate added parties and issued fresh copies of the original proceedings: *Held*, that the Magistrate was within jurisdiction. 10 C.W.N. 1095=4 Cr. L. J. 223.

——Ss. 145, 576—Transfer of case—Investigation under it is an 'enquiry'—Jurisdiction of the High Court to transfer.

An investigation in a case under S. 145 is an 'enquiry' within the meaning of the Code, and the court taking cognizance of it is a 'criminal court' within the meaning of the Code. 5 C.W.N. 749=28 C. 709.

72. Miscellaneous.

——S. 145 (4)—Miscellaneous—Proviso—When becomes applicable.

The proviso to S. 145 (4), Cr. P. Code, becomes applicable only if a Magistrate can come to a definite finding that any particular party has been dispossessed within a period of two months next preceding the order under S. 145 (1) of the Code. In the absence of any finding as to dispossession of party there is no scope for the applicability of the proviso. I.L.R. 1949 A. 125=49 Cr. L. J. 751=A.I.R. 1949 All. 97=3 A.I. Cr. D. 190=1948 A.W.R. (H.C.) 196.

——Ss. 145 (6), 350, 366 and 367—Miscellaneous—Order under S. 145 (6) if a judgment—Applicability of Ss. 366 and 367 to such an order—Order written and signed by a Magistrate but pronounced by his successor—Legality.

A proceeding under S. 145 of the Code is not a trial ; the order issued by the Magistrate under sub-Cl. (6) of S. 145 is not a judgment and therefore the provisions of Ss. 366 and 367 of the Code are not applicable and if at all, the provisions of S. 350 alone are applicable. Hence, the action of a succeeding Magistrate in pronouncing in Court the order of his predecessor under S. 145 (6) which had been written and signed by him when he was in office is perfectly justified and is not open to revision. I.L.R. (1949) Mad. 293=49 Cr. L. J. 754=61 L.W. 344 =A.I.R. 1948 Mad. 510=1948 M.W.N. 353 (2)=(1948) 1 M.L.J. 396.

——S. 145—Miscellaneous—Reopening the proceeding at the application of the second party and awarding the possession to the latter because first party has failed to prove, is illegal.

Certain land was attached under Cl. (4) of S. 145. After several adjournments, the Magistrate refused to give further time to the first party, and recorded the order. "Proceedings stopped ; File." On the same day a petition was put in by the second party and the Magistrate wrote on it this order : "Heard the parties, examined the documents. The first party have failed to prove their possession and case, though repeated opportunity was granted ; second party will remain in possession."

Held, in doing so, the Magistrate was clearly wrong. In the first place having dropped proceedings he ought not to have re-opened them, and secondly, assuming that he had jurisdiction to go on with the case without a fresh proceeding, he ought to have put the parties on the same footing instead of awarding possession to the second party because the first party had failed to prove its case. 65 Ind. Cas. 851=23 Cr. L. J. 195=A.I.R. 1923 Cal. 314.

——S. 145—Miscellaneous.

Where a Magistrate did not record a decision under sub.-S. (4) nor issued an order containing a declaration contemplated by sub-S. (6) but passed an order on a supposed right to possession.

Held, this constitutes an obvious infringement of the provisions of Ss. 145 and 146. 71 Ind. Cas. 508=16

M.L.W. 338=1922 M.W.N. 689=24 Cr. L. J. 156=A.I.R. 1923 Mad. 24.

——S. 145, Cl. (4)—Miscellaneous—Case given up by one side—Oral admission by mukhtar if sufficient—Recording of admission if indispensable.

Although it is ordinarily necessary to record evidence in a case under S. 145, Cr. P. C., before passing final orders, it is not indispensable to do so when the case is completely given up by one side. Where the Mukhtar of one of the parties in a proceeding under S. 145, Cr. P. C., orally denied their claim to the disputed land, though such denial had been made in their written statements :

Held, that admission by the legal practitioner conducting the case was sufficient in a *quasi* civil proceeding of this nature, and the Magistrate was justified in passing an order in favour of the other party. The fact that such admission was not recorded did not invalidate the order. 7 C.W.N. 351.

——S. 145, Cl. (4)—Miscellaneous—Order under—Construction of.

An order under S. 145, Cr. P. C., saying that as the court sees that one party is in possession it is not necessary to continue the proceedings, is not an order declaring the possession of that party. 30 Cal. 112=6 C.W.N. 417.

——S. 145, Cl. (4)—Miscellaneous—Summons case, procedure for, not applicable—Witnesses, summons or processes for.

There is no provision in the Criminal Procedure Code, which makes the procedure laid down for summons cases, applicable to proceedings under S. 145 and the parties cannot claim it as a matter of right that it is obligatory, upon the Magistrate to assist them to produce their evidence by issuing summons or processes upon their witnesses. 32 Cal. 1093=2 C.L.J. 280.

——S. 146.

Synopsis.

1. Applicability.
2. Attachment.
3. Civil Court's decision.
4. Civil suit for declaration.
5. Competent Court.
6. Conflicting claims on title.
7. Duty of Magistrate.
8. Ex parte order.
9. Extension of time.
10. Joint property.
11. Jurisdiction.
12. Limitation.
13. Mesne profits.
14. Objects.
15. Parties.
16. Party can be left in possession.
17. Possession through mortgagee.
18. Procedure.
19. Receiver.
20. Release from attachment.
21. Remedies.
22. Revision.
23. Scope.
24. Miscellaneous.

1. Applicability.

——S. 146 (1)—Applicability.

Where a Magistrate has come to a definite conclusion that a particular party was in possession before the relevant date, it is not open to him to pass an order under S. 146 (1). I.L.R. 1949 A. 125=49 Cr. L. J. 751=A.I.R. 1949 All. 97=3 A.I. Cr. D. 190=1948 A.W.R. (H.C.) 196.

——Ss. 146 and 147—Applicability—Proceeding under S. 147—Attachment of property—Jurisdiction of Magistrate.

S. 146, Cr. P. Code, is strictly limited to proceedings under S. 145, Cr. P. Code, and cannot apply to proceedings under S. 147, Cr. P. Code, in which there is no conflict regarding the question of possession. A Magistrate has, therefore, no jurisdiction in a proceeding under S.147 to attach the property and appoint a receiver. I.L.R. (1948) 1 Cal. 374.

——S. 146—Applicability.

Order under S. 146 is to be passed only in the absence of an order of a competent Court. But in case such an order has been actually passed which is binding on the parties to the proceedings, the question as to whether possession was actually delivered to the successful party as a result of the order is not material. A.I.R. 1944 Mad. 472=(1944) 2 M.L.J. 41=1944 M.W.N. 499 (2)=46 Cr. L. J. 104=216 Ind. Cas. 9.

——Ss. 146 (1), 561-A—Applicability—Magistrate, if can release property after decision of trial Court—Trial Court's decision reversed on appeal—Magistrate, if can pass orders regarding property—Proper remedy for aggrieved party—S. 561-A, if applies.

It is not at all necessary that the final Court of appeal should be considered to be the competent Court within the meaning of the words in sub-S. (1) of S. 146, Criminal P. C. A Magistrate can, therefore, pass an order releasing the property from attachment in favour of a successful party on the decision of a suit by trial Court, even if an appeal from such a decision is pending.

And if the decision is reversed on appeal, the Magistrate has no further jurisdiction under S. 145 or S. 146, Criminal P. C., to pass order regarding delivery of possession of property.

Nor can the High Court pass an order under S. 561-A, as it cannot be invoked to override an express provision of law or when there is another remedy open. The reversal of the order of the Magistrate would amount to overriding an express provision of law and further, the party has the remedy of suing for possession on payment of proper court-fee. A.I.R. 1942 Pesh. 11=43 Cr. L. J. 384=198 Ind. Cas. 490.

——S. 146—Applicability.

An order under S. 146, Criminal P. C., attaching property is a desperate remedy for cases in which Magistrate finds it quite impossible to choose between conflicting evidence adduced by parties. A.I.R. 1940 Pat. 113=21 P.L.T. 306=6 B.R. 81=41 Cr. L. J. 101=184 Ind. Cas. 817.

——S. 146—Applicability.

Inability of Magistrate to find which party was in possession is necessary to invoke applicability. 1939 N.L.J. 213.

——S. 146—Applicability—Inability to decide possession or that neither had it.

Where it is not known whether it was the plantiff or the defendant who was guilty of interference with possession or dispossession, all that one can say as to what led the Magistrate to take possession is that it was either his inability to decide who was in actual possession or his decision that neither party was in possession and that neither

of these can be said to be wrong by the defendant. 85 Ind. Cas. 631=20 N.L.R. 195=A.I.R. 1925 Nag. 236.

——S. 146—Applicability—Doubtful possession.

Where the Magistrate is unable to satisfy himself as to which of the parties is then in possession he cannot attach the subject of dispute under S. 146. 1930 M.W.N. 771.

2. Attachment.

——S. 146 (1)—Attachment—If can be made when both parties were found to be in possession.

It is not correct to say that once the Magistrate comes to the conclusion that both the parties to the dispute were in possession of portions of the land in dispute on the date of the preliminary order, no matter how recent was that possession of one or the other, the Court loses all jurisdiction vested in it under S. 146 (1) of the Cr. P. Code to pass an order of attachment. 1949 M.W.N. 115=A.I.R. 1949 Mad. 461=50 Cr. L. J. 659=(1948) 2 M.L.J. 642.

——S. 146—Attachment—Legal possession for all purposes must be deemed to be with successful party.

When property is attached by Criminal Court under S. 146, Criminal P. C., the legal possession for all purposes including those of limitation is with the successful party on whose behalf the Court holds the property. A.I.R. 1943 Nag. 246=1943 N.L.J. 369=44 Cr. L. J. 739=I.L.R. (1943) Nag. 752=208 Ind. Cas. 58.

——S. 146—Attachment under and that in execution of Civil Court's decree—Distinction.

A Magistrate acting under S. 146, Criminal P. C., takes the property out of the possession of the disputants and the subsequent possession of the Receiver is in law treated as possession on behalf of the true owner and not of the party previously in possession without title. But an attachment in execution does not prevent the judgment-debtor and much less a third party from continuing to enjoy the property ; there is accordingly no occasion for the application of the rules relating to " constructive possession." The same consideration furnishes the ground of distinction between cases relating to *vis major* and attachment in execution. In the former case, the land has *ex hypothesis* become incapable of actual possession ; and the doctrine of constructive possession can be invoked only by the true owner and not by a person who has to rely on adverse possession. A.I.R. 1939 Mad. 456 =49 M.L.W. 671=1939 M.W.N. 488=(1939) 1 M.L.J. 802=I.L.R. (1939) Mad. 803=182 Ind. Cas. 999 (F.B.).

——S. 146—Attachment—Effect—Entry into house for removal of movable property therein after attachment without Magistrate's orders—Legality of.

Once a house is attached, the Court is deemed to be in possession of it and neither party can enter it it or go into the premises appurtenant to it or remove any movable property which may be on those premises without getting an order from the Magistrate. A.I.R. 1936 All. 141=(1936) A.L.J. 83=37 Cr. L. J. 346=1936 A.W.R. (H.C.) 192 (1)=160 Ind. Cas. 870 (1).

——S. 146—Attachment—Power to attach when to be exercised.

S. 146, Criminal P. C., comes into operation only if the Magistrate is unable to satisfy himself as to which of the parties is in possession. It is not necessary that the order of the Magistrate should be so convincing as to make a Revisional Court equally sure that one party is in possession rather than the other. A.I.R. 1932 All. 325=33 Cr. L. J. 157=135 Ind. Cas. 246.

——Ss. 146 and 145—Attachment—Crops severed from the land—Jurisdiction.

Held, that the words 'crops or other produce of land,' as used in S. 145 (2), Cr. P. C., do not include crops which have been severed from the land upon which they grew. A Magistrate has therefore, no jurisdiction to attach, under S. 146 of the Code, a crop of muhwa no longer growing on the trees, 30 C. 110, Foll. (1905) A.W.N. 278=28 A. 266=3 A.L.J. 13.

——S. 146—Attachment.

Where the Magistrate is unable to satisfy himself as to which of the parties was in possession at the date of the preliminary order, it is quite open to him to continue the attachment already made till a competent Court has determined the rights of the parties or the person entitled to possession. 11 A.I. Cr. R. 194=111 Ind. Cas. 445=29 Cr. L. J. 861=A.I.R. 1928 Nag. 325.

——S. 146—Attachment.

The object of proceedings under S. 145, being to determine which party was in possession at the date of the proceedings to and declare such party to be entitled to retain possession the possession of the Court during attachment in the course of those proceedings should ensure for the benefit of such party in whose favour such a declaration is made. 30 C.W.N. 541=95 Ind. Cas. 117=A.I.R. 1926 Cal. 782.

——S. 146 (1)—Attachment—Cancellation before termination of proceedings.

An order of attachment passed under S. 146 (1) must be kept in force till the adjudication of the rights of the parties by a competent Civil Court. A Magistrate has no jurisdiction to cancel an attachment as a result of further enquiry and adjudication by him as to the right of possession. 26 Mad. 410, Foll. 19 Cr. L. J. 443=44 Ind. Cas. 971.

——S. 146—Attachment—Dispute between landlords—Tenants in possession—Crop, attachment of, propriety of.

Where the dispute is between rival zemindars and the tenants in possession are not involved in the dispute the crops on the land raised by the tenants should not be attached. 5 C.W.N. 105.

——S. 146—Attachment—Duration of.

An attachment under S. 146 remains in force until withdrawn but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice, that a competent court has determined the rights of the parties thereto or of the person entitled to possession. 17 M.L.T. 392=16 Cr. L. J. 481=29 Ind. Cas. 321.

——S. 146 (1)—Attachment.

When each party is found to be in possession of different portions of the disputed land a Magistrate has no jurisdiction to order attachment under S. 146 (1), Cr. P. C. 9 C.W.N. 887=1 C.L.J. 321.

——S. 146—Attachment—Finding.

Magistrate cannot take action under the section merely because he is unable to satisfy himself as to which of the parties is entitled to possession or has a right to the property. Inability to decide on the right of the parties to the property cannot, therefore, justify the attachment of property under S. 146, Cr. P. C. 6 Bom. L. R. 723.

——S. 146—Attachment—Prerequisites.

For a Magistrate to attach property in dispute under S. 146, all that S. 146 requires is that the Magistrate should be unable to satisfy himself as to which of the parties was in "such possession," that is actual possession of the subject in dispute. 1930 Cr. C. 548=125 Ind. Cas. 718=31 Cr. L. J. 933=32 Bom. L. R. 340=A.I.R. 1930 Bom. 172.

——S. 146—Attachment—Prerequisites.

It is not a Magistrate's business to speculate whether his order under S. 145 will prejudice a future decision, perhaps several years hence, in a revenue proceeding,

It is also not sound to check his hand because his decision is not final. Although it is true that an attachment under S. 146 will as effectually prevent a breach of the peace as a decision in favour of a party under S. 145, a reasonable effort, varying of course with the circumstances of each particular case, must be made to decide as to possession before there is jurisdiction to attach the subject-matter under S. 146. 74 Ind. Cas. 258=4 P.L.T. 441=1 Pat. L.R. Cr. 161=24 Cr. L. J. 754=A.I.R. 1924 Pat. 47.

——S. 146—Attachment—Prerequisites.

There must be a proceeding under S. 145 before an order under S. 146 can be passed. 75 Ind. Cas. 80=24 Cr. L. J. 880=A.I.R. 1923 Nag. 297.

See also 2 A.L.J. 149.

——S. 146—Attachment—Prerequisites.

An order under S. 146 is *ultra vires* unless the Magistrate records a finding that he is unable to find which party is in actual possession under S. 145. 16 Cr. L. J. 239=27 Ind. Cas. 911.

3. Civil Court's decision.

——S. 146—Civil Court decision—Effect.

When an order of attachment of the disputed property is passed under S. 146, Criminal P. C., the Criminal Court has power to take possession of the property, and furthermore, during the continuance of such attachment in accordance with the terms of S. 146, can use its powers as a Court to make the attachment effective and summarily eject a third party at any time by its own judicial process and judicial power. The attachment, however, automatically ends when the order of a competent Civil Court is passed. Hence, if the Receiver is dispossessed after the attachment comes to an end by reason of the decision by the Civil Court, the Criminal Court cannot thereafter eject the trespasser and deliver possession to the successful party. The power to deliver possession subsists only during the continuance of attachment. A.I.R. 1943 Nag. 246=1943 N.L.J. 369=44 Cr. L. J. 739=I.L.R. (1943) Nag. 752=208 Ind. Cas. 58.

——S. 146 (1)—Civil court decision—Duty of Magistrate.

Decree-holder obtaining symbolical possession in execution of decree upon delivery warrant—Judgment-debtor attempting forcible entry within two months—Application under S. 145 by decree-holder—Magistrate by order under S. 146 (1) referring back parties to Civil Court—Such order, held highly improper and opposed to all principles of justice. A.I.R. 1939 Rang. 388=1940 Rang. L.R. 157=41 Cr. L. J. 123=185 Ind. Cas. 119.

——S. 146—Civil Court's decision—Value.

It is not proper for a Magistrate on the ground that he is unable to determine which party is in possession to attach the land under S. 146 where the Civil Court has not only determined the rights of the parties but has also determined the possession so far as it was in its power to do so. 48 All. 397=24 A.L.J. 399=7 L.R.A. Cr. 102=27 Cr. L. J. 559=93 Ind. Cas. 1055=A.I.R. 1926 All. 685.

——S. 146—Civil Court decision though not inter partes—Effect.

An underground colliery together with certain huts and workings on the surface of the land were attached under S. 145 on 29th March 1922. On the 27th of March 1923 the Subordinate Judge gave a decision relating to a money claim put forward by some person against some members of the second party, as certain rights in respect of the colliery purported to be demised by some of the second party to the plaintiff in that suit had failed. With respect to the ownership of the colliery some part of which was the subject-matter in dispute under proceedings under S. 145, Cr. P. Code, the Sub-Judge came to the conclusion adverse to the rights of the members of the second party. The first party upon this applied to the the Magistrate for withdrawal of the attachment and for declaration of possession in accordance with the decree of the Sub-Judge . The Magistrate granted the prayer:

Held, that the Magistrate had jursidiction to pass the order under sub-S. (1) of S. 146, Cr. P. Code, in view of the decision of the Sub-Judge. 81 Ind. Cas. 553=25 Cr. L. J. 937=39 C.L.J. 353=A.I.R. 1924 Cal. 812.

——S. 146 (2)—Civil Court decision—Effect on attachment.

Where a Receiver is appointed under S. 146 (2) of the Code till a competent Civil Court decides the rights of the parties, the Magistrate ceases to have authority to retain the property after such Civil Court determines the rights of the parties, and he cannot refuse to make over possession to the successful party on the ground that the losing party was going to appeal to the Chief Court. 15 Cr. L. J. 500=47 Bur. L.T. 293=24 Ind. Cas. 588.

——Ss. 146, 145—Civil Court decree—Possession under—Effect.

Where eight days prior to the institution of the inquiry the petitioner was placed in possession of the plot in execution of a decree obtained by him in the civil court establishing his right to such plot. *Held*, that the attachment order of the Magistrate so far as the plot covered by the decree was concerned was without jurisdiction. Also that the Magistrate was bound to find possession in accordance with the decree of the civil court. 32 C. 796=2 Cr. L. J. 761.

4. Civil suit for declaration.

——S. 146—Civil suit for declaration—Sufficiency.

Attachment of property and appointment of Receiver by Magistrate:

Held, that a suit for mere declaration of title without a prayer for possession is maintainable. A.I.R. 1933 Lah. 195=34 P.L.R. 242=14 Lah. 414=141 Ind. Cas. 443.

——S. 146—Civil suit for declaration—Sufficiency.

The mere declaration of title in favour of the plaintiffs is sufficient to entitle them to ask the Receiver appointed under S. 145, Criminal P. C., to make over the sum held in deposit by him to the plaintiffs. A.I.R. 1933 Pat. 224=14 P.L.T. 113=12 Pat. 261=149 Ind. Cas. 561.

5. Competent Court.

——S. 146—'Competent Court'—Dispute as to trusteeship of temple.

Where, on a petition under S. 145, a Receiver is appointed and the properties are delivered to him and subsequently, the Hindu Religious Endowments Board recognizes a certain person to be the trustee, such person is entitled to the possession of the property though the Board did not also declare him to be entitled to possession of the property. A.I.R. 1941 Mad. 803 (2)=1941 M.W.N. 767.

——S. 146—Competent Court—Order of survey authorities—Tantamount to decree of Civil Court.

An applicant is entitled to get his land released from the attachment under S. 146 by obtaining an order of survey authorities in his favour. Such an order is tanta-

mount to decree of Civil Court. Survey authority is a competent Court to deal with the question. 37 Cal. 331=11 C. L. J. 417=11 Cr. L. J. 372=6 Ind. Cas. 545.

——S. 146—Competent Court's decision.

Where a property was attached under S. 146, Cr. P. Code, and subsequently the Revenue Court decided in an enquiry under S. 40 of the Land Revenue Act that the non-applicant was entitled to possession and thereupon the Magistrate released the property from attachment, *held*, that the Magistrate was within the jurisdiction in having done so. 73 Ind. Cas. 153=25 O.C. 242=24 Cr. L. J. 537=A.I.R. 1922 Oudh 300.

——S. 146—Competent Court.

An entry in the finally published record-of-rights cannot be regarded as constituting the final adjudication of a competent Court within the meaning of S. 146 (1), Cr. P. Code. 26 Cr. L. J. 1055=30 C.W.N. 646=87 Ind. Cas. 975=A.I.R. 1926 Cal. 316.

——S. 146—Competent Court—Revenue Court.

Order of Revenue Court in mutation proceedings is order of competent court determining the person entitled to possession. 82 Ind. Cas. 170=22 A.L.J. 803=5 U.R.A. Cr. 129=25 Cr. L. J. 1242=46 All. 879=A.I.R. 1924 All. 777.

——S. 146—"Competent Court"—Collector's order under Bengal Survey Act—Whether decision of competent Court.

An order of the Collector as to the land under Bengal Survey Act is a determination by a competent Court of the rights of the person entitled to possession of the land, within the meaning of S. 146, Criminal P. C. A.I.R. 1939 Pat. 348=20 P.L.T. 595=5 B.R. 906=40 Cr. L. J. 797=183 Ind. Cas. 388.

——S. 146—Competent court—Survey authorities—Bengal Survey Act (V of 1875 B.C.), S. 41.

An order by the Survey authorities under S. 41 of the Bengal Survey Act has the force of a civil Court decree and is therefore tantamount to an order passed by a competent court as provided for in Chapter XII of the Cr. P. C. On such an order being passed with respect to any lands attached under S. 146, Cr. P. C., they should be released from attachment. 37 C. 331=11 C.L.J. 417=6 Ind. Cas. 545=11 Cr. L. J. 372.

6. Conflicting claims on title.

——S. 146—Conflicting claims based on different titles—Refusal of Magistrate—Jurisdiction.

In an inquiry as to possession, one party claimed under a will, another under a partition, settlement and will and the Magistrate, holding that he was unable to decide as to the question, ordered that the property do remain under Court attachment till the parties settled their disputes in a Civil Court. *Held*, that the Magistrate acted without jurisdiction and should have decided on the question of possession. 8 M.L.T. 447=11 Cr. L. J. 560=8 Ind. Cas. 63.

7. Duty of Magistrate.

——S. 146—Duty of Magistrate.

Magistrate finding that there is apprehension of breach of peace—His duty is to enquire into possession and pass orders either under S. 145 or S. 146. A.I.R. 1940 Oudh 22=41 Cr. L. J. 96 (2)=1939 O.W.N. (C.C.) 974=1939 A.W.R. (C.C.) 277=184 Ind. Cas. 751.

8. Ex parte order.

——S. 146—Ex parte order—Irregularity.

A Magistrate has no jurisdiction to pass an order under S. 146 behind the back of the parties or *ex parte*. 19 Cr. L. J. 225=43 Ind. Cas. 817.

9. Extension of time.

——S. 146—Extension of time—When proper.

When proceedings were drawn up against two parties who were required to produce their evidence on a certain date, the parties on the date applied for further time. One of the parties alleged that notice was served upon him only two days before the date of hearing and did not file even a written statemtnt and when the Magistrate in the absence of evidence was unable to satisfy himself as to who was entitled to possession and accordingly attached the property under S. 146: *Held* the Magistrate should have extended time for allowing parties to give evidence. 1 Pat. L.W. 55=18 Cr. L. J. 413=38 Ind. Cas. 973.

——S. 146—Joint Hindu family disputes—Order not proper.

A Magistrate took proceedings under S. 145 in respect of a dispute between three Hindu brothers and with regard to property which was formerly joint family property. The question in dispute was whether the three brothers were jointly entitled to the property in dispute or there had been partition in virtue of which the property in dispute had fallen to the share of the eldest brother who was in possession. The Magistrate could not make up his mind on the question and as he would not satisfy himself as to which of the parties was in exclusive possession of the land in dispute, he applied S. 146 and attached the land until the rights of the parties thereto were determined by a competent Court:

Held: that although it could not be said that the Magistrate's order under S. 146 was not competent it was an order which ought not to have been made under the circumstances of the case. It was clear that whether there had been partition or not the eldest brother was entitled to be in possession. If the alleged partition really took place then he was entitled to be in possession in his own right. If it did not take place he was entitled to be in possession as the eldest brother and the manager of the family. The order of attachment, therefore, was not reasonable and if there was any danger to the breach of the peace, proper order would have been to take proceedings under S. 107 and bind the parties for such term as was necessary. A.I.R. 1926 Bom. 313, Ref. 1930 Cr. C. 548=125 Ind. Cas. 718=31 Cr. L. J. 933=32 Bom. L. R. 340=A.I.R. 1930 Bom. 172.

——S. 146 (1)—Joint owners—'Unable to satisfy himself, as to which of them was in possession'—Whether includes case of joint owners.

Where there is a dispute between two joint owners of barren land in an urban area and there is a likelihood of a breach of the peace between them, a Magistrate is entitled to pass an order under S. 146, Criminal P.C., directing that the land should be kept in attachment until a decision is made in a civil suit for partition to be filed in the Civil Court.

The words 'unable to satisfy himself as to which of them was in possession' cover the case of two joint owners both in joint possession as, in such a case, it will not be possible

for the Magistrate to decide which of them was in exclusive possession. A.I.R. (Vol. 19) 1932 All. 683=(1932) A.L.J. 819=34 Cr. L. J. 480=143 Ind. Cas. 54.

——Ss. 146 and 147—Joint possession.

A Magistrate cannot pass an order of attachment under S. 146 when he finds that both the parties are in joint possession. *Per Seshagiri Aiyar, J.*—If both parties in joint possession try to commit a breach of the peace it will not be good to keep them both in possession. A Magistrate has no jurisdiction to pass an order of attachment if both the parties are in joint possession. 15 Cr. L. J. 572=27 M.L.J. 169=25 Ind. Cas. 324.

10. Joint Property.

——S. 146 (1)—Joint property.

Undivided share of a village cannot be attached under S. 146 (1). A.I.R. 1941 Mad. 744=1941 M.W.N. 703.

11. Jurisdiction.

——S. 146—Jurisdiction.

When no proceedings under S. 145, have actually been drawn up, the Magistrate has no jurisdiction to direct the attachment of the lands and to settle them with any person for the purpose of cultivation. 64 Ind. Cas. 848=2 P.L.T. 724=23 Cr. L. J. 64=A.I.R. 1921 Pat. 353.

12. Limitation.

——S. 146—Limitation—Suit for recovery of land brought six years after attachment under S. 146, Criminal Procedure Code, if barred—Limitation Act, S. 23.

Suits brought for the recovery of property after attachment under S. 146, Criminal P. C., are cases of a continuing wrong within the meaning of S. 23, Lim. Act and such suits brought more than six years after attachment are not barred. A.I.R. 1938 Pat. 212=4 B.R. 558=175 Ind. Cas. 256.

——S. 146—Limitation—Effect of attachment.

See LIMITATION. 5 C.W.N. 160=28 C. 86.

——S. 146—Limitation—Effect of attachment.

An attachment under S. 146, Cr. P. C., operates in law for purposes of limitation simply as detention or custody of the property by the Magistrate who, pending the decision by a civil court of competent jurisdiction, holds it merely on behalf of the party entitled on the date of attachment, whether he be one of the actual parties to the dispute before him or any other. For purposes of limitation, the seisin or legal possession will, during the attachment be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner or to his discontinuing possession. Such title of the true owner cannot be extinguished by the operation of S. 28 of the Limitation Act, however long such attachment may continue. 26 M. 410.

——S. 146—Limitation—Effect of attachment on adverse possession.

When a property is attached under S. 146, it passes into legal custody, and during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law. 22 C.L.J. 283, Foll. 28 Cal. 86 held obsolete. 66 Ind. Cas. 433=34 C.L.J. 302=A.I.R. 1921 Cal. 584

13. Mesne Profits.

——S. 146—Mesne profits during attachment—Jurisdiction of Magistrate.

A Magistrate has no jurisdiction to pass an order regarding mesne profits during attachment of property under S. 146, Cr. P. Code, arising out of a dispute under S. 145 of the Code, but the proper course for him is to deposit the money in court and allow the parties to litigate their rights in respect of the shares due to them for mesne profits. 4 L.W. 55=20 M.L.T. 247=(1916) 2 M.W.N. 173=17 Cr. L. J. 331=35 Ind. Cas. 507.

14. Objects.

——Ss. 146, 145—Object.

In order to pass an order under S. 146, Criminal P. C., it is necessary for the Magistrate to have come to some finding of his own on the evidence of the parties that he was unable to satisfy as to which of the parties was in possession of the subject of dispute. S. 146 pre-supposes an enquiry by the Magistrate on the evidence recorded, and the object of S. 146 is to give the Magistrate jurisdiction to attach the property, if upon the evidence so recorded, he is unable to come to finding as to who was in possession on the date on which the order under S. 145 was drawn up, and where there is no evidence of any kind on record, the order attaching property is without jurisdiction. A Magistrate cannot say that he is unable to satisfy himself if he has never made the slightest efforts to do so. When the Magistrate has not made any effort to satisfy himself, the order cannot be supported under S. 146.

S. 146 is only a continuation of the proceedings under S. 145, Criminal P. C. A.I.R. 1936 All. 177=37 Cr. L. J. 215=(1936) A.L.J. 197=1936 A.W.R. (C.C.) 125=160 Ind. Cas. 20.

15. Parties.

——S. 146—'Parties'—Meaning—Disposal of property—Jurisdiction of Magistrate.

'Parties' in S. 146, Cr. P. C., means parties concerned in the dispute relating to land or water ; a Magistrate has no jurisdiction to order the disposal of property in favour of persons not concerned at all in the dispute. 123 P.L.R. 1911=18 P.W.R. (Cr.) 1911=12 Cr. L. J. 403=11 Ind. Cas. 587.

16. Party can be left in possession.

——S. 146—Party can be left in possession.

It is open to the Magistrate under the proviso to make over possession of the property to any person that he thinks fit. He must of course exercise a judicial discretion in deciding to whom the possession is to be given. There may be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some party to take possession but it is also open to him to make over possession to any one according to his discretion. 90 Ind. Cas. 925=2 O.W.N. 868=26 Cr. L. J. 1629=A.I.R. 1926 Oudh 146.

17. Possession through mortgagee.

——S. 146—Possession through mortgagee.

Where the first party, a widow and her mortgagee are found to be in possession of the disputed garden and the second party is not found to be in possession, a Magistrate is not entitled to attach the subject of dispute merely on the ground that the widow had, in her written statement, stated that she was not in possession but the mortgagee was, because the possession which she had may be exercised through her mortgagee. A.I.R. 1923 Pat. 363.

18. Procedure.

——S. 146—Procedure—No evidence adduced.

There is no obligation imposed by S. 146 on the Magistrate to make independent enquiry if the parties having been given adequate opportunities decline to adduce evidence as to possession. He is entitled to act on his apprehension of breach of peace founded on information he may have before him and in the absence of material which would enable him to protect the possession of one or the other of the parties he must attach the property. 118 Ind. Cas. 326=1930 Cr. C. 5=10 P.L.T. 867=30 Cr. L. J. 894=A.I.R. 1930 Pat. 29.

——S. 146—Procedure—No evidence at all.

S. 146 presupposes an enquiry by the Magistrate on the evidence recorded and the object of S. 146 is to give the Magistrate jurisdiction to attach property if, upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under S. 145 was drawn up, and where there is no evidence of any kind on record order attaching property under S. 146 is without jurisdiction. 117 Ind. Cas. 600=30 Cr. L. J. 802=32 C.W.N. 813=A.I.R. 1928 Cal. 703.

——S. 146—Procedure—Witnesses—No examination.

An order passed under S. 146 was held not to be valid and was set aside, where none of the witnesses present in Court to give evidence in a proceeding under S. 145 was examined. 69 Ind. Cas. 272=35 C.L.J. 291=23 Cr. L. J. 688=A.I.R. 1922 Cal. 280.

——S. 146—Procedure—No enquiry.

Where no evidence was taken, no statetements were made before the Magistrate and he made an order merely on account of an allegation in the written statements of a party as to possession, *held*, the order of attachment is clearly wrong. 72 Ind. Cas. 541=1922 M.W.N. 484=24 Cr. L. J. 429=A.I.R. 1922 Mad. 437=43 M.L.J. 716.

——S. 146—Procedure—Enquiry necessary.

Before attaching the property, a Magistrate must make some enquiry in order to ascertain, if possible, who was in possession. 66 Ind. Cas. 421=3 Pat. L. T. 434=23 Cr. L. J. 277=A.I.R. 1922 Pat. 544.

——Ss. 146 and 439—Procedure—Possession not investigated—Order is without jurisdiction. 20 Cr. L. J. 117=49 Ind. Cas. 101.

——S. 146—Procedure—Fishery—Large area—Attachment—Local investigation.

A Magistrate who attaches the property in dispute without a local investigation does not commit an error in procedure. Where a Magistrate attached the property in dispute under S. 146 on a finding arrived at by him to the effect that it was very difficult to come to a decision about the possession of the whole *jalkar* in dispute from the evidence adduced. *Held*, that the judgment of the Magistrate must be read as meaning that on the evidence adduced, he was unable to satisfy himself as to which of the contending parties was in possession of the property in question. 20 Cr. L. J. 17=48 Ind. Cas. 497.

——S. 146—Procedure.

Where the Magistrate had not discussed the evidence produced by the parties nor had he given any reason why he could not come to a definite conclusion on that evidence, the order of attachment was bad. 1938 C.W.N. (C.C.) 673=1938 A.W.R. (C.C.) 134.

——S. 146—Procedure—Discussion of evidence and reasons.

An order under S. 146 can only be passed when the Magistrate upon a consideration of the evidence is unable to come to a definite finding as to the possession of either party, and in order to show the Magistrate's inability to decide the question of possession, he must discuss the evidence in the case and give reasons for his inability. 61 Ind. Cas. 51=2 P.L.T. 16=1921 P.H.C.C. 112=22 Cr. L. J. 323=A.I.R. 1921 Pat. 166.

——S. 146—Procedure—Magistrate should collect information and sift evidence thoroughly before passing order under S. 146.

It should be held as a very important principle in cases under S. 145 that a Magistrate should be extremely reluctant to attach the property in dispute. It is quite intelligible that he might be in a position to say with confidence that he was unable to satisfy himself as to the possession of the parties in cases where the land is jungle or waste. But where there is land admittedly subject year by year and season by season to cultivation, the Magistrate will be only admitting his own weakness if he states that he cannot come to a decision. He has before him two parties quite ready with information. The information may be true or false but it is his duty to collect information and sift it. After all the order under S. 146 is almost the same as an act of confiscation and therefore the Magistrate should naturally be reluctant to make use of that section. 82 Ind. Cas. 367=25 Cr. L. J. 1295=5 P.L.T. 589=A.I.R. 1924 Pat. 804.

——S. 146—Procedure—Order without evidence.

Where a Magistrate makes an order under S. 146 attaching disputed property without taking any evidence, the order is wholly without jurisdiction and should be set aside. 12 C.W.N. 896 and 14 C.W.N. 80, Ref. 40 Cal. 105=16 C.W.N. 1052=13 Cr. L. J. 486=15 Ind. Cas. 486.

19. Receiver.

——S. 146—Receiver.

The appointment of a Receiver under S. 146 (2), Criminal P. C., can only be made after a final order has been passed under S. 146 (1) attaching the property. 1933 M.W.N. 917.

——S. 146—Receiver—Person holding under settlement by Receiver under Criminal Procedure Code, S. 146—Does not acquire any under-*rayati* rights as against rightful person.

His possession is merely that of a licensee or a farmer and he is bound to give up possession as soon as the attachment is withdrawn as an effect of the decree of the competent Court. A.I.R. 1933 Pat. 224=14 P.L.T. 113=12 Pat. 261=149 Ind. Cas. 561.

——S. 146—Receiver—Grounds.

The passing of an *ad interim* order of attachment does not by itself justify the appointment of a receiver, unless on a subsequent enquiry the appointment of a receiver is found necessary, where the Magistrate is unable to decide which party is in possession or decides that none of them is in possession. 69 Ind. Cas. 268=25 O.C. 148=10 O.L.J. 157=23 Cr. L. J. 684=A.I.R. 1922 Oudh 256.

——S. 146 (2)—Receiver—Appointment under—Jurisdiction of Civil Court to appoint again—C. P. Code, O. 40, R. 1.

A Civil Court has no power to appoint a Receiver under O. 40, R. 1, C. P. C., in supersession of the Receiver appointed by the Magistrate under S. 146 (2) of the Cr. P. Code except conditionally on the Magistrate's withdrawing his attachment. 40 Cal. 862=17 C.W.N. 1070=20 Ind. Cas. 269.

——S. 146—Receiver—Powers.

A receiver appointed under S. 146, has a right to take possession of accretions to the original subject-matter of dispute. 14 C.W.N. 681=11 Cr. L. J. 288=6 Ind. Cas. 177.

20. Release from attachment.

——S. 146—Release from attachment.

Once an order under S. 146, Cr. P. Code, has been passed by a Court it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate would be competent to withdraw the order of attachment and he can do so at any time at which there is no such likelihood ; and secondly, it is competent for a Magistrate to release the subject-matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of the dispute. 87 Ind. Cas. 975=26 Cr. L. J. 1055=30 C.W.N. 646 =A.I.R. 1926 Cal. 316.

——S. 146—Releasing the attached property after the Revenue Court has decided as to who was entitled to possession is valid.

Where a property was attached under S. 146 and, subsequently the Revenue Court decided in an enquiry under S. 40 of the Land Revenue Act that the non-applicant was entitled to possession and thereupon the Magistrate released the property from attachment. *Held*, that the Magistrate was within the jurisdiction in having done so. 73 Ind. Cas. 153=25 O.C. 242= 24 Cr. L. J. 537=A.I.R. 1922 Oudh 300.

——S. 146—Release—Inherent power.

S. 146 of the Cr. P. Code, is not exclusive and an attaching Magistrate has an inherent power to release from attachment when the likelihood of the breach of the peace has disappeared. 1 Lah. 451=59 Ind. Cas. 36 =22 Cr. L. J. 4.

21. Remedies.

——S. 146—Remedies.

Where a Magistrate passes an order under S. 146, Cr. P. Code, a person claiming the property need only sue for a declaration.

But where the Magistrate interfered with the possession of the defendants because an emergency had arisen and decided that retention of the sale proceeds was unnecessary, and ordered them to be handed over to the defendants. *Held*, the Magistrate was holding the same on behalf of the defendants, and plaintiff's suit must be one for possession and *ad valorem* fees calculated on the value of the subject-matter in dispute must be paid. 103 Ind. Cas. 351=A.I.R. 1927 Nag. 316.

——S. 146—Remedies.

An order passed in a proceeding under S. 145 cannot be upset by the Magistrate of a district ; the remedy is to move High Court in revision or go to the Civil Court for a decision of the claims of the parties. The notice issued by the Deputy Commissioner stating that, unless a civil suit is brought within a certain period, the lands would be released from attachment and handed over to one of the parties cannot stand. He would not be able to review his order in the above manner. 68 Ind. Cas. 402=1 Pat. L. R. Cr. 1=23 Cr. L. J. 562=(1922) P.H.C.C. 224=3 Pat. L. T. 648=A.I.R. 1922 Pat. 554.

22. Revision.

——S. 146—Revision.

It is seldom that the High Court interferes on facts with an order passed under Ss. 145 and 146, Criminal P. C. A.I.R. 1934 Pat. 33=35 Cr. L. J. 611=148 Ind. Cas. 198.

——S. 146—Revision—Interference in.

The High Court, in the exercise of its revisional jurisdiction, should not lightly interfere with orders that may be passed by the Magistrate for the management of the attached properties under S. 146 of the Code. But where the order of the Magistrate offends against an elementary rule founded on the desire of the Courts to place the parties to a proceeding on a footing of absolute equality the order must be set aside. 104 Ind. Cas. 104=7 Pat. 1=9 A.I.Cr.R. 8=28 Cr. L. J. 776= 9 P.L.T. 109=A.I.R. 1927 Pat. 393.

——S. 146—Revision—Failure to understand Civil Court's decree.

Where the Deputy Magistrate attached the property in dispute, owing to his not understanding the meaning of a Civil Court's decree relating to the same property, his order is irregular and without jurisdiction. 76 Ind. Cas. 24=25 Cr. L. J. 88=A.I.R. 1924 Pat. 711.

——S. 146—Revision—Brevity of order.

It is impossible to lay down a hard and fast rule when the High Court should interfere on the ground of brevity of the order passed in a proceeding under S. 146. 73 Ind. Cas. 271=37 C.L.J. 127=24 Cr. L. J. 575=A.I.R. 1923 Cal. 483.

——S. 146—Revision—Evidence—Improper disposal.

The general remark in an order under S. 146, Cr. P. Code, that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record ; it amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. 57 I.C. 169, Foll. ; A.I.R. 1921 Pat. 173= 72 Ind. Cas. 544=1 Pat. L. R. Cr. 152=4 P.L.T. 579= 24 Cr. L. J. 432=A.I.R. 1923 Pat. 588.

——S. 146—Revision.

The general remark that oral evidence is not reliable, without referring to it and without giving any reasons, is not a disopsal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in Court by law and is remediable in revision. 63 Ind. Cas. 152=2 P.L.T. 168=1921 P.H.C.C. 110=22 Cr. L. J. 616=A.I.R. 1921 Pat. 173.

——S. 146—Revision—When to be applied—Order, made in disregard of decision under S. 41, Survey Act (V. B.C. of 1875)—Rejection of material evidence on erroneous grounds—Order without jurisdiction.

An order under S. 146 can be made only when the Magistrate is unable to satisfy himself as to which of the contending parties is in possession ; the trying Magistrate should have presumed possession in favour of the party who succeeded under S. 41 of the Survey Act which had the force of an order of the Civil Court. The Magistrate having discarded and rejected on erroneous grounds, practically every piece of evidence that might have led him to a correct conclusion, made his final order ; it is therefore without jurisdiction or passed with such gross and material irregularities as seriously to prejudice the second party. 21 C.W.N. 1059=26 C.L.J. 39= 18 Cr. L. J. 988=42 Ind. Cas. 604.

——Ss. 146, 439—Revision.

The High Court cannot under S. 435, interfere with orders passed under S. 146 of the Code. But an order which merely purports to be under S. 146, but exceeds the powers given thereby, is one with which the High Court is not precluded by S. 435 from interfering in revision. The powers given by S. 146 would justify attachment only on the Magistrate's inability to satisfy himself as to which of the parties was in possession of the subject of dispute, and would not justify attachment merely because the Magistrate could not decide upon the rights of the parties. For the purposes of S. 146 the Magistrate is neither called upon nor empowered to consider

the question of rightful possession. 7 Bom. L. R. 18= 2 Cr. L. J. 28. *See also* 6 C.W.N. 46.

23. Scope.

——S. 146—Scope of.

Attachment can be made only in cases where the property is not in possession of the contesting parties or if the Magistrate cannot determine who is in possession. 1935 M.W.N. 367.

——S. 146—Scope of.

S. 146 (2) cannot be so read as to make its provisions apply to attachment under S. 145 (4). (1910) M.W.N. 821 and 3 P.L.J. 147, Foll.; 91 P.R. 1912, Not foll. 115 Ind. Cas. 29=30 P.L.R. 29=30 Cr. L. J. 411= 10 Lah. 800=12 A.I.Cr. R. 375=A.I.R. 1929 Lah. 223.

——S. 146—Scope.

S. 146 (2) of the Cr. P. Code, should not be so read as to make its provisions apply to attachments under S. 145, Cr. P. Code. 8 M.L.T. 314=(1910) M.W.N. 821= 11 Cr. L. J. 536=7 Ind. Cas. 895.

——S. 146—Scope.

The jewellery and other movable property must be treated as appurtenant to the math and an order can be properly passed in respect of it under S. 146. 1 P.L.J. 386, Foll. 93 Ind. Cas. 157=24 A.L.J. 383=7 L.R. A. Cr. 129=27 Cr. L. J. 429=A.I.R. 1927 All. 125.

——S. 146—Scope—Difference between Ss. 145 and 146.

Provisions of S. 146 differ from those of S. 145 (6). What the plaintiff has to show to the Court when he comes to it after attachment under S. 146 is that he has rights in the lands attached and that he is entitled to possession. Provisions of S. 146 differ from those of S. 145 (6). S. 145 (6) provides that the Magistrate shall issue an order declaring a party to be entitled to possession of the subject-matter in dispute until evicted therefrom in due course of law in case he decides that the party was in possession or should, under the first proviso to sub-S. (4), be treated as being in possession of the subject-matter in dispute. 84 Ind. Cas. 386=(1924) P.H.C.C. 297= 6 P.L.T. 465=A.I.R. 1925 Pat. 168.

——S. 146—Scope.

An order cannot be passed under S. 146 declaring a person who is not a party to the proceedings to be in possession. 63 Ind. Cas. 152=2 P.L.T. 168=(1921) P.H.C.C. 110=22 Cr. L. J. 616=A.I.R. 1921 Pat. 173.

24. Miscellaneous.

——S. 146—Miscellaneous—Suit for—Procuring erroneous decision—Likelihood of breach of peace, information as to—Action, maintainability—Cause of action—Crops cut and appropriated—Limitation Act (XV of 1877), Sch. II, Art. 42—Injunction—Criminal Procedure Code (Act V of 1828), S. 146.

It is well settled that no action will lie against any person for procuring an erroneous decision of a Court of Justice. This is so, even though the Court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. Where the defendant informed the Magistrate that there was possibility of a breach of the peace and it was not suggested that the information was untrue in fact and on the recommendation of the Police the Magistrate commenced proceedings under S. 144 of the Criminal Procedure Code, it was held that the Plaintiff had no cause of action against the defendant in so far as the plaintiff might have suffered any damage by reason of his inability to cultivate the land attached by the order of the Magistrate. In so far as the crops grown by the plaintiff and cut by the defendant were concerned, the cause of action arose on the day they were appropriated by the defendants—Quaere, whether an order under S. 140 of the Code of Criminal Procedure, can be treated as an injunction within the meaning of Art. 42, Sch. II of Limit. Act. 10 C.L.J. 226=14 C.W.N. 96=3 Ind. Cas. 12 (D.B.).

——S. 146—Miscellaneous—Attachment order—Magistrate cannot be sued for possession.

No cause of action exists against a Magistrate for recovery of possession of property attached under S. 146, Cr. P. Code. 22 C.L.J. 283=20 C.W.N. 481=31 Ind. Cas. 242.

——S. 147.

Synopsis.

1. Applicability.
2. Costs.
3. Easements.
4. Exercise of right.
5. Fence as obstruction.
6. Fishing right.
7. Form and contents of order.
8. Interim order.
9. Interpretation.
10. Jurisdiction.
11. Mandatory injunction.
12. Natural rights.
13. Nature of proceedings.
14. Order under—Limitation for civil suit.
15. Order to be based on evidence.
16. Parties.
17. Personal and public right.
18. Police assistance.
19. Police report.
20. Powers of Magistrate.
21. Prior decision.
22. Privy—If land or water.
23. Procedure.
24. Proceedings under.
25. Public street.
26. Revision.
27. Right of way.
28. Right to recite sankalpams in tank.
29. Scope.
30. Temples.
31. Tolls.
32. Water.
33. Wells.
34. Miscellaneous.

1. Applicability.

——S. 147—Applicability.

Where S. 145, Criminal P. C., does not apply, S. 147 may, and proceedings under the latter section are carried on in the same manner as proceedings under the former. A.I.R. 1939 Pat. 206=20 P.L.T. 164=5 B.R. 539= 40 Cr. L. J. 538=181 Ind. Cas. 176.

——S. 147—Applicability.

Proceedings under S. 147 regarding dispute as to road—Order in form under S. 145 (6):

Held, there was no prejudice to opposite party. A.I.R. 1938 Pat. 133=4 B.R. 329=39 Cr. L. J. 363 (2)=19 P.L.T. 323=173 Ind. Cas. 750.

——Ss. 147, 146 and 145—Applicability.

S. 147 applies only to cases of disputes about the right of use of any land or water as distinct from disputes as to